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THE
FEDERAL REPORTER.

VOLUME 84.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 84.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
CIRCUIT AND DISTRICT COURTS.

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¹Deceased November 21, 1897.

²Commissioned January 10, 1898.

³Resigned June 5, 1897, to take effect on appointment of successor.

⁴Confirmed July 8, 1897. Deceased December 10, 1897.

⁵Commissioned February 15, 1898.

⁶Confirmed May 11, 1897.

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¹ Deceased February 19, 1897.

² Confirmed May 5, 1897.

³ Resigned January 12, 1898, to take effect on appointment of successor.

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 Hon. JOHN A. RINER, District Judge, Wyoming.

¹Deceased November 17, 1896.²Commissioned December 15, 1896.³Resigned May 16, 1896.⁴Commissioned May 18, 1896. Confirmed same date.⁵Deceased October 28, 1896.⁶Resigned.⁷Deceased August 8, 1896.⁸Commissioned August 31, 1896. Confirmed February 18, 1897.⁹Deceased August 9, 1896.¹⁰Commissioned December 15, 1896.

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Hon. ARTHUR K. DELANEY, District Judge, Alaska.⁶
Hon. CHARLES S. JOHNSON, District Judge, Alaska.⁷

¹Resigned December 1, 1897.

²Commissioned January 21, 1898.

³Resigned.

⁴Commissioned May 20, 1897.

⁵Commissioned June 8, 1897.

⁶Removed.

⁷Commissioned July 28, 1897.

CASES REPORTED.

	Page		Page
Adams v. Citizens' Bank of Tina, Mo. (C. C. A.)	270	Barber Asphalt Paving Co., City of Denver v. (C. C. A.)	1015
Adams v. Southern R. Co. (C. C. A.)	596	Barker, Smiley v. (C. C. A.)	1021
Adams, Citizens' Bank of Tina, Mo., v. (C. C.)	268	Barnes Cycle Co. v. Reed (C. C.)	603
Ætna Life Ins. Co., City of Burrton, Kan., v. (C. C. A.)	1015	Barnstable, The, Hall v. (D. C.)	895
Air-Brush Mfg. Co. v. Thayer (C. C.)	640	Barry, Little Rock & M. R. Co. v. (C. C. A.)	944
A. J. Wright, The, Reliance Marine Ins. Co. v. (D. C.)	1002	Bates, Ex parte (C. C.)	67
Alabama G. S. R. Co. v. Carroll (C. C. A.)	772	Bates v. International Co. of Mexico (C. C.)	518
Alexander, In re (C. C.)	633	Bates v. Keith (C. C. A.)	1014
Alford, McHenry v. (C. C. A.)	1019	Beacon Vacuum Pump & Electrical Co., Post v. (C. C. A.)	371
Allen v. Chappell (C. C. A.)	1014	Beck v. United States (C. C.)	150
Allen, Société Anonyme du Filtre Chamberland Système Pasteur v. (C. C.)	812	Belleville & St. L. R. Co. v. Leathe (C. C. A.)	103
American Dredging Co. v. Walls (C. C. A.)	428	Bennet, In re (D. C.)	324
American Loan & Trust Co. v. Central Vermont R. Co. (C. C.)	917	Bergin, Mitsch Compressing Co. v. (C. C.)	140
American Loan & Trust Co., Pullman's Palace-Car Co. v. (C. C. A.)	18	Bernard, United States v. (C. C.)	634
American Loan & Trust Co., Veatch v. (C. C. A.)	274	Berry v. Wynkoop-Hallenbeck-Crawford Co. (C. C. A.)	646
American Mfg. Co. v. The Maverick (C. C. A.)	906	Best, Smeeth v. (C. C. A.)	1021
American Strawboard Co. v. Elkhart Egg-Case Co. (C. C.)	960	Black Diamond Coal-Mining Co. v. The H. C. Grady (D. C.)	226
American Strawboard Co. v. Indianapolis Water Co. (C. C. A.)	1014	Blair v. Silver Peak Mines (C. C.)	737
American String Wrapper Co., Williams v. (C. C. A.)	197	Blake v. Merriwether (C. C. A.)	1014
American Wired-Hoop Co., Pillsbury-Washburn Flour-Mills Co. v. (C. C.)	339	Blake v. Pine Mountain Iron & Coal Co. (C. C. A.)	1014
Angus, Irvine v. (C. C.)	127	Bluthenthal v. Southern R. Co. (C. C.)	920
Archibald, Hunt v. (C. C. A.)	1018	Blythe v. Hinckley (C. C.)	228
Argonaut Min. Co. v. Kennedy Mining & Milling Co. (C. C.)	1	Blythe v. Hinckley (C. C.)	246
Arkansas, The Crocker v. (D. C.)	361	Borgfeldt, United States v. (C. C. A.)	1022
Armour Packing Co. v. Snyder (C. C.)	136	Boston Fruit Co., Turret Steam Shipping Co. v. (D. C.)	895
Arnold, Lovy v. (C. C.)	214	Bowen v. Denton (C. C. A.)	1015
Arnold, People v. (C. C. A.)	1020	Bowen, Clymer v. (C. C. A.)	1016
Asher W. Parker, The, Curtin v. (C. C. A.)	832	Bowes v. Hopkins (C. C. A.)	767
Aspen Mining & Smelting Co. v. Wood (C. C. A.)	48	Boyd v. Stuttgart & A. R. R. R. (C. C. A.)	9
Associated Press, Minnesota Tribune Co. v. (C. C. A.)	921	Boyle, Northern Pac. R. Co. v. (C. C. A.)	1020
Atchison, T. & S. F. R. Co., Prescott & A. C. R. Co. v. (C. C. A.)	213	Bratton v. People's Building & Loan Ass'n (C. C. A.)	1015
Atlas Nat. Bank, Holm v. (C. C. A.)	119	Brewer v. Central of Georgia R. Co. (C. C.)	258
Atlas, The, Dumont v. (D. C.)	1011	Brewer v. Commercial Tribune Co. (C. C.)	419
Augusta, T. & G. R. Co., Kittel v. (C. C. A.)	386	Brewer v. Evening News Ass'n (C. C.)	419
Balano v. The Illinois (D. C.)	697	Brewer v. Herald Co. (C. C.)	419
Balfour v. Parkinson (C. C.)	855	Brewer v. Inter-Ocean Pub. Co. (C. C.)	419
Ballentine, Cleveland, C. C. & St. L. R. Co. v. (C. C. A.)	935	Brewer v. Journal Newspaper Co. (C. C.)	419
		Brewer v. Louisville Press Co. (C. C.)	419
		Brewer v. Ohio State Journal (C. C.)	419
		Brewer v. Times-Star Co. (C. C.)	419
		Brewer v. United States (C. C.)	149
		Brewer, United States v. (C. C.)	147
		Bridgeport Mfg. Co., William Schollhorn Co. v. (C. C.)	674
		Briggs v. Taylor (C. C. A.)	681
		British & A. Mortg. Co. of London, Hawkins v. (C. C. A.)	526
		Brown v. Cranberry Iron & Coal Co. (C. C. A.)	930

	Page		Page
Brown v. Tillinghast (C. C.)	71	Cleveland, C., C. & St. L. R. Co. v. Ballentine (C. C. A.)	935
Brown v. Walker (C. C.)	532	Clow, Kelly v. (C. C.)	352
Brown Mfg. Co., Palmer v. (C. C.)	454	Clyde S. S. Co. v. The Persia (D. C.)	705
Buchanan v. Denig (C. C.)	863	Clymer v. Bowen (C. C. A.)	1016
Buck, Timoney v. (C. C. A.)	887	Cockrill v. United States Nat. Bank (C. C. A.)	1016
Buhl v. Stephens (C. C.)	922	Coffeen v. Chicago, M. & St. P. R. Co. (C. C. A.)	46
Burrows v. Niblack (C. C. A.)	111	Coit & Co. v. Sullivan-Kelly Co. (C. C.)	724
Burton, The, Constantine v. (D. C.)	998	Columb v. Webster Mfg. Co. (C. C. A.)	592
Canton Ins. Office, Woodside v. (D. C.)	283	Columbian Equipment Co., Highland Ave. & B. R. Co. v. (C. C. A.)	1018
Carolan v. Southern Pac. Co. (C. C.)	84	Commercial Tribune Co., Brewer v. (C. C.)	419
Carpenter, Zimmerman v. (C. C.)	747	Commercial Tribune Co., Union Associated Press v. (C. C.)	419
Carrroll, Alabama G. S. R. Co. v. (C. C. A.)	772	Compania Transatlantica, In re (C. C. A.)	504
Carter v. Couch (C. C. A.)	735	Consolidated Fastener Co. v. Littauer (C. C. A.)	164
Carter v. Sweet (C. C.)	16	Consolidated Fastener Co., Patent Button Co. v. (C. C.)	189
Carter, Caspary v. (C. C.)	416	Consolidated Water Co. v. City of San Diego (C. C.)	369
Carter, United States v. (C. C.)	622	Constantine v. The Burton (D. C.)	998
Case v. L'Oeble (C. C.)	582	Continental Trust Co. of City of New York, Hamlin v. (C. C. A.)	1017
Caspary v. Carter (C. C.)	416	Cornell Steamboat Co. v. The Ellen J. (D. C.)	684
Cedar Creek & West Creek Tp., Indianapolis Air-Line R. Co. v. (C. C. A.)	1018	Cornell Steamboat Co. v. The Tillie A. (D. C.)	684
Centaur Co. v. Heinsfurter (C. C. A.)	955	Couch, Carter v. (C. C. A.)	735
Central of Georgia R. Co., Brewer v. (C. C.)	258	Couper v. Smyth (C. C.)	757
Central Pac. R. Co., United States v. (C. C.)	88	Crain, In re (C. C.)	788
Central Pac. R. Co., United States v. (C. C.)	218	Cramer v. Clancy (C. C. A.)	508
Central Vermont R. Co., American Loan & Trust Co. v. (C. C.)	917	Cramp, The, O'Brien v. (D. C.)	696
Central Vermont R. R., Grand Trunk Ry. v. (C. C.)	66	Cranberry Iron & Coal Co., Brown v. (C. C. A.)	930
Chappell, Allen v. (C. C. A.)	1014	Crawford v. Foster (C. C. A.)	939
Charles Pope Glucose Co., Chicago Sugar-Refining Co. v. (C. C. A.)	977	Crawford County, Pauley Jail Bldg. & Mfg. Co. v. (C. C. A.)	942
Chase, Fenton Metallic Mfg. Co. v. (C. C.)	893	Crocker v. The Arkansas (D. C.)	361
Chemical Nat. Bank of New York, Hayden v. (C. C. A.)	874	Crockett, The David (D. C.)	698
Chesapeake & O. R. Co. v. Steele, two cases (C. C. A.)	93	Cuff, The Mary E. (D. C.)	719
Chicago G. W. R. Co., Kowalski v. (C. C.)	586	Curnen, Palmer v. (C. C.)	829
Chicago, M. & St. P. R. Co., Coffeen v. (C. C. A.)	46	Curtin v. The Asher W. Parker (C. C. A.)	832
Chicago Sugar-Refining Co. v. Charles Pope Glucose Co. (C. C. A.)	977	Daenell, Appeal of (C. C. A.)	1017
Chicago & N. P. R. Co., Farmers' Loan & Trust Co. v. (C. C. A.)	1017	Danforth, The Grace (D. C.)	1005
Chisholm v. Johnson (C. C.)	384	Darragh v. H. Wetter Mfg. Co. (C. C. A.)	1016
Cisna v. Mallory (C. C.)	851	David Crockett, The (D. C.)	698
Citizens' Bank of Tina, Mo., v. Adams (C. C.)	268	Davis & Rankin Bldg. & Mfg. Co., Philadelphia Creamery Supply Co. v. (C. C. A.)	881
Citizens' Bank of Tina, Mo., Adams v. (C. C. A.)	270	Dawson, Ex parte (C. C. A.)	1016
City of Beaver Dam, Webster v. (C. C.)	280	Dayton, The, Flannery v. (D. C.)	678
City of Burrton, Kan., v. Aetna Life Ins. Co. (C. C. A.)	1015	Deere & Co. v. Rock Island Plow Co. (C. C. A.)	171
City of Columbus v. Dennison (C. C. A.)	1015	De Freitas, New York News Pub. Co. v. (C. C. A.)	758
City of Denver v. Barber Asphalt Paving Co. (C. C. A.)	1015	De La Vergne Refrigerating Mach. Co. v. German Savings' Inst. (C. C. A.)	1016
City of Des Moines, McCain v. (C. C.)	726	De Luze v. United States (C. C.)	156
City of Milwaukee, Wis., v. Shailer (C. C. A.)	106	De Neufville v. New York & N. R. Co. (C. C.)	391
City of San Angelo, Shapleigh v. (C. C. A.)	1020	Denig, Buchanan v. (C. C.)	863
City of San Diego, Consolidated Water Co. v. (C. C.)	369	Dennison, City of Columbus v. (C. C. A.)	1015
City of Tacoma v. Wright (C. C.)	836	Denton, Bowen v. (C. C. A.)	1015
Clancy, Cramer v. (C. C. A.)	508	Des Moines Valley R. Co., United States v. (C. C. A.)	40
Clancy, New York & M. P. S. S. Co. v. (C. C. A.)	508	Detroit Motor Co. v. Jenney Electric Motor Co. (C. C.)	180
Clarkson, United States v. (C. C.)	634		
Clayton, Texas & P. R. Co. v. (C. C. A.)	305		
Clerk v. Tannage Patent Co. (C. C. A.)	643		

	Page		Page
Devol, Kansas City Hay-Press Co. v. (C. C. A.)	463	Flannery v. The Dayton (D. C.)	678
Dexter, Horton & Co. v. Sayward (C. C.)	296	Flatboat, Lawrence v. (D. C.)	200
Diamond State Iron Co. v. Goldie (C. C. A.)	972	Fleming Cement & Brick Co. v. United States (C. C.)	158
Dickerson v. Tinling (C. C. A.)	192	Fletcher v. Harney Peak Tin-Min. Co. (C. C.)	555
Dieckhoff v. United States (C. C.)	443	Ford Morocco Co. v. Tannage Patent Co. (C. C. A.)	644
Dodge v. United States (C. C. A.)	449	Foster v. Elk Fork Oil & Gas Co. (C. C.)	839
Drake, Front Street Cable R. Co. v. (C. C.)	257	Foster, Crawford v. (C. C. A.)	939
Drucklieb, Lillenthal v. (C. C.)	918	Fox Solid Pressed Steel Co. v. Schoen Mfg. Co. (C. C. A.)	544
D. S. Morgan & Co. v. Maul (C. C.)	336	Frank v. Hess (C. C.)	170
Duffy v. Jarvis (C. C.)	731	Front Street Cable R. Co. v. Drake (C. C.)	257
Dumont v. The Atlas (D. C.)	1011	Furniture Caster Ass'n v. John Toler Sons & Co. (C. C.)	995
Durrant, In re (C. C.)	314		
Durrant, In re (C. C.)	317		
		Gardiner v. Wise (C. C. A.)	337
Eastman Co. v. Getz (C. C. A.)	458	Garfield & Proctor Coal Co. v. McLean (C. C. A.)	910
Ebanks, In re (D. C.)	311	Garner v. Southern Mut. Building & Loan Ass'n (C. C. A.)	3
Eberman, United States v. (C. C.)	634	Garvin Mach. Co., Salomon v. (C. C.)	195
Edgell v. Felder (C. C. A.)	69	George S. Shultz, The (C. C. A.)	508
Egbert, Fidelity & Casualty Co. of New York v. (C. C. A.)	410	German Savings Inst., De La Vergne Refrigerating Mach. Co. v. (C. C. A.)	1016
E. H. Godshalk Co., Hanifen v. (C. C. A.)	649	Getz, Eastman Co. v. (C. C. A.)	458
Electrical Supply Co. v. Put-in-Bay Water-works, Light & Railway Co. (C. C.)	740	Gittings v. Loper (C. C.)	102
E. L. Goodsell Co., United States v. (C. C. A.)	439	Godshalk Co., Hanifen v. (C. C. A.)	649
Elizabeth Farrell, The (D. C.)	1002	Goldenberg, United States v. (C. C. A.)	1022
Elk Fork Oil & Gas Co. v. Jennings (C. C.)	839	Goldie, Diamond State Iron Co. v. (C. C. A.)	972
Elk Fork Oil & Gas Co., Foster v. (C. C.)	839	Goodsell, United States v. (C. C.)	155
Elkhart Egg-Case Co., American Straw-board Co. v. (C. C.)	960	Goodsell Co., United States v. (C. C. A.)	439
Elkhart Nat. Bank of Elkhart, Ind., v. Northwestern Guaranty Loan Co. of Minneapolis, Minn. (C. C.)	76	Gorham Mfg. Co. v. Watson & Newell Co. (C. C. A.)	1017
Ella, The, Neafie & Levy Ship & Engine Building Co. v. (D. C.)	471	Gormully & Jeffery Mfg. Co. v. Western Wheel Works (C. C. A.)	968
Ellen J., The, Cornell Steamboat Co. v. (D. C.)	684	Grace Danforth, The (D. C.)	1005
Evening News Ass'n, Brewer v. (C. C.)	419	Grady, The H. C. (D. C.)	226
Evening News Ass'n, Union Associated Press v. (C. C.)	419	Grahl v. The Nymphaea (D. C.)	711
E. V. MacCauley, The, Rilatt v. (D. C.)	500	Grand Trunk Ry. v. Central Vermont R. R. (C. C.)	66
		Great Northern R. Co., Westinghouse Air-Brake Co. v. (C. C.)	9
Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (C. C. A.)	1017	Green, Hughes v. (C. C. A.)	833
Farmers' Loan & Trust Co., Venner v. (C. C. A.)	1022	Greene v. Societe Anonyme des Materieues Colorantes et Produits Chemeques De St Denis (C. C. A.)	1017
Farrell, The Elizabeth (D. C.)	1002	Green Mountain Stock-Ranching Co., Matson v. (C. C. A.)	1019
Farrelly, Wirt v. (C. C.)	891	Gut Lun, In re (D. C.)	323
Farwell Co. v. Hilton (C. C.)	293		
Favorite Stove & Range Co., Soehner v. (C. C. A.)	182	Hadden v. Natchaug Silk Co. (C. C.)	80
Felder, Edgell v. (C. C. A.)	69	Hall v. The Barnstable (D. C.)	895
Fenno v. The Mary E. Cuff (D. C.)	719	Hall v. The Maverick (C. C. A.)	906
Fensterer, United States v. (C. C.)	148	Hall, Nederland Life Ins. Co. v. (C. C. A.)	278
Fenton Metallic Mfg. Co. v. Chase (C. C.)	893	Hamburg American Line v. The Saginaw (D. C.)	705
Ferguson, Serviss v. (C. C. A.)	202	Hamburg-American Packet Co., Hohorst v. (C. C.)	354
Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co. (C. C.)	744	Hamlin v. Continental Trust Co. of City of New York (C. C. A.)	1017
Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co. (C. C.)	752	Hamor v. Taylor-Rice Engineering Co. (C. C.)	392
Fidelity & Casualty Co., Person v. (C. C.)	759	Hanchett v. Humphreys (C. C.)	862
Fidelity & Casualty Co. of New York v. Egbert (C. C. A.)	410	Hanifen v. E. H. Godshalk Co. (C. C. A.)	649
First Nat. Bank of Chicago, Ill., v. Mitchell (C. C.)	90	Harding v. Minneapolis Northern R. Co. (C. C. A.)	287
First Nat. Bank of Omaha, Neb., v. Illinois Trust & Savings Bank (C. C.)	34	Harney Peak Tin-Min. Co., Fletcher v. (C. C.)	555
Flandrau v. Massachusetts Loan & Trust Co. (C. C. A.)	1017	Harold, The, Manson v. (D. C.)	698

	Page		Page
Harper v. Holman (C. C.).....	222	Jenney Electric Motor Co., Detroit Motor Co. v. (C. C.).....	180
Harper v. Holman (C. C.).....	224	Jennings v. Elk Fork Oil & Gas Co. (C. C.).....	839
Hart v. United States (C. C. A.).....	799	Jewett, United States v. (C. C.).....	142
Harvey, The Lydia A. (D. C.).....	1000	Job T. Wilson, The (D. C.).....	204
Hatcher's Adm'x v. Wadley (C. C.).....	913	John and Winthrop, The, Krueger v. (D. C.).....	503
Haulenbeck v. United States (C. C.).....	148	John E. Brown Mfg. Co., Palmer v. (C. C.).....	454
Hawkhurst S. S. Co. v. Keyser (D. C.).....	693	Johnson v. The Niagara (C. C. A.).....	902
Hawkins v. British & A. Mortg. Co. of London (C. C. A.).....	526	Johnson, Chisholm v. (C. C.).....	384
Hayden v. Chemical Nat. Bank of New York (C. C. A.).....	874	Johnson, The, Shores Lumber Co. v. (C. C. A.).....	1021
H. C. Grady, The, Black Diamond Coal-Mining Co. v. (D. C.).....	226	Johnson Co. v. Thomson-Houston Electric Co. (C. C. A.).....	16
Heap v. Tremont & Suffolk Mills (C. C. A.).....	1017	John Toler Sons & Co., Furniture Caster Ass'n v. (C. C.).....	995
Heckman, Ross v. (C. C.).....	6	John V. Farwell Co. v. Hilton (C. C.).....	293
Heinrici v. The Laura Madsen (D. C.).....	362	Journal Newspaper Co., Brewer v. (C. C.).....	419
Heinsfurter, Centaur Co. v. (C. C. A.).....	955	Journal Newspaper Co., Union Associated Press v. (C. C.).....	419
Hench, National Harrow Co. v. (C. C.).....	226		
Herald Co., Brewer v. (C. C.).....	419	Kansas City Hay-Press Co. v. Devol (C. C. A.).....	463
Herald Co., Union Associated Press v. (C. C.).....	419	Kauffman, United States v. (C. C. A.).....	446
Hermann v. United States (C. C.).....	151	Kavanagh v. Omaha Life Ass'n (C. C.).....	295
Hess, Frank v. (C. C.).....	170	Keane, United States v. (C. C.).....	330
Hibberd v. Slack (C. C.).....	571	Keith, Bates v. (C. C. A.).....	1014
Highland Ave. & B. R. Co. v. Columbian Equipment Co. (C. C. A.).....	1018	Kellar, United States v. (C. C.).....	634
Hilton, John V. Farwell Co. v. (C. C.).....	293	Kelley v. Kelley (C. C.).....	420
Hinckley, Blythe v. (C. C.).....	228	Kellogg, Shaw v. (C. C. A.).....	1020
Hinckley, Blythe v. (C. C.).....	246	Kelly v. Clow (C. C.).....	352
Hohorst v. Hamburg-American Packet Co. (C. C.).....	354	Kennedy Mining & Milling Co., Argonaut Min. Co. v. (C. C.).....	1
Holcombe, Stanley v. (C. C. A.).....	1021	Keyser, Hawkhurst S. S. Co. v. (D. C.).....	693
Holm v. Atlas Nat. Bank (C. C. A.).....	119	Keyser, Wood v. (D. C.).....	688
Holman, Harper v. (C. C.).....	222	Kidd, Pittsburgh Plate-Glass Co. v. (C. C. A.).....	1020
Holman, Harper v. (C. C.).....	224	King v. Lawson (C. C.).....	299
Holt, Silver v. (C. C.).....	809	King v. Port Royal & A. R. Co. (C. C.).....	67
Hoopes, Pope v. (C. C.).....	927	King v. Stuart (C. C.).....	546
Hopkins v. United States (C. C. A.).....	1018	Kirby, In re (D. C.).....	606
Hopkins, Boves v. (C. C. A.).....	767	Kittel v. Augusta, T. & G. R. Co. (C. C. A.).....	386
Ho Quai Sin, In re (D. C.).....	310	Koechl v. United States (C. C. A.).....	448
Horst v. Roehm (C. C.).....	565	Koechl v. United States (C. C.).....	954
Hostetter Co. v. Sommers (C. C.).....	333	Kowalski v. Chicago G. W. R. Co. (C. C.).....	586
Howard, The (D. C.).....	204	Krueger v. The John and Winthrop (D. C.).....	503
Hughes v. Green (C. C. A.).....	833		
Humphreys, Hanchett v. (C. C.).....	862	Lady Furness, The, Steindl v. (D. C.).....	679
Hunt v. Archibald (C. C. A.).....	1018	Lake Nat. Bank v. Wolfeborough Sav. Bank (C. C. A.).....	1018
H. Wetter Mfg. Co., Darragh v. (C. C. A.).....	1016	Landes, Jennes v. (C. C.).....	73
		Larrinaga, Thomas v. (C. C. A.).....	1020
Idlehour, The, Nelligan v. (C. C. A.).....	358	Laura Madsen, The, Heinrici v. (D. C.).....	362
Illinois, The, Balano v. (D. C.).....	697	Lawrence v. Flatboat (D. C.).....	200
Illinois Trust & Savings Bank, First Nat. Bank of Omaha, Neb., v. (C. C.).....	34	Lawson, King v. (C. C.).....	209
Indianapolis Air-Line R. Co. v. Cedar Creek & West Creek Tp. (C. C. A.).....	1018	Leathe, Belleville & St. L. R. Co. v. (C. C. A.).....	103
Indianapolis Water Co., American Straw-board Co. v. (C. C. A.).....	1014	Lee, Smith v. (C. C.).....	557
Ingalls, Rice v. (C. C. A.).....	1020	Lee, United States v. (D. C.).....	626
International Co. of Mexico, Bates v. (C. C.).....	518	Lehigh Valley Coal Co. v. Warrek (C. C. A.).....	866
Inter-Ocean Pub. Co., Brewer v. (C. C.).....	419	Lehigh Valley Trust & Safe-Deposit Co., Ouseley v. (C. C.).....	602
Inter-Ocean Pub. Co., Union Associated Press v. (C. C.).....	419	Lehigh & H. R. R. Co. v. Marchant (C. C. A.).....	870
Irvine v. Angus (C. C.).....	127	Leiter v. Ronalds (C. C.).....	894
Ivanhot, The (D. C.).....	500	Le Lion, The, Phinney v. (D. C.).....	1011
		Leslie v. Leslie (C. C.).....	70
Jacot v. United States (C. C.).....	159	Lilienthal v. Drucklieb (C. C.).....	918
Jarvis-Conklin Mortgage Trust Co. v. Willhoit (C. C.).....	514	Littauer, Consolidated Fastener Co. v. (C. C. A.).....	164
Jarvis-Conklin Mortgage Trust Co., Ruohs v. (C. C.).....	513	Little Rock & M. R. Co. v. Barry (C. C. A.).....	914
Jarvis, Duffy v. (C. C.).....	731		
Jennes v. Landes (C. C.).....	73		

CASES REPORTED.

xi

	Page		Page
Little Silver, The (C. C. A.).....	508	Moore v. National Water-Tube Boiler Co. (C. C.)	346
L'oeble, Case v. (C. C.).....	582	Morgan v. Nunn (C. C.).....	551
Long v. Rosedale Cemetery (C. C.).....	135	Morgan v. Rogers (C. C. A.).....	1019
Loper, Gittings v. (C. C.).....	102	Morgan & Co. v. Maul (C. C.).....	336
Lopes v. Luce (D. C.).....	465	Morris, West v. (C. C. A.).....	1023
Loss v. Mercantile Trust Co. (C. C. A.).....	1019	Morrison v. United States (C. C. A.).....	444
Louisville, N. A. & C. R. Co., Louisville Trust Co. v. (C. C. A.).....	539	Moses, United States v. (C. C. A.).....	329
Louisville Press Co., Brewer v. (C. C.).....	419	Mount Hope, The (C. C. A.).....	910
Louisville Press Co., Union Associated Press v. (C. C.).....	419	Murphy, United States v. (D. C.).....	609
Louisville Trust Co. v. Louisville, N. A. & C. R. Co. (C. C. A.).....	539	Mutual Ben. Life Ins. Co., Omaha Nat. Bank v. (C. C. A.).....	122
Loving v. Arnold (C. C.).....	214	Mutual Life Ins. Co. of New York v. Owen (C. C. A.).....	1019
Lowell Mfg. Co. v. Whittall (C. C. A.).....	1019	Natchaug Silk Co., Hadden v. (C. C.).....	80
Lowry v. United States Shipping Co. (D. C.).....	685	National Bank of Commerce of Tacoma, Wash., v. Wade (C. C.).....	10
Lozier, Palmer Pneumatic Tire Co. v. (C. C.).....	659	National Bank of Redemption v. Rutledge (C. C.).....	400
Luce, Lopes v. (D. C.).....	465	National Exchange Bank of Newport, Whitney v. (C. C.).....	377
Lvdia A. Harvey, The, Tarr v. (D. C.).....	1000	National Harrow Co. v. Hench (C. C.).....	226
McBrier, Pioneer Fuel Co. v. (C. C. A.).....	495	National Harrow Co. v. Wescott (C. C.).....	670
McCain v. City of Des Moines (C. C.).....	726	National Harrow Co. v. Wescott (C. C.).....	671
MacCaulley, The E. V. (D. C.).....	500	National Harrow Co. v. Wescott (C. C.).....	673
McDonald v. Miller (C. C.).....	344	National Water-Tube Boiler Co., Moore v. (C. C.).....	346
McHenry v. Alford (C. C. A.).....	1019	Neafie & Levy Ship & Engine Building Co. v. The Ella (D. C.).....	471
McIntyre, Smith v. (C. C.).....	721	Neall v. Manson (D. C.).....	698
McKay, Rury v. (D. C.).....	360	Nederland Life Ins. Co. v. Hall (C. C. A.).....	278
McLean, Garfield & Proctor Coal Co. v. (C. C. A.).....	910	Nellie E. Rumball, The (C. C. A.).....	681
Madsen, The Laura (D. C.).....	362	Nelligan v. The Idlehour (C. C. A.).....	353
Mallory, Cisma v. (C. C.).....	851	New York News Pub. Co. v. De Freitas (C. C. A.).....	758
Manson v. The Harold (D. C.).....	698	New York World, The (D. C.).....	1002
Manson, Neall v. (D. C.).....	698	New York & M. P. S. S. Co. v. Clancy (C. C. A.).....	508
Marble, Stevenson v. (C. C.).....	23	New York & N. R. Co., De Neufville v. (C. C.).....	391
Marchant, Lehigh & H. R. R. Co. v. (C. C. A.).....	870	Niagara, The, Johnson v. (C. C. A.).....	902
Mary E. Cuff, The, Fenno v. (D. C.).....	719	Niagara, The, Stahl v. (C. C. A.).....	902
Massachusetts Loan & Trust Co., Flandrau v. (C. C. A.).....	1017	Niblack, Burrows v. (C. C. A.).....	111
Matson v. Green Mountain Stock-Ranching Co. (C. C. A.).....	1019	North American Transport Co., Red R. S. S. Co. v. (D. C.).....	467
Maul, D. S. Morgan & Co. v. (C. C.).....	336	Northern Pac. R. Co. v. Boyle (C. C. A.).....	1020
Maverick, The, American Mfg. Co. v. (C. C. A.).....	906	Northwestern Guaranty Loan Co. of Minneapolis, Minn., Elkhart Nat. Bank of Elkhart, Ind., v. (C. C.).....	76
Maverick, The, Hall v. (C. C. A.).....	906	Nunn, Morgan v. (C. C.).....	551
Mavtner v. United States (C. C.).....	155	Nymphæa, The, Grahl v. (D. C.).....	711
May, The, Stag Line v. (D. C.).....	711	O'Brien v. The Cramp (D. C.).....	696
Mercantile Trust Co. v. Missouri, K. & T. R. Co. (C. C.).....	379	Odgen v. Port Royal & A. R. Co. (C. C.).....	67
Mercantile Trust Co., Loss v. (C. C. A.).....	1019	Ohio State Journal, Brewer v. (C. C.).....	419
Merriwether, Blake v. (C. C. A.).....	1014	Ohio State Journal, Union Associated Press v. (C. C.).....	419
Merriwether, Southern Land Imp. Co. v. (C. C. A.).....	1014	Omaha Life Ass'n, Kavanagh v. (C. C.).....	295
Mexico, The (C. C. A.).....	504	Omaha Nat. Bank v. Mutual Ben. Life Ins. Co. (C. C. A.).....	122
Miller, McDonald v. (C. C.).....	344	Oneida, The, Summers v. (D. C.).....	716
Minneapolis Northern R. Co., Harding v. (C. C. A.).....	287	Onseley v. Lehigh Valley Trust & Safe-Deposit Co. (C. C.).....	602
Minnesota Tribune Co. v. Associated Press (C. C. A.).....	921	Owen, Mutual Life Ins. Co. of New York v. (C. C. A.).....	1019
Missouri, K. & T. R. Co., Mercantile Trust Co. v. (C. C.).....	379	Palmer v. Curnen (C. C.).....	829
Missouri Savings & Loan Co. v. Rice (C. C. A.).....	131	Palmer v. John E. Brown Mfg. Co. (C. C.).....	454
Mitchell, First Nat. Bank of Chicago, Ill. v. (C. C.).....	90	Palmer Pneumatic Tire Co. v. Lozier (C. C.).....	659
Moline Plow Co. v. Parlin & Orendorff Co. (C. C.).....	349	Park v. United States (C. C.).....	159
Monmouth Min. & Mfg. Co., Stephenson v. (C. C. A.).....	114		

	Page		Page
Parker, The Asher W. (C. C. A.)	832	Ross v. Heckman (C. C.)	6
Parker, Southern R. Co. v. (C. C. A.)	1021	Ross v. United States (C. C.)	153
Parkinson, Balfour v. (C. C.)	855	Rumball, The Nellie E. (C. C. A.)	681
Parlin & Orendorff Co., Moline Plow Co. v. (C. C.)	349	Ruohs v. Jarvis-Conklin Mortgage Trust Co. (C. C.)	513
Patent Button Co. v. Consolidated Fastener Co. (C. C.)	189	Rury v. McKay (D. C.)	360
Patten, Whittemore v. (C. C.)	51	Russell, United States v. (C. C. A.)	878
Pauley Jail Bldg. & Mfg. Co. v. Crawford County (C. C. A.)	942	Rutledge, National Bank of Redemption v. (C. C.)	400
People v. Arnold (C. C. A.)	1020	Saginaw, The, Hamburg American Line v. (D. C.)	705
People's Building & Loan Ass'n, Bratton v. (C. C. A.)	1015	St. Louis Corset Co. v. Williamson Corset & Brace Co. (C. C.)	161
Persia, The, Clyde S. S. Co. v. (D. C.)	705	Salomon v. Garvin Mach. Co. (C. C.)	195
Person v. Fidelity & Casualty Co. (C. C.)	759	Sampson, Thorpe v. (C. C.)	63
Pettus, United States v. (C. C.)	791	Sandow v. United States (C. C.)	146
Philadelphia, The (C. C. A.)	1020	Saturnina, The (C. C. A.)	1020
Philadelphia Creamery Supply Co. v. Davis & Rankin Bldg. & Mfg. Co. (C. C. A.)	881	Sawyard, Dexter, Horton & Co. v. (C. C.)	296
Philadelphia & R. R. Co., Platt v. (C. C. A.)	535	Schieffelin v. United States (C. C. A.)	880
Phinney v. The Le Lion (D. C.)	1011	Schoen Mfg. Co., Fox Solid Pressed Steel Co. v. (C. C. A.)	544
Pillsbury-Washburn Flour-Mills Co. v. American Wired-Hoop Co. (C. C.)	339	Schollhorn Co. v. Bridgeport Mfg. Co. (C. C.)	674
Pine Mountain Iron & Coal Co., Blake v. (C. C. A.)	1014	Schwabacher, Tremper v. (C. C.)	413
Pintch Compressing Co. v. Bergin (C. C.)	140	Sehlbach v. United States (C. C.)	157
Pioneer Fuel Co. v. McBrier (C. C. A.)	495	Serviss v. Ferguson (C. C. A.)	202
Pittsburgh Plate-Glass Co. v. Kidd (C. C. A.)	1020	Shailer, City of Milwaukee, Wis., v. (C. C. A.)	106
Platt v. Philadelphia & R. R. Co. (C. C. A.)	535	Shapleigh v. City of San Angelo (C. C. A.)	1020
Pope v. Hoopes (C. C.)	927	Shaw v. Kellogg (C. C. A.)	1020
Pope Glucose Co., Chicago Sugar-Refining Co. v. (C. C. A.)	977	Shoemaker, United States v. (C. C.)	146
Porter, Sigafus v. (C. C. A.)	430	Shores Lumber Co. v. The Johnson (C. C. A.)	1021
Port Royal & A. R. Co., King v. (C. C.)	67	Shultz, The George S. (C. C. A.)	508
Port Royal & A. R. Co., Ogden v. (C. C.)	67	Sibbs, Yardley v. (C. C.)	531
Port Royal & A. R. Co., State v. (C. C.)	67	Sigafus v. Porter (C. C. A.)	430
Post v. Beacon Vacuum Pump & Electrical Co. (C. C. A.)	371	Silver v. Holt (C. C.)	809
Prescott & A. C. E. Co. v. Atchison, T. & S. F. R. Co. (C. C. A.)	213	Silver Peak Mines, Blair v. (C. C.)	737
Price, United States v. (D. C.)	636	Simon, United States v. (C. C.)	154
Pullman's Palace-Car Co. v. American Loan & Trust Co. (C. C. A.)	18	Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America (C. C. A.)	1021
Put-in-Bay Waterworks, Light & Railway Co., Electrical Supply Co. v. (C. C.)	740	Slack, Hibberd v. (C. C.)	571
Rabboni, The (C. C. A.)	681	Smeeth v. Best (C. C. A.)	1021
Red R. S. S. Co. v. North American Transport Co. (D. C.)	467	Smiley v. Barker (C. C. A.)	1021
Reed, Barnes Cycle Co. v. (C. C.)	603	Smith v. Lee (C. C.)	557
Reliance Marine Ins. Co. v. The A. J. Wright (D. C.)	1002	Smith v. McIntyre (C. C.)	721
Rice v. Ingalls (C. C. A.)	1020	Smith v. United States (C. C.)	158
Rice, Missouri Savings & Loan Co. v. (C. C. A.)	131	Smyth, Couper v. (C. C.)	757
Richards v. The Topgallant (D. C.)	356	Snyder, Armour Packing Co. v. (C. C.)	136
Rilatt v. The E. V. MacCaulley (D. C.)	500	Societe Anonyme des Materieues Colorantes et Produits Chemenques de St. Denis, Greene v. (C. C. A.)	1017
Roanoke Iron Co., Fidelity Insurance, Trust & Safe-Deposit Co. v. (C. C.)	744	Société Anonyme du Filtre Chamberland Système Pasteur v. Allen (C. C.)	812
Roanoke Iron Co., Fidelity Insurance, Trust & Safe-Deposit Co. v. (C. C.)	752	Soehner v. Favorite Stove & Range Co. (C. C. A.)	182
Rochester, The (C. C. A.)	365	Sommers, Hostetter Co. v. (C. C.)	333
Rock Island Plow Co., Deere & Co. v. (C. C. A.)	171	Southern Land Imp. Co. v. Merriwether (C. C. A.)	1014
Roehm, Horst v. (C. C.)	565	Southern Mut. Building & Loan Ass'n, Garner v. (C. C. A.)	3
Rogers, Morgan v. (C. C. A.)	1019	Southern Pac. Co., Carolan v. (C. C.)	84
Rogers, Wm. Rogers Mfg. Co. v. (C. C.)	639	Southern R. Co. v. Parker (C. C. A.)	1021
Rogers Mfg. Co. v. Rogers (C. C.)	639	Southern R. Co., Adams v. (C. C. A.)	596
Ronalds, Leiter v. (C. C.)	894	Southern R. Co., Bluthenthal v. (C. C.)	920
Rosedale Cemetery, Long v. (C. C.)	135	Spiegel, The (D. C.)	1002
		Sprague Electric Railway & Motor Co. v. Union R. Co. (C. C.)	641
		Stag Line v. The May (D. C.)	711

	Page		Page
Stahl v. The Niagara (C. C. A.).....	902	Union Associated Press v. Ohio State Jour- nal (C. C.).....	419
Standard Electric Co., Western Electric Co. v. (C. C. A.).....	654	Union Associated Press v. Times-Star Co. (C. C.).....	419
Stanley v. Holcombe (C. C. A.).....	1021	Union Pac. R. Co., United States v. (C. C. A.).....	1022
State v. Port Royal & A. R. Co. (C. C.)....	67	Union R. Co., Sprague Electric Railway & Motor Co. v. (C. C.).....	641
Steele, Chesapeake & O. R. Co. v., two cases (C. C. A.).....	93	Union R. Co., Thomson-Houston Electric Co. v. (C. C.).....	888
Steindl v. The Lady Furness (D. C.).....	679	United States v. Bernard (C. C.).....	634
Stephens, Buhl v. (C. C.).....	922	United States v. Borgfeldt (C. C. A.).....	1022
Stephenson v. Monmouth Min. & Mfg. Co. (C. C. A.).....	114	United States v. Brewer (C. C.).....	147
Stevenson v. Marble (C. C.).....	23	United States v. Carter (C. C.).....	622
Stuart, King v. (C. C.).....	546	United States v. Central Pac. R. Co. (C. C.)	88
Stuttgart & A. R. R. R. Boyd v. (C. C. A.)	9	United States v. Central Pac. R. Co. (C. C.).....	218
Sullivan-Kelly Co., Coit & Co. v. (C. C.)...	724	United States v. Clarkson (C. C.).....	634
Summers v. The Oneida (D. C.).....	716	United States v. Des Moines Valley R. Co. (C. C. A.).....	40
Sweet, Carter v. (C. C.).....	16	United States v. Eberman (C. C.).....	634
Symonds v. United States (C. C. A.).....	1021	United States v. E. L. Goodsell Co. (C. C. A.).....	439
Syracuse, The (D. C.).....	1005	United States v. Fensterer (C. C.).....	148
Tabor, Weaver v. (C. C. A.).....	1023	United States v. Goldenberg (C. C. A.).....	1022
Tannage Patent Co., Clerk v. (C. C. A.)....	643	United States v. Goodsell (C. C.).....	155
Tannage Patent Co., Ford Morocco Co. v. (C. C. A.).....	644	United States v. Jewett (C. C.).....	142
Tarr v. The Lydia A. Harvey (D. C.).....	1000	United States v. Kauffman (C. C. A.).....	446
Taylor, Briggs v. (C. C. A.).....	681	United States v. Keane (C. C.).....	330
Taylor-Rice Engineering Co., Hamor v. (C. C.).....	392	United States v. Kellar (C. C.).....	634
Texas & P. R. Co. v. Clayton (C. C. A.)....	305	United States v. Lee (D. C.).....	626
Thayer, Air-Brush Mfg. Co. v. (C. C.).....	640	United States v. Moses (C. C. A.).....	329
Thomas v. Larrinaga (C. C. A.).....	1020	United States v. Murphy (D. C.).....	609
Thomson-Houston Electric Co. v. Union R. Co. (C. C.).....	888	United States v. Pettus (C. C.).....	791
Thomson-Houston Electric Co., Johnson Co. v. (C. C. A.).....	16	United States v. Price (D. C.).....	636
Thorpe v. Sampson (C. C.).....	63	United States v. Russell (C. C. A.).....	878
Tillie A., The, Cornell Steamboat Co. v. (D. C.).....	684	United States v. Shoemaker (C. C.).....	146
Tillinghast, Brown v. (C. C.).....	71	United States v. Simon (C. C.).....	154
Times-Star Co., Brewer v. (C. C.).....	419	United States v. Union Pac. R. Co. (C. C. A.).....	1022
Times-Star Co., Union Associated Press v. (C. C.).....	419	United States v. Wagner (C. C.).....	161
Timmonds v. United States (C. C. A.).....	933	United States v. Warren Chemical & Man- ufacturing Co. (C. C. A.).....	638
Timoney v. Buck (C. C. A.).....	887	United States v. Watson (C. C.).....	160
Tinling, Dickerson v. (C. C. A.).....	192	United States, Beck v. (C. C.).....	150
Toler Sons & Co., Furniture Caster Ass'n v. (C. C.).....	955	United States, Brewer v. (C. C.).....	149
Topgallant, The, Richards v. (D. C.).....	356	United States, De Luze v. (C. C.).....	156
Tremont & Suffolk Mills, Heap v. (C. C. A.).....	1017	United States, Dieckerhoff v. (C. C.).....	443
Tremper v. Schwabacher (C. C.).....	413	United States, Dodge v. (C. C. A.).....	449
Trust Co. of North America, Sioux City Terminal Railroad & Warehouse Co. v. (C. C. A.).....	1021	United States, Fleming Cement & Brick Co. v. (C. C.).....	158
Turret Steam Shipping Co. v. Boston Fruit Co. (D. C.).....	895	United States, Hart v. (C. C. A.).....	799
Tuska v. United States (C. C.).....	442	United States, Haulenbeck v. (C. C.).....	142
Ulrich, Walder v. (C. C. A.).....	1023	United States, Hermann v. (C. C.).....	151
Union Associated Press v. Commercial Trib- une Co. (C. C.).....	419	United States, Hopkins v. (C. C. A.).....	1018
Union Associated Press v. Evening News Ass'n (C. C.).....	419	United States, Jacot v. (C. C.).....	159
Union Associated Press v. Herald Co. (C. C.).....	419	United States, Koechl v. (C. C. A.).....	448
Union Associated Press v. Inter-Ocean Pub. Co. (C. C.).....	419	United States, Koechl v. (C. C.).....	954
Union Associated Press v. Journal Newspa- per Co. (C. C.).....	419	United States, Mavtner v. (C. C.).....	155
Union Associated Press v. Louisville Press Co. (C. C.).....	419	United States, Morrison v. (C. C. A.).....	444
		United States, Park v. (C. C.).....	159
		United States, Ross v. (C. C.).....	153
		United States, Sandow v. (C. C.).....	146
		United States, Schieffelin v. (C. C. A.).....	880
		United States, Sehlbach v. (C. C.).....	157
		United States Shipping Co., Lowry v. (D. C.).....	685
		United States, Smith v. (C. C.).....	158
		United States, Symonds v. (C. C. A.).....	1021
		United States, Timmonds v. (C. C. A.).....	933
		United States, Tuska v. (C. C.).....	442

	Page		Page
United States, Volkman, Stollwerck & Co. v. (C. C.).....	442	Western Wheel Works, Gormully & Jeffery Mfg. Co. (C. C. A.).....	968
United States, Wiebusch & Hilger v. (C. C. A.).....	451	Westinghouse Air-Brake Co. v. Great Northern R. Co. (C. C.).....	9
United States, Wilkens v. (C. C.).....	152	Wetter Mfg. Co., Darragh v. (C. C. A.).....	1016
United States, Wolff v. (C. C. A.).....	444	Wheeler v. Wood (C. C. A.).....	48
United States, Wotton v. (C. C.).....	954	Whitney v. National Exch. Bank of New-port (C. C.).....	377
United States Nat. Bank, Cockrill v. (C. C. A.).....	1016	Whittall, Lowell Mfg. Co. v. (C. C. A.).....	1019
Val Blatz Brewing Co. v. Walsh (C. C.).....	5	Whittemore v. Patten (C. C.).....	51
Ventch v. American Loan & Trust Co. (C. C. A.).....	274	Wiebusch & Hilger v. United States (C. C. A.).....	451
Venner v. Farmers' Loan & Trust Co. (C. C. A.).....	1022	Wilkens v. United States (C. C.).....	152
Volkman, Stollwerck & Co. v. United States (C. C.).....	442	Willhoit, Jarvis-Conklin Mortgage Trust Co. v. (C. C.).....	514
Wade National Bank of Commerce of Tacoma, Wash., v. (C. C.).....	10	Wm. Rogers Mfg. Co. v. Rogers (C. C.).....	639
Wadley, Hatcher's Adm'x v. (C. C.).....	913	Williams v. American String Wrapper Co. (C. C. A.).....	197
Wagner, United States v. (C. C.).....	161	William Schollhorn Co. v. Bridgeport Mfg. Co. (C. C.).....	674
Wagner Typewriter Co. v. Watkins (C. C.).....	57	Williamson Corset & Brace Co., St. Louis Corset Co. v. (C. C.).....	161
Walder v. Ulrich (C. C. A.).....	1023	Wilson, The Job T. (D. C.).....	204
Walker, Brown v. (C. C.).....	532	Wilson v. Ward Lumber Co. (C. C. A.).....	1023
Walls, American Dredging Co. v. (C. C. A.).....	428	Wirt v. Farrelly (C. C.).....	891
Walsh, Val. Blatz Brewing Co. v. (C. C.).....	5	Wise, Gardiner v. (C. C. A.).....	337
Ward Lumber Co., Wilson v. (C. C. A.).....	1023	Wolfeborough Sav. Bank, Lake Nat. Bank v. (C. C. A.).....	1018
Warrek, Lehigh Valley Coal Co. v. (C. C. A.).....	866	Wolff v. United States (C. C. A.).....	444
Warren Chemical & Manufacturing Co., United States v. (C. C. A.).....	638	Wood v. Keyser (D. C.).....	688
Watkins, Wagner Typewriter Co. v. (C. C.).....	57	Wood, Aspen Mining & Smelting Co. v. (C. C. A.).....	48
Watson, United States v. (C. C.).....	160	Wood, Wheeler v. (C. C. A.).....	48
Watson & Newell Co., Gorham Mfg. Co. v. (C. C. A.).....	1017	Woodside v. Canton Ins. Office (D. C.).....	283
Weaver v. Tabor (C. C. A.).....	1023	Wotton v. United States (C. C.).....	954
Webster v. City of Beaver Dam (C. C.).....	280	Wright, The A. J. (D. C.).....	1002
Webster Mfg. Co., Columb v. (C. C. A.).....	592	Wright, City of Tacoma v. (C. C.).....	836
Wescott, National Harrow Co. v. (C. C.).....	670	Wynkoop-Hallenbeck-Crawford Co., Berry v. (C. C. A.).....	646
Wescott, National Harrow Co. v. (C. C.).....	671		
Wescott, National Harrow Co. v. (C. C.).....	673	Yardley v. Sibbs (C. C.).....	531
West v. Morris (C. C. A.).....	1023		
Western Electric Co. v. Standard Electric Co. (C. C. A.).....	654	Zimmerman v. Carpenter (C. C.).....	747

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

ARGONAUT MIN. CO. v. KENNEDY MIN. & MILL. CO.

(Circuit Court, N. D. California. December 13, 1897.)

No. 12,517.

REMOVAL OF CAUSES—CASE ARISING UNDER LAWS OF UNITED STATES—MINING CLAIMS.

An action in a state court, which appears by the complaint to be simply one to recover damages for trespass upon the plaintiff's mining claim, is not removable as a case arising under the laws of the United States.

Lindley & Eickhoff and W. J. McGee, for plaintiff.
John M. Wright, for defendant.

MORROW, Circuit Judge. This is a motion to remand the cause to the superior court of the state, from whence it was brought, on the ground that this court is without jurisdiction to hear and determine the cause. The right of removal is claimed upon the ground that the action is of a civil nature at common law; that the matter in dispute exceeds, exclusive of costs and interest, the sum or value of \$2,000; and that it arises under the laws of the United States. Plaintiff and defendant are both corporations organized under the laws of the state of California. The complaint is in the ordinary form of an action of trespass, and the allegations, material to the present question, are as follows:

"That at all times mentioned in the complaint the plaintiff has been, and now is, the owner, and in the possession, and entitled to the sole and exclusive possession, of all that certain mine and mining claim situate, lying, and being in Jackson mining district, Amador county, state of California, * * * which said mine and mining claim was and is commonly known and called the 'Pioneer Quartz Mine.' * * * And plaintiff avers that at all of said times it was, and now is, the owner, in the possession of, and entitled to the exclusive possession of, 1,589.94 linear feet of that certain quartz vein or lode known as the Pioneer quartz vein or lode, which has its apex within the premises hereinbefore described, with the exclusive right to said 1,589.94 feet of said lode throughout its entire depth, although it may enter the land adjoining. And said plaintiff at all of said times was, and now is, the owner of all other veins, lodes, and ledges, throughout their entire length and depth, the top or

apices of which lie within or inside of the exterior lines of the Pioneer Quartz Mine, described as aforesaid, extended vertically, although such veins, lodes, or ledges in their downward course may so far depart from a perpendicular as to extend outside of the vertical side lines of said described Pioneer Quartz Mine. That defendant has sunk an incline shaft upon land adjacent to plaintiff's mining claim, and since August 11, 1894, and prior to the commencement of this action, said defendant, by means of said shaft and of levels, drifts, cross-cuts, and stopes, has penetrated into and upon the said lands and premises belonging to this plaintiff, as hereinbefore alleged, and into and upon the lodes, ledges, and veins having their apices within the surface lines of said Pioneer Quartz Mine, and by means of said underground works has willfully, wrongfully, and unlawfully, and without the license or consent of said plaintiff, worked and mined said lodes, ledges, and mining ground, and has taken out and extracted therefrom, and converted to its own use, large quantities of gold-bearing quartz of great value. And plaintiff alleges upon its information and belief that said defendant, since August 11, 1894, and prior to the commencement of this action, has extracted over three thousand tons of ore and gold-bearing quartz from the veins, lodes, and ledges aforesaid, and has taken out, carried away, and converted the same to its own use. That said ore was of great value, to wit, of the value of one hundred and thirty-five thousand dollars. That by reason of the aforesaid acts of defendant, plaintiff has been damaged in the sum of one hundred and thirty-five thousand dollars. Plaintiff further alleges that defendant threatens to continue said wrongful acts, and threatens to continue to so mine and work the veins, ledges, and lodes so belonging to this plaintiff, as hereinbefore set forth, and to extract, remove, and convert to its own use, the gold-bearing ore and quartz therein, and will do so unless restrained by the order of this court."

It has been repeatedly determined by the supreme court that a case not depending on the citizenship of the parties, nor otherwise specially provided for, cannot be removed from a state court into the circuit court of the United States, as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or in the subsequent pleadings. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 487, 15 Sup. Ct. 192; *Land Co. v. Brown*, 155 U. S. 488, 15 Sup. Ct. 357; *U. S. v. American Bell Tel. Co.*, 159 U. S. 553, 16 Sup. Ct. 69; *Railway Co. v. Skottowe*, 162 U. S. 490, 16 Sup. Ct. 869; *Hanford v. Davies*, 163 U. S. 273, 16 Sup. Ct. 1051; *Railway Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703; *Walker v. Collins*, 167 U. S. 57, 17 Sup. Ct. 738; *Florida v. Charlotte Harbor Phosphate Co.*, 20 C. C. A. 538, 74 Fed. 578. It is contended, however, by the defendant, that it does appear by the plaintiff's statement of his own claim that the case arises under the laws of the United States; that the trespass charged is into and upon the lodes, ledges, and veins of a mining claim alleged to be owned and in the possession of the plaintiff; that a mining claim, as the term is used in the statutes of the United States, is that portion of a vein or lode and of the adjoining surface, or of the surface and subjacent material, to which a claimant has acquired the right of possession by virtue of a compliance with the laws of the United States and the local rules and customs of mines. *Copp*, U. S. Min. Dec. 136; *Williams v. Mining Co.*, 66 Cal. 193, 5 Pac. 85; *Railroad Co. v. Sanders*, 1 C. C. A. 192, 49 Fed. 135. This may be all true, but it does not follow

that a trespass upon such premises involves a question arising out of or under any law of the United States. As well might it be contended that a case between individuals relating to the possession of government securities is a case arising under the laws of the United States, because a description of the property would involve a judicial knowledge of the origin, validity, and value of the obligation under the legislation of the national government. This is certainly not the interpretation intended by the removal act. The case of *Consolidated Wyoming Gold-Min. Co. v. Champion Min. Co.*, 62 Fed. 945, involved the precise question we have here, but the motion to remand in that case was based upon the defendant's petition. The decision, denying the motion, was rendered by Judge McKenna on March 6, 1893. At that time the supreme court had not decided the case of *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, holding that the question of federal jurisdiction must be determined upon the complainant's statement of his own claim, and not upon the defendant's petition. The statement of Judge McKenna, in the first-named case, that "a contest between mining claims necessarily involves a consideration of the laws of the United States," must be considered with respect to the issues of that case, and the question of jurisdiction as it then stood. In *Hanford v. Davies*, 163 U. S. 273, 16 Sup. Ct. 1051, Mr. Justice Harlan, speaking for the supreme court, stated the law upon this subject very clearly. He said:

"We are not required to say that it is essential to the maintenance of the jurisdiction of the circuit court of such a suit that the pleadings should refer, in words, to the particular clause of the constitution relied on to sustain the claim of immunity in question, but only that the essential facts averred must show, not by inference or argumentatively, but clearly and distinctly, that the suit is one of which the circuit court is entitled to take cognizance,"—citing *Ansbro v. U. S.*, 159 U. S. 695, 16 Sup. Ct. 187.

As it does not appear clearly and distinctly that this case arises under the laws of the United States, the motion to remand must be granted, and it is so ordered.

GARNER et al. v. SOUTHERN MUT. BUILDING & LOAN ASS'N.

(Circuit Court of Appeals, Fifth Circuit. June 10, 1897.)

No. 588.

FEDERAL AND STATE COURTS—CONFLICT OF JURISDICTION—APPOINTMENT OF RECEIVERS.

A federal court will not appoint a receiver for a corporation when it appears that a state court of competent jurisdiction has already appointed a receiver therefor, who has taken possession of all its assets.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

This was a bill in equity by Charles E. Garner, a citizen of Florida, suing in behalf of himself and all other stockholders and creditors, against the Southern Mutual Building & Loan Association, a corporation organized under the laws of Georgia, and others. The bill was in the nature of a creditors' bill, and set

forth that the defendant company was insolvent, and prayed for the appointment of a receiver to take charge of all the corporate property, books, etc., and for the issuance of writs of injunction restraining the defendant, its officers, directors, agents, etc., from interfering further with its affairs. Thereafter the bill was amended by making William J. Speer, treasurer of the state of Georgia, a party defendant, and alleging that he had in his possession, as such treasurer, in compliance with the Georgia statutes, \$331,000 of the securities and assets of the defendant corporation. By this amendment it was sought to sequester the securities and assets in the hands of said Speer, to have a receiver appointed for the same, and the administration of the fund proceeded with by the court. On a rule to show cause why the injunction should not be granted, and a receiver appointed, as prayed for, the defendant association made a return, showing, among other things, that prior to the institution of this suit a creditors' suit had been brought by Roby Robinson and others against the defendant association, in the superior court of the state of Georgia, which suit was for the purpose of sequestering all the assets of the association, and for the general administration thereof, the payment of its debts, and the distribution of the remainder among its stockholders; that on February 5, 1897, a receiver was appointed in that suit, who qualified on the following day, and, three days before the institution of the present suit, took possession of all the assets of the association, so far as the same could be found, including possession of the key to the box in the office of the treasurer of Georgia, where the securities deposited with such treasurer were stored; that the key so taken possession of was the only key to said box; and that the receiver also notified the treasurer of his appointment, and of his right to control the securities, leaving the same voluntarily in the box in the treasurer's office. On this showing the circuit court entered an interlocutory order denying the application for an injunction, and refusing to appoint a receiver. From this decree the present appeal was taken.

Tompkins & Alston, for appellants.

Ellis & Gray and King & Spalding, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. Considering that the bill filed by Roby Robinson and others in the superior court of Fulton county, in the state of Georgia, on the 6th day of February, 1897, was a bill to liquidate and wind up the affairs of the Southern Mutual Building & Loan Association, and that upon the said bill the said court took jurisdiction, appointing a receiver, who was directed to take charge of all the moneys, properties, and assets of said corporation, and hold the same subject to the further order of the said court, we are of opinion that thereby, and prior to the filing of the bill by the present appellants in the circuit court of the United States for the Northern district of Georgia, all the assets, money, and properties of every description of the said Southern Mutual Building & Loan Association were taken into the custody and control of said state court, and placed beyond the jurisdiction of the circuit court of the United States for the Northern district of Georgia. It follows that the order appealed from, refusing an injunction on the application of appellants to restrain the treasurer of the state of Georgia from making certain disposition of the assets of the Southern Mutual Building & Loan Association in his possession and under his control, and refusing to appoint a receiver to take charge and administer said assets, was in all respects proper. The decree appealed from is affirmed, with costs.

VAL. BLATZ BREWING CO. v. WALSH et al.

(Circuit Court, D. Minnesota. December 23, 1897.)

FEDERAL COURTS—FORECLOSURE SUITS—RECEIVER FOR PROPERTY IN CUSTODY OF STATE COURT.

Where foreclosure proceedings are pending in a state court, to which a junior mortgagee is a party, and the mortgaged property is in the hands of an assignee in insolvency of the mortgagor, the assigned estate being under the direction and management of the same court, a federal court will not appoint a receiver to take charge of the property in a foreclosure suit instituted by the junior mortgagee.

This is a suit by the Val Blatz Brewing Company against Matthew Walsh, as assignee of Jacob Barge, and others, for the foreclosure of a mortgage. Heard on an application by complainant for a receiver pendente lite.

Merrick & Merrick, for complainant.

Henry J. Gjertsen, for defendant assignee.

LOCHREN, District Judge. This matter came before this court upon an application made by the complainant for the appointment of a receiver of the mortgaged property described in the bill of foreclosure pendente lite. The conceded facts in the case are, briefly stated, these: On the 14th day of August, 1896, the defendant Barge gave to the complainant a third mortgage upon the property in question, for the sum of \$18,423.10. At that time prior incumbrances existed on the tract in the sum of \$34,100. On the 18th day of October, 1897, the mortgagor defendant made an assignment of all his unexempt property to the defendant Matthew Walsh, as assignee, under the laws of the state of Minnesota, and the defendant Walsh immediately qualified, and took possession of the insolvent estate under said deed of assignment, and now is, and has ever since acted as, such assignee, under the direction and management of the state district court in and for Hennepin county. On the 13th of November, 1897, an application was made, in an action then pending before said district court for a foreclosure of the second mortgage, for the appointment of a receiver of the mortgaged premises. The complainant herein was a party defendant to said foreclosure suit, and appeared in open court, and advised the appointment of such receiver at the instance of the second mortgagee. The said state district court, however, denied said application. Thereafter, on the 27th of November, 1897, the second mortgagee, in the matter of the assignment proceedings, made an application requiring the assignee to pay the taxes, insurance, and interest due on the first mortgage out of the rentals of the mortgaged property, and to fix the rental value of the property occupied by the assignee; and thereafter, on the 21st day of December, 1897, said district court made an order granting the application, directing the assignee to pay all delinquent taxes, and the necessary insurance and repairs, and fixing the rental value of that part of the premises occupied by the assignee, and requiring him to keep separate account of the income and disbursements pertaining to such property. The remainder of the application was de-

nied. On the 26th of November, 1897, the complainant in this suit became a party to the insolvency proceedings in the state court, by serving notice of appearance upon the assignee, and authorizing its attorneys, Merrick & Merrick, to appear and act for it in said insolvency proceedings, in relation to its claim filed on said day, and also on said date complainant filed due proof of its unsecured claim in the matter of the said assignment of the defendant Barge. The assignee has filed six specific objections to the application of the complainant for a receiver. The main point of his contention is that, under the laws of Minnesota, the mortgagor is entitled to a full year of redemption from and after the foreclosure sale of the mortgaged premises, and that the possession of the mortgaged property follows this right of redemption; that in the present case this right is vested in the assignee, who is now in possession of the mortgaged property, managing the same under the immediate supervision and control of the state district court; that all equity rights in and to the property are in the custody of the district court of Hennepin county; and that said state court acquired jurisdiction over said equity prior to the commencement of this suit. The assignee does not claim that this court is precluded from making an appropriate decree of foreclosure, but contends that any application to the equity side of the court, which seeks, in effect, to appropriate the equity of redemption in aid of complainant's right, must be made to the state district court having charge of said insolvency proceedings. It seems clear to this court that in foreclosure cases the doctrine maintained in the federal courts is that, where the property is in the possession of a receiver or an assignee of a state court, the federal court will ordinarily do nothing to disturb his possession, or to interfere with the proper management of the property by the state court, pending the foreclosure. The objection of the assignee is held to be well taken, and the application for the appointment of a receiver is therefore denied.

ROSS v. HECKMAN.

(Circuit Court, D. Washington, N. D. December 23, 1897.)

FEDERAL COURTS—JURISDICTION—PROPERTY IN CUSTODY OF STATE COURT.

A circuit court of the United States will not entertain an action to recover property in possession of the defendant as receiver of a state court, though brought by a citizen of another state, who is not a party to the proceedings in the state court, unless leave to sue its receiver is obtained from that court.

Bill in equity by Charles D. Ross against P. Y. Heckman for an injunction to restrain the defendant from extracting coal in a certain tract of land, to which the plaintiff has a clear and undisputed title. The defendant filed a plea in abatement, alleging that he is in possession and operating the coal mine as receiver of the Seattle Coal & Iron Company, under the direction and control of the superior court of the state of Washington for King county, and that personally he has no interest in the subject of the litigation, and that the plaintiff did not obtain leave of said superior court to bring this action.

Struve, Allen, Hughes & McMicken, for complainant.

Ballinger, Ronald & Battle, Donworth & Howe, Strudwick & Peters, and Bausman, Kelleher & Emory, for respondent.

HANFORD, District Judge (orally). I am very firmly convinced that this plea is sufficient to oust this court of jurisdiction. If this court were authorized to review the decisions of the superior court of King county, and to reverse its judgments for error, or to grant a writ of prohibition against that court, restraining it from proceeding without jurisdiction against the property of a person not before it, nor a party to any proceeding before it, and not within its jurisdiction, I could yield to the argument of plaintiff's counsel. There would be certainly great merit in the matters that have been urged for my consideration. But this court, in proceedings of this nature, where the right to sue in the federal court is claimed by the plaintiff on the ground of diversity of citizenship, and perhaps on the ground that his property is being taken without due process of law, in violation of the constitution of the United States, has only concurrent jurisdiction with the courts of the state. It has not exclusive jurisdiction of a case where the jurisdiction is predicated upon the grounds I have stated. There are many instances in which the two courts, having thus concurrent jurisdiction, may be called upon to deal with the same property rights of parties at the same time, and they may, by reason of the differences of the human mind, reach opposite conclusions as to the rights of the parties; and their proceedings, if carried out in the execution of conflicting judgments, might lead to a collision of forces. But, to avoid that, the decisions have set up certain guide-posts, to guide each court in the exercise of its own jurisdiction, so as to avoid an unseemly conflict between courts having concurrent jurisdiction. Where proceedings have been taken which divest one court of its jurisdiction, and give to another court exclusive jurisdiction, there the court which has acquired exclusive jurisdiction of a matter will proceed to judgment, and to execute its judgment, and issue injunctions and all process necessary, and exercise all the power necessary to carry out its decrees, giving the parties their rights, regardless of anything that may be done or attempted in the court which has been entirely stripped and divested of its jurisdiction. That may take place where a case has been rightfully removed out of the state court into the federal court. If the state court is disposed to doubt the validity of the removal proceedings, and refuse to give up jurisdiction, and plaintiff sees fit to prosecute his action in the state court, and there is an attempt to deal with the property by the state court after it has been divested of its jurisdiction, the circuit court has the right then to issue injunctions, and to use all the force that is necessary to protect the rights of the litigants before it. The ultimate determination of any question of that kind between the two courts is by the supreme court of the United States, whose writs may run to the courts of the state as well as the federal courts. And so where one court has rendered a judgment, and issued process under which property has been taken, sold, and the possession transferred to a purchaser, if it did not have jurisdiction of the parties,

the owner can come forward and say: "My property has been taken without due process of law, because I was not granted a hearing in court. I did not have my day in court. I received no notice." In such a case the judgment is not voidable, but simply void, and any other court afterwards acquiring jurisdiction to adjudicate the matter may pronounce it void; may, notwithstanding the judgment and the proceedings under it, issue its process to restore the property to the owner. Where personal liberty is involved, where a person is deprived of his liberty, by being incarcerated in violation of the constitution of the United States, a federal court may issue process to release him, and all state officers are bound to obey the process of the national courts in cases of that kind. In case of any opposition or disagreement about the law of the case, the ultimate determination must be with the supreme court. Now, where only property rights are involved, and there is litigation in different courts of concurrent jurisdiction about the same property at the same time, the decisions have gone so far as to establish this principle: that the court which first acquired jurisdiction of the case is entitled to ultimately determine the right of the parties; but, if property has been taken into custody, the court which first acquired jurisdiction of the res, by taking manual possession and custody of the property, must be left undisturbed in that custody until the proceedings have terminated in that court. Whatever the right of the matter may be, the process of one court will not run to take property out of the custody of another court. The courts, federal and state, have so far observed that rule, and I can look for nothing but evil consequences when one court breaks away and attempts to disregard it. Now, in this case, the orderly procedure in the matter is to go to the superior court, and get leave to sue this receiver in any court having jurisdiction of the matter, and bring the case here regularly, by leave of that court. The plaintiff has a right, under the laws of the United States, by reason of being a citizen of another state, to have his rights heard and determined by a federal court, if he elects to do so. If the superior court should obstinately refuse that right, and refuse to grant the leave to sue, there is a power above that court that you can appeal to. There may be something to prevent, of which I do not know, but, as the facts now appear, it would be the plain duty of the superior court to grant the leave; and, if that were refused, the supreme court would, by a writ of mandamus, order it to be done; and, if the supreme court of the state refused it, then you could go ultimately to the supreme court of the United States. I can hardly conceive that the courts of the state would refuse to the owner of property the right to invoke the federal jurisdiction given by the constitution of the United States. If the case, being properly here by leave, should eventuate in a decision in favor of the plaintiff, it might be reasonably expected that the superior court would, as its duty would be, respect the decision of the court which had jurisdiction to adjudicate the rights of the parties. Cases have been brought here and adjudicated, and rights determined, where the parties had to depend on the superior court to execute judgments obtained here. Such proceedings as I have suggested will give to the parties their constitu-

tional and legal rights, and at the same time avoid danger, that is plainly threatened, of a collision of forces between the two courts. I do not hesitate to entertain jurisdiction with the idea that the court is incompetent to execute any decree which it has jurisdiction to make, but because it has not the lawful right to use its power where it has to invade the actual custody and possession of property by the superior court of this county; and that, in view of the facts set before me in this plea, I consider is what may become necessary by further proceeding in this case. An order will be entered sustaining the plea.

WESTINGHOUSE AIR-BRAKE CO. v. GREAT NORTHERN RY. CO. et al.

(Circuit Court, S. D. New York. December 27, 1897.)

CIRCUIT COURTS—JURISDICTION IN PATENT CASES.

In patent suits it is not necessary that the defendant shall be an inhabitant of the district in which he is sued, if service is there properly obtained upon him. *Southern Pac. Co. v. Earl*, 82 Fed. 690, followed.

This was a suit in equity by the Westinghouse Air-Brake Company against the Great Northern Railway Company and others for alleged infringement of a patent. The cause was heard upon the bill and pleas thereto raising a question of jurisdiction.

Frederic H. Betts, L. F. H. Betts, James J. Cosgrove, and Kerr, Curtis & Page, for complainant.

Frederick P. Fish and W. D. Grover, for defendants.

COXE, District Judge. This is an equity suit for the infringement of a patent. The pleas dispute the jurisdiction of the court on the ground that neither of the defendants served with process within this district was at the time of such service a citizen of this state or an inhabitant of this district. The question thus presented, which has been variously decided by the circuit courts, must now be determined in favor of the complainant, so far at least, as this court is concerned, upon the authority of *Southern Pac. Co. v. Earl*, 82 Fed. 690, 694, affirming *Earl v. Southern Pac. Co.*, 75 Fed. 609. The pleas are overruled, the defendants to answer within 20 days.

BOYD v. STUTTGART & A. R. R. R. et al.

(Circuit Court of Appeals, Eighth Circuit. December 8, 1897.)

No. 851.

APPEAL—SERVICE OF CITATION—DISMISSAL.

An appeal presenting a question whether a judgment creditor of a railroad company or the trustee of its mortgage bondholders is entitled to priority of lien must be dismissed on motion of the trustee, when no citation has been addressed to or served upon it.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

This was a suit in equity by J. A. Boyd against the Stuttgart & Arkansas River Railroad and another, seeking to recover a decree

for money advanced and services rendered, and to have the same declared a lien upon the railroad property. The defendant filed an answer, but shortly afterwards a receiver of its property was appointed, on the application of the mortgage bondholders, with an independent suit, and the receiver was permitted to defend the action. The suit resulted in a decree adjudging that complainant recover the sum of \$12,627.48, with interest and cost, but that the said sum did not constitute a lien on the railroad property and franchises. From this decree, the present appeal was taken.

P. C. Dooley and Ewan, Manning & Lee, for appellants.
John McClure, for appellees.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

PER CURIAM. The question upon the merits in this case is whether J. A. Boyd, a judgment creditor of the Stuttgart & Arkansas River Railroad Company, or the Farmers' Loan & Trust Company, the trustee for certain bondholders secured by a mortgage made by that company, is entitled to the superior lien upon its franchises and property. No citation was addressed to or served upon the trust company, and upon that ground it has appeared, and made a motion to dismiss the appeal. The motion is granted upon the authority of *Trust Co. v. McClure*, 49 U. S. App. 43, 24 C. C. A. 64, and 78 Fed. 209; *Dodson v. Fletcher*, 49 U. S. App. 61, 24 C. C. A. 69, and 78 Fed. 214; and *Trust Co. v. Clark*, 83 Fed. 230.

NATIONAL BANK OF COMMERCE OF TACOMA, WASH., v. WADE et al.

(Circuit Court, D. Washington, W. D. December 4, 1897.)

1. JURISDICTION OF FEDERAL COURTS—SUIT BY NATIONAL BANK AGAINST OFFICERS—FEDERAL QUESTION.

A suit by a national bank against its former managing officers to charge them with losses sustained by reason of their having made loans to one individual in excess of 10 per cent. of the capital stock, and other loans without personal security, in violation of the national banking statutes, the right of recovery being claimed under Rev. St. § 5239, is one arising under the laws of the United States.

2. NATIONAL BANKS—SUIT AGAINST DIRECTORS.

A national bank may maintain a suit against its directors to enforce their liability under Rev. St. § 5239, for losses resulting from a violation of the statutory requirements in conducting the business of the bank. A suit by the comptroller for dissolution of the association and an adjudication of such violations is not a condition precedent to the enforcement of such liability.

3. SAME—JURISDICTION OF EQUITY.

A suit by a national bank against its former officers and directors, under Rev. St. § 5239, to recover for losses resulting from their mismanagement in violation of the provisions of the national banking law, is cognizable in equity, where the transactions involved are complicated, and the conversion of securities into money is required before the extent of the liability can be ascertained, and when, therefore, the remedy at law is not complete or adequate.

4. SAME—LIMITATIONS.

The fact that a suit by the comptroller for the forfeiture of the charter of a national bank for violations of the banking statutes is barred by limitation does not operate to bar a suit by the bank against its officers and directors, under Rev. St. § 5239, to charge them with losses resulting from such violations.

5. SAME—ACCRUING OF CAUSE OF ACTION.

The statute does not commence to run against a suit by a national bank against its managing officers to enforce their liability under Rev. St. § 5239, for losses resulting from acts in violation of the national banking law, until such officers have surrendered control of the bank to their successors.

This is a suit in equity by the National Bank of Commerce of Tacoma, Wash., against F. M. Wade, A. F. McClaine, and J. C. Weatherred. Defendants demur to the bill.

W. H. Bogle and Charles Richardson, for complainant.

W. C. Sharpstein, Crowley & Grosscup, and Sullivan & Christian, for defendants.

HANFORD, District Judge. The complainant, a national banking association organized under the laws of the United States, having its place of business at Tacoma, in this state, brings this suit against the defendants, who are citizens of this state, and in its bill of complaint charges that, while the defendants were members of its board of directors, and holding, respectively, the offices of president, vice president, and cashier, and, as such directors and officers, intrusted with the control and management of its business, by their malfeasance in office, and violations of the statutes of the United States, in knowingly loaning the money of the bank in some instances without security, to an irresponsible and insolvent borrower, to be used in speculation, and in other instances making loans in excess of the amount permitted by the statutes to be loaned to a single individual, and by renewing said loans without collecting the accrued interest thereon, the complainant has suffered heavy losses. The bill also avers that, after said loans had been thus improvidently made, certain real estate was conveyed to the bank as security for some of the loans, but said property was burdened with prior incumbrances, and is of trifling value, as compared with the amount of indebtedness to the bank intended to be secured thereby; and that collateral notes, which were obtained as additional security, are worthless, the makers being insolvent. The defendants have demurred to the bill on the following grounds: First. There is no question of federal law involved, and, as the parties are all citizens of this state, there is no ground for the exercise of jurisdiction by this court. Second. The facts stated do not show any ground for equitable relief. Third. The suit is barred by the statute of limitations of the state of Washington.

1. In their argument upon the first and second grounds of the demurrer the defendants' counsel assumed that the case must be treated as an action by a principal against agents to recover damages caused by negligence on the part of the agents in the transaction of business for their principal, and that the common law alone furnishes the measure of their liability. The true test of jurisdiction in this class of cases is fairly given in that part of the opinion of the supreme

court in the case of *Cooke v. Avery*, 147 U. S. 375, 13 Sup. Ct. 340, which is quoted in the defendants' brief, as follows:

"Whether a suit is one that arises under the constitution or laws of the United States is determined by the questions involved. If, from them, it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the constitution or laws of the United States. *Osborn v. Bank*, 9 Wheat. 738; *Starin v. City of New York*, 115 U. S. 248-257, 6 Sup. Ct. 28. In *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, it was ruled that it was necessary that the construction either of the constitution or some law or treaty should be directly involved, in order to give jurisdiction."

By this rule it is plain that the jurisdiction would have to be denied in this case, if the argument in support of the demurrer were based upon a correct understanding of the elements which the complainant has introduced into its case by the bill. But from the pleading I cannot infer that the complainant intends to rest its case upon evidence proving merely that the defendants were inattentive or negligent in loaning the funds of the bank upon securities which proved to be inadequate, and which, by the exercise of diligence, they might have ascertained to be insufficient, before making the loans; nor that it hopes to recover upon such evidence. The bill charges directly that loans were made to an individual and to a corporation, each amounting to aggregate sums largely in excess of 10 per cent. of its entire capital, in violation of the express prohibition contained in section 5200, Rev. St., and that heavy loans were made to another individual, without any security other than the note of the borrower; and counsel for the complainant insists that the provisions of section 5136, Rev. St., conferring power upon national banking associations to carry on the business of banking by loaning money on personal security, by implication restrict the power of such banking association, so that it was a violation of said section for the defendants to loan the funds of the bank without additional personal security; and the complainant contends that section 5239, Rev. St., is a law of the United States, creating a liability on the part of the defendants for all damages which the complainant has sustained in consequence of their having knowingly violated the national banking act in the particulars above specified. If, upon the trial of this case, the facts alleged in the bill should be proved, then the right of the complainant to recover will depend upon the proper construction and application of these statutes; if the facts shall not be proven as alleged, the plaintiff must fail, even though it should be made to appear that it has sustained damages by reason of negligence on the part of the defendants. For the purpose of this demurrer, the bill must be taken as true. Therefore, tested by the above rule, it is quite plain that the case is one arising under the laws of the United States, for the questions to be decided involve the construction of laws of the United States. Convincing evidence that there is a federal question in the case is to be found in the defendants' brief, a considerable portion of which is devoted to a discussion of the important question as to whether or not an action can be maintained against directors to enforce liability under section 5239, Rev. St., before the violations of

the statute have been determined and adjudged by a proper court, in a suit brought for that purpose by the comptroller of the currency, and a dissolution of the association, as provided by said section. Counsel for the defendants affirm that no action against directors to recover damages which the association shall have sustained in consequence of violations of the statute can be commenced until after the association has ceased to exist. More concisely stated, the proposition is that the same law which creates a liability denies to the injured party all right to enforce it. The following authorities are relied upon: *Welles v. Graves*, 41 Fed. 459-468; *Bank v. Peters*, 44 Fed. 13-16; *Hayden v. Thompson*, 67 Fed. 273-277; *Gerner v. Thompson*, 74 Fed. 125-131; *Kennedy v. Gibson*, 8 Wall. 498. The first two of these cases may be fairly regarded as decisions sustaining the defendants' side of the argument. The case of *Gerner v. Thompson* was originally brought in a state court, and was removed by the defendants into the United States circuit court for the district of Nebraska, and was remanded for want of jurisdiction. The court held that, if the action were to enforce only a common-law liability, there would be no federal question upon which the jurisdiction could be founded; and, if the action be considered as one to enforce a liability under a statute of the United States, it could not be maintained by the plaintiff, for the reason that the circuit court of appeals for that circuit had previously ruled in the case of *Bailey v. Mosher*, 11 C. C. A. 304, 63 Fed. 488, that, after the appointment of a receiver of an insolvent national bank, an action of this character, based upon the provisions of the national banking act, could be brought only in the name of the receiver. All of the opinion touching the question as to the necessity for an adjudication dissolving a national banking association, before the liability of its directors, for violations of the national banking act, could be enforced under the provisions of section 5239, Rev. St., was a mere voluntary expression, not necessary to the disposition of the case. In the case of *Kennedy v. Gibson* a receiver of an insolvent national bank brought a suit against stockholders as a means of assessing them to make up a deficiency in the assets. In his bill, the complainant averred that it was necessary to collect the amount sued for to meet the balance of the bank's indebtedness. The court held that under the law it is for the comptroller of the currency to decide when it is necessary to institute proceedings against the stockholders of an insolvent national bank to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected; and, as these matters are referred to the judgment and discretion of the comptroller of the currency, action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver, and the bill was held to be defective and insufficient for failure to aver that the comptroller had directed the receiver to commence the suit, or that he had made any order assessing the stockholders. Good and sufficient reasons are given in the opinion for requiring action by the comptroller in the exercise of his discretionary powers to precede the commencement of suits by a receiver, and to my mind the argument in the opinion

of the supreme court in that case takes from the decision any possible bearing, by analogy or otherwise, upon the question now under consideration. The decision and judgment of the circuit court, by Judges Dundy and Riner, in *Hayden v. Thompson*, was reversed by the circuit court of appeals for the Eighth circuit, in a decision reported in 17 C. C. A. 592, 71 Fed. 60-70, and by the opinion of the appellate court it is shown that the court was not authorized to consider or pass upon this question. So that case may also be eliminated from consideration. I will not extend this opinion by commenting on the decisions in *Welles v. Graves* and *Bank v. Peters*, further than to say that the reasons assigned do not impress me as being sound. I am not able to adopt the conclusions arrived at by the learned judges in those cases, for the reason that the words of the statute do not in any wise suggest the idea that congress intended to deny to an association which has the strength, ambition, and honesty to continue its existence after having sustained losses in consequence of willful violations of law on the part of its directors, the right to recover the amount of such losses from the wrongdoers. If the comptroller finds reasons in any case to forbear prosecuting for a forfeiture of the franchise, his exercise of discretion should not be a shield to the real culprits, nor have the effect to make the damage to innocent shareholders irreparable. 3 *Thomp. Corp.* §§ 4113, 4303. The opposite ruling of the circuit court for the Eastern district of Missouri, in *Stephens v. Overstolz*, 43 Fed. 771-775, in my opinion comes nearer to being a correct interpretation of the law. The opinion in that case was delivered by Judge Thayer, and was concurred in by Mr. Justice Miller. It shows plainly that a decision of this question was necessary to a determination of the case, and that part of the opinion which bears upon this question was in fact a solemn adjudication, and not mere obiter dictum, as counsel for the defendants have supposed.

2. This suit relates to the execution of a trust, and is for the recovery of money alleged to have been fraudulently dissipated by unfaithful agents, who are the defendants called to account. Cases of this nature are cognizable in equity, whenever a suit in equity affords the only complete and adequate remedy. I have made reference to section 5239 as a law creating a liability. It is a positive declaration of the lawmaking power defining the extent of liability of directors of national banking associations for willful breaches of trust. And yet the liability is not a new creation of the statute. If the statute does more than to re-enact the common law, and principles previously familiar to equity practice, all that is new consists of an extension of the liability in favor of shareholders and other persons who may be damaged by acts of the directors in violation of the statutes, so as to authorize suits and actions by persons who otherwise would be compelled to look to the association alone to make good their losses. It has been decided in a number of cases that, where the affairs of an insolvent national bank have been placed in the hands of a receiver, who alone has the right to collect its assets, actions to enforce the liability of directors cannot be prosecuted by shareholders or creditors, so that practically the rule of the statute as to the liability of directors and the remedy is the same as the rule in equity. Possibly

there may be cases in which a suit based upon the statute may be maintained by a plaintiff who would otherwise be debarred, but I am unable to discover any enlargement of the rights of a banking association. In equity, the relation of the directors to the association are similar, if not identical, to that of trustee and cestui que trust (3 Pom. Eq. Jur. §§ 1089, 1090); and in equity "the trustee's personal liability to make compensation for the losses occasioned by a breach of trust is a simple contract equitable debt. It may be enforced by a suit in equity against the trustee himself, or against his estate after his death." 2 Pom. Eq. Jur. § 1080. I hold that, even if the statute does create a liability enforceable by an action at law, nevertheless it does not diminish the jurisdiction of the courts in equity, unless the conditions are such that the remedy at law is equally adequate and complete. In this case the transactions involved are complicated by the subsequent exchanging of promissory notes and taking of property as security for the loans which are alleged to have caused the losses complained of. These securities must be converted into money, or otherwise disposed of, before the amount of the loss can be definitely ascertained. It is obvious, therefore, that the complainant is entitled to relief in equity, because the remedy at law is not adequate or complete.

3. In their argument the defendants' counsel show that at the time of the institution of this suit the comptroller of the currency could not have brought suit against the complainant to forfeit its charter on account of the alleged violations by the defendants, because such action at that time was barred by section 1047, Rev. St., which provides that "no suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from, the time when the penalty or forfeiture accrued," and on this foundation build an argument to the effect that, because the comptroller of the currency could not then have maintained an action to forfeit the charter, the complainant cannot maintain this action. This might be a logical conclusion if it were true that an adjudication forfeiting the charter in a suit instituted by the comptroller of the currency were a necessary prerequisite to an action against the directors to recover the amount of losses sustained in consequence of violations of the banking act, committed by them; but, that proposition failing, the argument based upon section 1047, Rev. St., must likewise fail. The statute of limitations of this state provides that the right to commence an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument, is barred after three years from the time the cause of action accrued. But it must be remembered that at the time of making the loans which caused the losses complained of the defendants were the managing officers of the bank. I hold that in cases of this nature the statute of limitations will not begin to run so long as the cestui que trust is under the control or influence of the trustee (2 Perry, Trusts [3d Ed.] § 864, p. 512; 2 Pom. Eq. Jur. § 1089), and, as this suit

was commenced within three years from the time when the defendants gave up control of the bank to their successors, it is not barred by the statute of limitations. Demurrer overruled.

JOHNSON CO. et al. v. THOMSON-HOUSTON ELECTRIC CO.

(Circuit Court of Appeals, Third Circuit. September 21, 1897.)

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

This was a suit in equity by the Thomson-Houston Electric Company against the Johnson Company and others for alleged infringement of a patent. The circuit court made an order granting a preliminary injunction (78 Fed. 361), from which order the defendants appealed. On September 17, 1897, the following stipulation, signed by counsel for the respective parties, was filed:

"In view of the decision of the circuit court of appeals for the Second circuit in the suit of the complainant and appellee herein against the Hoosick Railway Company, filed July 21, 1897, it is hereby consented that the order for a preliminary injunction granted herein in the circuit court upon the 6th, 7th, 8th, 12th, and 16th claims of Van Depoele patent, No. 495,443, be reversed, with costs, without prejudice to the rights of either party at final hearing upon the said claims or other claims of said letters patent."

G. J. Harding, for appellants.

Frederic H. Betts, for appellee.

Before DALLAS, Circuit Judge, and BUTLER and BRADFORD, District Judges.

PER CURIAM. And now, this 21st day of September, A. D. 1897, in view of the stipulation between counsel attached hereto consenting to the same, it is ordered that the decretal order of the circuit court of the United States for the Western district of Pennsylvania, made January 28, 1897, enjoining the Johnson Company, of Pennsylvania, the Steel Motor Company, and R. T. Lane from infringing the 6th, 7th, 8th, 12th, and 16th claims of patent No. 495,443, issued to C. A. Coffin and Albert Wahl, administrators of Charles J. Van Depoele, deceased, assignors to the Thomson-Houston Electric Company, be reversed, with costs, without prejudice to the rights of either party at final hearing upon the said claims or other claims of said letters patent.

CARTER v. SWEET et al.

(Circuit Court, S. D. California. November 1, 1897.)

No. 730.

1. WITNESS FEES.

Under Rev. St. § 848, witnesses are not entitled to any per diems for time occupied in going to and returning from court. Their only compensation is the prescribed mileage.

2. DOCKET FEE.

Under Rev. St. § 824, a docket fee of \$20 is chargeable where any issue of law or fact has been presented to the court for consideration, and where the expression of the court's opinion thereon, after hearing, results in a final disposition of the cause, even though such disposition be a dismissal on motion of the complainant.

This was a suit in equity by Benjamin F. Carter against H. P. Sweet, the Big Rock Creek Irrigating District, and others. The cause was heard on a motion to retax the costs.

Frank A. Cattern and Wm. J. Hunsaker, for complainant.

Hatch, Miller & Brown and Mulford & Pollard, for defendants.

WELLBORN, District Judge. This is a motion to retax costs. The items objected to are: First, the charges of two witnesses, each for three days, at \$1.50 per day, in going to and returning from court; second, a docket fee of \$20 for defendants' counsel, on dismissal of suit.

The material facts concerning the docket fee are these: A provisional injunction was applied for by the complainant. A hearing was had upon this application, witnesses were examined, and briefs of counsel submitted. No formal order was made at this hearing, other than one allowing complainant leave to amend and to submit additional authorities; but the court did express, upon some of the issues involved, views unfavorable to complainant, and thereupon complainant asked for and obtained said order. Neither an amendment, however, nor further brief, was filed, but the suit was afterwards dismissed on complainant's motion.

1. Witness' fees, as prescribed by law, are these: One dollar and fifty cents for each day's attendance in court, and five cents a mile in going from his residence to the court, and five cents a mile for returning. Rev. St. § 848. There is no provision of law, so far as I am advised, for any other compensation. The objections above mentioned to the charges of the witnesses are sustained.

2. The law applicable to docket fees is as follows:

"On a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars." Rev. St. § 824.

The cases are not harmonious, as to what constitutes "a final hearing," within the meaning of the section just quoted. There is one construction, however, which is determinative here, and upon which the cases seem to be agreed, or, at least, with which none are at variance, and that construction is declared, in the leading case, as follows:

"We are of opinion that, upon the face of the statute, the intention of the legislature is manifest that it is only where some question of law or fact, involved in or leading to the final disposition actually made of the case, has been submitted, or at least presented, to the consideration of the court, that there can be said to have been a final hearing which warrants the taxation of a solicitor's or proctor's fee of \$20; as, for instance, where the court, on motion and argument, dismisses for irregularity an appeal from the district court, as in the case before Mr. Justice Nelson of *Hayford v. Griffith*, 3 Blatchf. 79, Fed. Cas. No. 6,264, or where the plaintiff discontinues, after the court has sub-

stantially decided the merits of the case, either by an opinion expressed at the hearing upon the merits, as in the case of *The Bay City*, before Judge Brown, 3 Fed. 47, or by a previous interlocutory decree, as in *Goodyear Dental Vulcanite Co. v. Osgood* [10 Fed. Cas. p. 739], decided by Judge Shepley in February, 1877." *Coy v. Perkins*, 13 Fed. 112.

The rule here enunciated has been referred to approvingly in many subsequent cases, among others *McLean v. Clark*, 23 Fed. 861; *Andrews v. Cole*, 20 Fed. 410; and *Louisville & N. R. Co. v. Merchants' Compress & Storage Co.*, 50 Fed. 449.

It is manifestly within the spirit, if not exact letter, of this rule to hold, as I do, that where there has been presented to the court for consideration any issue of law or fact, and the expression of the court's opinion thereon, after hearing, results in a final disposition of the cause, although such disposition be a dismissal on motion of the complainant, the docket fee is taxable. Objection to docket fee disallowed.

PULLMAN'S PALACE-CAR CO. v. AMERICAN LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. December 6, 1897.)

No. 912.

RAILROAD RECEIVERSHIPS—PREFERRED CLAIMS—PULLMAN PALACE-CAR RENTALS.

Mileage due under a contract for the use of Pullman palace cars is not distinguishable from car rentals, and cannot be made a preferred claim on the appointment of a receiver for the railroad company. *Thomas v. Car Co.*, 13 Sup. Ct. 824, 149 U. S. 95, applied.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was an intervening petition filed by Pullman's Palace-Car Company in the foreclosure proceedings against the Union Pacific, Denver & Gulf Railway Company, praying that Frank Trumbull, receiver of the said railway company, be ordered to pay a claim for \$21,505.90, with interest, held by the petitioner against the railway company. The receiver demurred to the petition, and the demurrer was sustained, and the petition dismissed.

The petitioner's claim was for car mileage arising under a contract which, as set forth in the petition, provided, among other things, that the petitioner should have the exclusive right, for a term of 15 years from the date of the contract, to furnish sleeping and parlor cars for the use of the said railroad companies, and all their passenger trains, over their entire lines of road, and over all railroads controlled by them. That the petitioner should remain the owner of said cars, and should retain the right to collect fares for the use of seats and berths therein; should furnish one or more employes for each car; should renew and improve certain portions thereof, as provided in said contract, and as might be necessary to keep the said cars up to the average standard of the best cars of that character in use on railroads of the United States; and should do certain other things with reference to the maintenance and management of the said cars. That, in consideration thereof, the said railroad companies agreed, among other things, that they would furnish to and for said cars certain material and supplies as provided in said contract; that they would pay to the petitioner the cost of repairing and making good all damages to said cars arising from accidents or casualties on the lines of said railroad companies; would promptly make all repairs that might be necessary to put said cars in good order; would furnish, free of charge, at convenient points, necessary space and facilities for storing bedding and other supplies; and

would pay to the petitioner, as the cost of maintaining the running gear and bodies of said cars, the sum of three cents per mile for every mile run by said cars upon the lines of the said roads, or upon the roads of other companies by direction of the officers of said railroad companies. The petition further alleged that the said cars yielded to the Union Pacific, Denver & Gulf Railway Company from September 30, 1890, to July 30, 1893, a large amount of revenue, no part of which has been paid to the petitioner, as in equity and in accordance with the terms of said contract should be done, but that the same was wrongfully diverted and paid as interest to the holders of the mortgage bonds of said company, and used to improve and benefit the corpus of the property of said company; that said cars are, and at all times have been, necessary for the proper operation of passenger trains over the road of the Union Pacific, Denver & Gulf Railway Company, and over the roads controlled by the said receiver, and that said trains could not, at any time, have been, and could not now be, successfully or profitably operated, nor could the demands of the traveling public thereon be met, without the use of said cars; that at all times during said period, from September 30, 1890, to June 30, 1893, there were divers lines of railroads competing with the said the Union Pacific, Denver & Gulf Railway Company, and that each and all of said competing lines were fully equipped and provided with sleeping and parlor cars, and that if the roads of the said Union Pacific, Denver & Gulf Railway Company had not been provided with said cars it would have suffered great loss and damage in its passenger travel by reason of the diversion of such travel to such competing lines, and that thereby the gross and net earnings of said road would have been greatly diminished, and the bondholders of said company would have suffered great loss; that the said sleeping and parlor cars are protected by patents of the United States owned by the petitioner, and that it has exclusive control of said cars, and that during the said period from September 30, 1890, to June 30, 1893, no other sleeping or parlor cars than those owned by the petitioner were in use or operated within the territory traversed by the Union Pacific, Denver & Gulf Railway Company by any of the lines connecting or competing with the road of said company; and that if the petitioner had elected to exercise its right to terminate said contract, as it well might have done under the terms thereof, because of the failure of the Union Pacific, Denver & Gulf Railway Company to pay the amount due on account of the use of said cars, it would have been impracticable for said company to have procured other suitable sleeping and parlor cars for use upon said road, or to have made any contract with any individual or corporation, owning or operating sleeping or parlor cars, for the use of such cars upon said road; and that if the petitioner had elected during said period from September 30, 1890, to June 30, 1893, to terminate said contract, such action would not only have caused great inconvenience and discomfort to the traveling public, but would also have seriously diminished the earning capacity of the road and of the trust estate, and would thereby have caused great loss and damage to all persons interested therein, and particularly to the mortgage bondholders of the Union Pacific, Denver & Gulf Railway Company.

Brief for Appellant.

Expenses necessarily incurred in the operation of the road and conserving the property, and in providing the road with necessary services, supplies, and equipment during a reasonable time prior to the appointment of the receiver, are preferred claims. *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 182; *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, 10 C. C. A. 323, 62 Fed. 205; *Newgass v. Railway Co.*, 72 Fed. 712; *Railroad Co. v. Lamont*, 16 C. C. A. 364, 69 Fed. 23; *Trust Co. v. Morrison*, 125 U. S. 591, 8 Sup. Ct. 1004; *Blair v. Railroad Co.*, 22 Fed. 471; *Miltenberger v. Railroad Co.*, 106 U. S. 286, 1 Sup. Ct. 140; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434-457, 6 Sup. Ct. 809; *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, 41 Fed. 551-554; *Trust Co. v. Souther*, 107 U. S. 591, 2 Sup. Ct. 295; *Kneeland v. Machine Works*, 140 U. S. 592, 11 Sup. Ct. 857; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675; *Railroad Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787; *Fosdick v. Schall*, 99 U. S. 235.

Indebtedness for car rentals may or may not be entitled to a preference,

according to the special circumstances of the particular case. It is no exception, however, to the general rule (a) that expenses necessarily incurred in the proper operation of the road, or in enabling it to perform its obligations to the public, are entitled to be paid prior to the mortgage lien; (b) that where current receipts have been diverted from the payment of current expenses, and any one class of creditors has been given that which in equity should have been given to another, a court of equity will, as far as practicable, restore the parties to their original equitable rights; (c) and that, when it is to the interest of the trust estate that the contract entered into by the railroad company be carried out, the court will direct the receiver to perform it; and (d) that, where such an indebtedness has been incurred, it is to be regarded as a preferred claim, whether incurred from the use of cars or otherwise.

There is no decision, or dictum even, making car rentals an exception to this general rule. To sustain the proposition that "car rentals due from a railroad company, like those due petitioner, are not looked upon as a claim having preferential rights, and are not entitled to priority out of the earnings during the receivership, or out of the corpus of the estate," counsel for the receiver cite *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824; *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950; *Transportation Co. v. Anderson*, 22 C. C. A. 109, 76 Fed. 164; *Bound v. Railway Co.*, 7 C. C. A. 322, 58 Fed. 478.

The petitioner's claim possesses all the equitable features which are held as requisite to entitle it to be preferred over the mortgage debt. The petition alleges that the use of the cars was indispensable to the successful and profitable operation of the road, and that without them the road could not properly have performed its duties to the public; that a large amount of revenue was earned by these cars, and that without them this income would have been diverted to other and competing lines; that the income thus earned has been inequitably, and in violation of the terms of the contract, diverted to the payment of interest to the bondholders and to the improvement and benefit of the corpus of the property; that the petitioner had the exclusive control of parlor and sleeping cars in the territory traversed by the road, and that it would have been impracticable for the road to obtain other suitable cars elsewhere; and that it is to the advantage of the trust that this contract be carried out, for if the petitioner should now elect to terminate the contract for nonpayment of arrears, "as it might well do under the provisions of the contract," the road and the mortgagees would suffer great loss and the public great inconvenience.

Upon the point urged by counsel, that the benefit to the security derived from the use of the petitioner's cars is too remote and indirect to be a basis for preference, it is sufficient to say that a direct and proximate benefit is alleged in the petition, namely, the amount of railroad fares paid by the Pullman passengers who would otherwise have traveled upon competing lines; and it must be presumed, upon demurrer, that this averment can be established by evidence. The petition avers that the receiver is still using the cars upon the terms agreed upon in the contract. The presumption would therefore be that the value of the use of these cars to the trust estate is three cents per mile, the amount agreed upon in the original contract, and now being paid by the receiver. The benefit derived from the use of the Pullman cars is certainly not as problematical as the benefit that the security derives from the services of unskilled laborers, and yet indebtedness due laborers is everywhere conceded to be entitled to preference. The petitioner should, at any rate, be allowed to show in evidence, if it can, the benefit to the security derived from the use of its cars.

While the allowance of the claim is, in a measure, a matter within the discretion of the court, and to be determined by the equities of the case, yet where, from the current receipts, interest has been paid to the bondholders and permanent improvements have been made,—or, in other words, where there has been a diversion of the income,—then the debts incurred, within a reasonable time, in the operation of the road, are entitled to priority out of the earnings of the receivership, and, when necessary, even out of the corpus of the estate. *Fosdick v. Schall*, supra; *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, supra; *High*, Rec. § 394c; and cases supra.

It is not, however, indispensable that there should be a diversion of the income; that is simply an item for equitable consideration, and makes the equity stronger. *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, supra; *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, supra; *Union Trust Co. v. Illinois M. Ry. Co.*, supra.

It is not necessary that the provision for the payment of debts of the road be made at the time of the appointment of receiver, nor that the consent of bondholders be obtained. An order directing that a claim be preferred may be made at any time. *Union Trust Co. v. Illinois M. Ry. Co.*, supra; *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, supra.

There is no rule barring preferential debts contracted more than six months, or at any specific time, before the appointment of the receiver. *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, supra; *Hale v. Frost*, 99 U. S. 389; *Burnham v. Bowen*, supra; *Atkins v. Railroad Co.*, 3 Hughes, 307, Fed. Cas. No. 604; *Railroad Co. v. Lamont*, supra; *Trust Co. v. Morrison*, supra.

Appellant's Supplemental Brief.

Appellant's claim is, strictly speaking, not one for car rental. It is more properly a claim for services rendered by the appellant in maintaining and preserving the coach feature of these cars, i. e. such parts of the cars as are common or incidental to ordinary first-class passenger cars, and not essential and peculiar to sleeping or parlor cars. The contract provides that the appellant, remaining the owner of the cars and providing sufficient employés to insure the comfort of the passengers, "shall keep all such sleeping and parlor cars in good order and repair, and shall renew and improve the same, so far as may be necessary to keep them up to the average standard of the best sleeping and parlor cars generally in use on the lines of the trunk-line railroad companies in the United States." Contract, art. 1, § 4.

There are practically two features of a sleeping car which are contemplated by the contract, and which must be preserved in order to insure its safety and comfort, and these are: (1) The coach feature, so called, or those parts of the car which are common and incidental to all first-class passenger cars, such as the running gear and body of the car; and (2) the sleeping-car feature, or those parts of the car which are peculiar to, and characteristic of, sleeping cars, such as the beds, linen, etc. The second or sleeping-car feature is maintained absolutely by the Pullman Company, without any compensation therefor being paid by the railroad company; i. e. the Pullman Company must supply its own mattresses, bedding, linen, and all other features of the car which essentially distinguish it from an ordinary first-class passenger car. But the cost of maintaining the coach feature of the car is borne by the railroad company; that is to say, the railroad company, under the contract, has agreed to defray the cost and expense of maintaining the running gear and bodies of the cars, "and such other parts thereof as are incidental to ordinary first-class passenger cars, and are not essential to the sleeping or parlor car." It was agreed by the parties to the contract that this particular work could be done more effectively and economically by the Pullman Company; and therefore the contract provides (article 1, § 4) that the latter company should keep all these cars in good order and repair, as above stated. It was necessary that the cars should be kept in good repair, and it was also necessary that the railroad company should employ some one to do that work. It cannot affect the legal aspect of this question whether the railroad company paid for such services by the day, or for the specific amount of work performed, or by the number of miles run by such cars, or in any other particular manner. The parties to this contract agreed that the railroad company should discharge this obligation on the basis of the number of miles run, and engaged the Pullman Company to make these repairs. Nor is the legal and equitable aspect of this agreement affected by the fact that the cars are owned by the Pullman Company, and not by the railroad company. Whoever owned the cars, whether the railroad company or the Pullman company, their use was indispensable to the proper operation of the road, and the cost and expense of maintaining them and keeping them in repair were necessary operating expenses.

And, in order that this portion of the contract might be the more effectually performed, it provides (Contract, art. 2, § 1): "That the railroad company shall also, in consideration of the use of such sleeping and parlor cars for the transportation of its passengers, bear the cost of maintaining the running gear and bodies of such cars, and such other parts thereof as are incidental to ordinary first-class passenger cars, and not essential to a sleeping or parlor car, which cost is understood and agreed to amount to an average of three cents per mile; and shall pay to the Pullman Company, in fulfillment of such obligation, the said sum of three cents per car per mile for every mile run by such sleeping and parlor cars upon the roads of the railroad company, or upon the roads of other railroad companies by direction of the officers of the railroad company."

Necessarily, the cost of such maintenance and repairs was an uncertain and variable element; and in order to liquidate the same, and reduce to certainty and precision the amount to be allowed the Pullman Company for this work, it was agreed that the cost of such maintenance and repairs should be regarded as amounting to an average of three cents per mile.

This allowance of three cents per mile was not intended to be, and is not made, a source of profit to the Pullman Company. It was simply intended to reimburse the Pullman Company for the outlay and disbursements it was obliged to make in maintaining the coach feature of the cars, in order that they might be operated by the railroad company with safety and comfort to its passengers.

Although not appearing in the record, it is a fact that those railroads which use narrow-gauge cars pay no mileage whatever for the operation of their sleeping cars, for the simple reason that all the work of maintaining and repairing the coach feature of such cars is performed by the railroad companies operating them.

Under this contract the advantage derived, and consideration received, by the railroad company, are the inducements offered to the traveling public of safe and comfortable sleeping and parlor cars, and the consequent sale of a larger number of passenger tickets; and also, by the operation of Pullman cars under this contract, the railroad company is enabled to avoid the necessity of hauling additional passenger cars of its own, thereby saving to the railroad company expenses which would necessarily be incurred if it were obliged to haul such additional cars for the accommodation of its passengers: the consideration to the Pullman Company being the sale of its seats and berths, and the revenue derived therefrom. This mileage of three cents, being simply one of the incidental and unavoidable expenses of the railroad company connected with the operation of its passenger trains, is as necessary and unavoidable as the cost and expense of maintaining and repairing its engines, freight cars, or any other portion of its rolling stock, and is therefore distinctly an operating expense.

It is well established, by a long line of decisions, that claims for indebtedness incurred in repairing, maintaining, and keeping in order the roadway, rolling stock, and equipment of the road, necessary for the proper operation of the same, are regarded as operating expenses, and as such are entitled to priority over the payment of the mortgage indebtedness.

In our main brief we have cited the leading authorities upon this subject; and, in addition to them, we submit to the consideration of the court the following authorities: *Blair v. Railway Co.*, 22 Fed. 769; *Southern Ry. Co. v. Carnegie Steel Co.* (Nov., 1896) 22 C. C. A. 289, 76 Fed. 492. See, also, *Southern Ry. Co. v. American Brake Co.*, 22 C. C. A. 298, 76 Fed. 502; *Railway Co. v. Adams*, 22 C. C. A. 300, 76 Fed. 504; *Railway Co. v. Tillett* (Nov., 1896) 22 C. C. A. 303, 76 Fed. 507.

L. M. Cuthbert (Henry T. Rogers and D. B. Ellis, on brief), for appellant.

E. E. Whitted (H. W. Hobson, on brief), for appellees.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

PER CURIAM. Notwithstanding the ingenious and able argument of counsel for appellant, we are unable to perceive in this case other than an effort to establish as a preferential debt a claim for the stipulated compensation for the use of cars, or, as it is generally called, "car rental." Under the authority of *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, this cannot be done. The order is therefore affirmed.

STEVENSON V. MARBLE.

(Circuit Court, S. D. California. October 5, 1897.)

No. 694.

1. SALES—FRAUDULENT REPRESENTATIONS—RESCISSION.

Where a seller of stock and bonds of a corporation falsely and fraudulently represents that the mortgage securing the bonds is a first and only mortgage, he cannot defeat the buyer's suit to rescind the contract by showing that after the suit was brought he paid off, and procured the cancellation of, the prior incumbrances.

2. SAME.

Nor, in such a case, does it deprive the buyer of his right to rescind, that the contract bound the seller to pay off all liabilities of the corporation, except the mortgage debt in question, if it is shown that the buyer did rely upon the representation that there was no prior mortgage.

Gardiner, Harris & Rodman, for complainant.

Wells, Works & Lee and Works & Lee, for defendant.

WELLBORN, District Judge. This is a suit, brought April 29, 1896, and now on final hearing, to rescind a contract for fraud in its procurement. The real issues in the case, as I view them, are mainly questions of fact, and therefore my opinion will be devoted largely to a review of the evidence. The contract is as follows:

"Los Angeles, November 29th, 1895.

"This agreement, made this 29th day of November, 1895, between John M. C. Marble, hereafter called the 'seller,' and John B. Stephenson, Jr., hereafter called the 'buyer,' witnesseth: That the seller hereby sells the buyer 255 shares of the capital stock of the Van Wert Electric Light and Power Company, of Van Wert, Ohio, amounting to \$25,500, or 51% of the total issue thereof, and \$25,000 of bonds secured by the first and only mortgage, of \$50,000, covering said electric light company plant and franchises, for the price or sum of fifteen thousand dollars, payable as follows, viz.: One thousand dollars cash before July 5/96; four thousand dollars, with interest at 5%, to the order of John M. C. Marble; buyer's note, payable on or before July 5/96, for \$10,000, with interest at 5%, to the order of John M. C. Marble, and secured by certificate of the Missouri Coal & Construction Company for \$10,000, with buyer's right to collect interest due on said certificate January 2/96. Seller agrees to pay forthwith all taxes due on said plant, and all proportions of taxes hereafter paid by said company, so far as they relate to any charge upon said plant anterior to Dec. 1/95, and any and all liabilities of every kind owing by said company at the closing of the thirtieth day of November, 1895, excepting the mortgage debt of \$50,000 (capital stock not considered a liability, in this sense) above referred to. It is understood between seller and buyer that all cash in bank, and all bills for lighting falling due at the closing of the thirtieth day of November, A. D. 1895, shall become the personal property of the seller. It is understood between seller and buyer that the company shall

faithfully carry out its contract to reimburse consumers for moneys advanced on account of meters. Signed in duplicate. In witness whereof, we hereunto affix our hands and seals this 29th day of November, 1895.

"Witness signing: John M. Lutz.

"John M. C. Marble. [Seal.]

"John B. Stevenson, Jr. [Seal.]"

Complainant made the cash payment and executed the two notes provided for in said contract, and the stock and bonds were duly delivered to him. Prior to the making of the contract, defendant, through one John M. Lutz, as hereinafter stated, furnished complainant with the following papers:

"The National Bank of California, at

"Los Angeles, Cal., August 5th, 1895.

"The Electric Light & Power Company of Van Wert, Ohio, has a bonded indebtedness of \$50,000, 6% bonds, and a capital of \$50,000. The Van Wert Gaslight Company has a capital of \$37,500. These two companies have for years been on unfriendly terms, and have furnished light below its value, and yet earned considerable net money,—the former, more than the interest on its bonds; and the latter, by the latest data before us (1892), earning \$2,524.64, net. Since then its net earnings have moderately increased. Recently an option has been taken on the gas plant, looking to combining the two companies under one management. This, of course, removes unreasonable competition, and will enable an advance of rates to that customary in other localities, which will increase the income fully 25% to 33%, without adding to expense, making the increase entirely net income. In addition to this, a union of products will very materially reduce the expenses, which will be a further addition to profits. The electric company has a contract with the city for street lighting that is new, bringing in \$500 per month, and it will be increased. This is equal to \$6,000 per year,—sufficient to pay 6% on a mortgage of \$100,000 on the joint properties. In addition to street lighting, the city and county authorities take considerable light, that, if desired, could be set aside as a sinking fund to retire the bonds. The acquiring of the two properties, retiring all their bonds, debts, stock, making an entire and clean new company, would require \$84,000, which would represent the cost of the following security, free from all other claims or debt: We would propose that the combined company have a capital of \$100,000, and a bonded debt of \$100,000, and to assign and set aside irrevocably, to protect the interest, the \$6,000 revenue per annum from the city of Van Wert, which contract has eight years yet to run. Both works are in excellent condition, and doing excellent service, and the stock will be a good dividend payor from the start. It would be a pleasure to sell you the mortgages, or to have you join in the deal on joint account, in which case we will agree to carry the principal part of the deal until you can sell the bonds, if so desired, and would ask that you immediately visit Van Wert, and make personal investigation. It is a progressive city, of over 6,000 inhabitants; and the deal, as outlined, means that the new pool gets all the bonds and the stock of the new company for \$84,000.

"[Pencil indorsement:] Haven't you among your customers some promoter who would go out and look at this property, and, if he liked it, take the deal?"

"Marble.

"[On slip of paper pinned to original paper:] Issue at par 100,000 5% mtg. bonds, with sinking fund of 1% per annum, 33% stock, as bonus to subscribers to bonds."

"The National Bank of California, at

"Los Angeles, Cal., Sept. 7, 1895.

"Mr. H. M. Lutz, c/o Centennial Nat'l Bank, Philadelphia, Pa.—My Dear Mr. Lutz: I wrote you hurriedly yesterday, and sent you a copy of trust deed of Van Wert Electric Light & Power Company. You will notice that the contract of the city street lighting is specially pledged to protect interest. The income from that contract is more than double the interest charge, and the contract

has eight years yet to run. I would not care to sell the present issue of bonds until we know whether a combination of the lighting plants at Van Wert is to be made, unless with the understanding that I could redeem them in cash, should the buyers not care to substitute them for another issue of the combined properties. The electrician in charge of the works is a capable young man,—a graduate of the electrical and mechanics department of the University of Michigan. My son John, who was with me in the bank here, went forward in August to take charge of the business part of the company; and, though August is a dull month, he arranged for new business in that month that will exceed \$700 per annum, and will commence coming in in October. Conditions are favorable for September. The largest church in the town, the Methodist, has just voted to put the light in, with but one dissenting vote. I desire my son to return here as soon as possible, but he will remain in charge at Van Wert as long as necessary. For sale of the present issue of bonds at par, I would pay usual commissions, if sold subject to the conditions above referred to. The interest until January 1st next is arranged, so that it would want to be deducted. Any one who will go to Van Wert and inspect things would be likely to take them.

"Very truly,

John M. C. Marble."

These papers were first shown to the complainant, in Philadelphia, Pa., in September, 1895, by H. M. Lutz, who, at the instance of defendant, was seeking a purchaser for said properties. Defendant afterwards, and before the contract was signed, in personal interviews with complainant at Los Angeles, reiterated and confirmed the representations contained in said papers. For the purpose of investigating said properties, complainant made two visits to the city of Van Wert, Ohio,—one on the 7th of October, 1895, and the other on the 7th of November in the same year. After this second visit he proceeded to the city of Los Angeles, Cal., where the contract sought to be rescinded was finally made. Besides the \$50,000 mortgage referred to in the contract as the first and only mortgage, there was on record at Van Wert, Ohio, at the date of the contract, another, prior mortgage, covering the plant and franchises of the electric company, and securing bonds of said company to the amount of \$35,000. Of these last-mentioned bonds, \$20,000 were then held by the Van Wert National Bank as collateral for a note of \$10,000 executed to said bank by G. L. Marble, A. V. Rice, and the defendant, and \$7,500 were held by the Bass Foundry & Machine Works, of Ft. Wayne, Ind., or its assignee, the Citizens' Bank of Huntington, Ind., as collateral for a note of the electric company for \$4,421.59, on which note the defendant and G. L. Marble were securities. These bonds were not taken up by the defendant, nor was the mortgage canceled, until some time in July, 1896. There were also, at the date of the contract, floating debts against the company, aggregating, approximately, \$2,000, which the defendant paid off soon thereafter. Other material facts are in dispute. My findings as to such disputed facts are indicated in the subsequent parts of this opinion.

Complainant submits, as his ground or grounds for relief, that, to induce him to enter into said contract, defendant made certain representations, upon which he (complainant) relied, which were false and fraudulent, and that these representations were as follows: First, that the net earnings of the electric light and power company for years prior to the contract were more than the interest on its

bonds; second, that the stockholders of said electric light and power company were not personally liable for its debts; third, that the net income of the Van Wert Gaslight Company in 1892 was \$2,524.64, and that there had since been a moderate increase in its net earnings; fourth, that there were no outstanding bonds of said electric company, other than those secured by the \$50,000 mortgage, and that said mortgage was the first and only mortgage. These alleged misrepresentations will be considered in the order of their statement:

1. In their briefs, the parties have confused the representations which were made as to the earnings of the electric company with those that were made as to the earnings of the gas company. For instance, defendant, in his brief, at page 3, states the representation to have been "that, by the latest data before us (1892), the electric company is earning \$2,524.64, net, and since then its net earnings have moderately increased." To the same effect, see page 1 of complainant's brief, filed March 6, 1897. By reference to the written paper, called by some of the witnesses a "prospectus," which was exhibited to complainant, it will be seen that the representations as to net earnings in 1892 of \$2,524.64 refer to the gas company, and not the electric company. The representations which were made as to the electric company were that its net earnings were more than the interest on its bonds, and that these bonds aggregated \$50,000, and bore interest at 6 per cent. per annum. There were also oral representations to the effect that the income of said company would pay all operating expenses, and the interest on its bonds. These oral statements, however, are substantially the same as those contained in the prospectus above mentioned. There is no question but that the representations as to the earnings of the electric company, as I have stated them, were made. The issue between the parties on this branch of the case is as to their truth or falsity. Complainant, I think, has not only failed to establish the falsity of these representations, but the proofs show, or tend to show, that the earnings were as represented. The main argument of complainant in this connection is that, if the earnings of the company had been as large as represented, there would have been no occasion for defendant to have made to said company the advances of money which he did make. This argument is inconclusive; its infirmity lying in the fact that the advances made by the defendant, with two or three exceptions, were applied, not to operating expenses, but to extensions or betterments of the plant. Two reports of the company's business (one for the month of September, and the other for the month of October, 1895) are in evidence; and these reports show that the net earnings of the company for the former month were \$457.59, and for the latter \$426.64. These amounts are largely in excess of what the earnings were represented to be. It is true that in the month of March, 1896, the income was considerably below the represented monthly earnings. The small receipts for that month, however, are sufficiently accounted for by an injudicious raising of rates made by the then president of the company, John B. Stevenson, 3d, which is testified to by several witnesses,—chiefly, George Hayler, Jr. The testimony

of this witness, who for more than two years was superintendent or manager of the company, and thoroughly acquainted with its operations, including receipts and expenditures, together with the statements taken by him and other witnesses from the books of the company, satisfies me that the representations made by the defendant as to the earning capacity of the electric plant were well founded.

2. There is a sharp conflict of testimony in regard to the alleged representation that the stockholders in said company were exempt from personal liability for its debts. The evidence, however, convinces me that the representations on this subject were confined to the liability of stockholders under the \$50,000 mortgage. That mortgage provides:

"Article VII. That it is expressly agreed by and between the said trustee and the said electric company, and is expressly agreed and assented to by each of the holders of said bonds, and of any and all of them (and each such holder, by the acceptance and holding of such bonds, or any of them, does thereby expressly agree and assent to this article), that all liability of stockholders of said electric company, in respect of said bonds, and each of them, whether statutory or otherwise, whether partial, ratable, joint, or several, is hereby expressly waived and released; but nothing in this article shall be deemed to affect or in any wise limit the liability of the corporation, said electric company, itself."

This article itself is a declaration that under the general laws of Ohio there is a liability on stockholders for the debts of the company; otherwise, how could liability be "waived and released"? It must be borne in mind that, according to complainant's testimony, the terms and provisions of this mortgage were fully known to him. The same is true of the defendant. Under these circumstances, it is improbable that the defendant would have represented, or that the complainant would have confided in any representation to the effect, that stockholders generally were exempt from liability for the debts of the corporation.

3. Complainant has failed, in my opinion, to show that the net earnings of the Van Wert Gaslight Company were not \$2,524.64 in the year 1892, or that they did not thereafter moderately increase. There is another reason, however, why complainant is not entitled to relief on account of these last-mentioned representations, namely, that they were made by the defendant, not upon his own knowledge, but from data furnished by the gaslight company, which he believed to be reliable, and which were equally accessible to the complainant.

4. As to what representations were made by the defendant in reference to the \$35,000 mortgage, the evidence is again conflicting. There is no doubt but that complainant knew that said mortgage had been authorized. This he admits, but testifies positively that defendant represented to him that none of the bonds secured by that mortgage had been issued, and that all of them were then in his possession. Defendant denies that he made any such representation, but, as he states himself, his recollection of what he did represent is not definite. On this issue the evidence strongly preponderates in favor of complainant. The testimony of defendant, so far as material here, is as follows:

"Q. Did you make any statement to him at that time to the effect that the \$35,000 bonds had never been issued, and were not outstanding? A. I have no recollection of any such statement. Q. Would you likely have remembered it, if you had made it? A. I think so. I think so. Q. Did you make any statement to him at that time that all of the bonds were still in your possession, and never had been issued? A. No, sir; never made any such statement. Q. Was there any conversation between you and Mr. Stevenson with reference to the outstanding debts of the company, or what they amounted to, or to whom they were due? A. Very little, I think. Q. Was there any? Did you give him a statement as to what the debts were, or did he ask you? A. I don't think that he asked me, though I cannot speak positive as to that. I know that I agreed to pay everything except the \$50,000 mortgage. Q. You may state whether at any time when he was here, or at any other time, you represented to him that none of the \$35,000 issue of bonds had been issued, and that they were all in your possession. A. If I had represented anything, I would have stated that they were under our control. I have no recollection as to representing anything about them. He had been at Van Wert. Q. Did you and he enter into any discussion of that matter at all,—as to the condition of the securities? A. It is barely possible. Q. Have you any present recollection as to it? A. Not definite enough—"

Here the witness' attention was called to another subject.

Thus it will be seen that while there is, in one place, an express denial by the defendant of his having stated that all of the bonds secured by the \$35,000 mortgage were in his possession, and never had been issued, yet his testimony, as a whole, shows hesitancy and doubt as to what he did represent on the subject. Particularly is this true of the following answer, which is also significant in other respects:

"If I had represented anything, I would have stated that they were under our control. I have no recollection as to representing anything about them. He had been at Van Wert."

If the defendant had made the representation here indicated,—that the bonds were under his control,—it would have been substantially what complainant asserts was represented, namely, that none of the bonds were outstanding, because bonds held by other parties, either in absolute ownership, or as collaterals, could not, in any just sense, be said to be under defendant's control. Furthermore, it will be observed that the defendant nowhere claims that he informed complainant of the true condition of the bonds covered by the \$35,000 mortgage, namely, that \$20,000 of them were held by the Van Wert National Bank, and \$7,500 of them by the Bass Foundry & Machine Works. On the contrary, he says that he has no recollection of having made, in his interviews with complainant, any representations about them. Now, if complainant was not informed verbally of the real facts concerning the bonds last mentioned, then the statement made impliedly in the prospectus, and expressly in the contract, that the \$50,000 mortgage was the first and only mortgage, was the only representation on the subject. That representation, being false, could have been overcome only by proof of oral explanations of the facts as they really existed, yet defendant testifies that he has no definite recollection of any such explanations; and therefore, on his own testimony, this branch of the case is clearly against him.

Leaving out of view, however, the vulnerable points of defendant's testimony, and allowing his denial equal weight with complain-

ant's affirmation, still there are other evidences in the case which turn the scales in favor of complainant, and these evidences are documentary proofs of the most unmistakable character. The prospectus, to which I have already referred, states the bonded indebtedness to be \$50,000. The language of the contract itself is still stronger, and more explicit. It, in terms, declares the \$50,000 mortgage to be the first and only mortgage. Both parties, it must be remembered, were familiar with this contract. It was signed in duplicate; the original draft having been prepared by the complainant, and the other copied by the defendant, who, besides, testifies that he read the contract, "and thought it embodied the most pertinent things." Now, since it was expressly represented in the contract that the \$50,000 mortgage was the first and only mortgage, and since complainant knew that the \$35,000 mortgage had been authorized, it necessarily follows that he was informed either that the bonds secured by the \$35,000 mortgage had not been issued, or, if issued, that they had been paid off, and the mortgage lien thus discharged. There is no proof of any representation to the effect that said bonds had been issued, and subsequently paid off. Therefore the representation must have been that said bonds and mortgage, though authorized, were never in fact used. Besides, some of the evidence on which the defendant himself relies supports this conclusion. G. L. Marble testifies, among other things, that he told the complainant that the bond issues were entirely under his control. This language accords with complainant's testimony as to what defendant represented, namely, that the bonds had never been used, and were in his possession. In no other way could they have been entirely under defendant's control. If the bonds were held by other parties, either as purchasers or pledgees, it is obvious that they were not entirely, or at all, under the control of the defendant; and that they were not, at the date of the contract, so controlled, is shown by the undisputed fact that, although defendant immediately thereafter began his efforts to secure their surrender to him, it was seven months and a half before he succeeded in obtaining possession of them, so as to enable him to cancel the mortgage. Mr. G. L. Marble, referring to a conversation between himself and the complainant at Van Wert just before complainant made the contract with defendant, further testifies thus:

"I remember distinctly that the question of the mortgages came up, and I said to him that if he purchased the electric light plant, and desired to float bonds on it, he could either use the thirty-five thousand dollar mortgage or the fifty thousand dollar mortgage; either one or the other could be canceled or used at his pleasure."

Here, again, complainant was impliedly told that, of the bonds covered by the \$35,000 mortgage, none were outstanding; otherwise, how could they have been canceled at his pleasure? Again, after complainant had consummated the trade with defendant, and returned to Van Wert, Mr. G. L. Marble testifies that:

"He told me their trade had been made, and he showed me the contract of his purchase of the twenty-five thousand of the fifty thousand bonds, and two

hundred and fifty-five shares of stock, and I told him then that I would at once prepare a release for the thirty-five thousand dollar mortgage, and send it to father for execution," etc.

Is not this manifestly in line with the previous representation that said mortgage was ready for cancellation? To the same effect was the correspondence between the complainant and G. L. Marble in reference to the formal release of the \$35,000 mortgage. The material parts of this correspondence are as follows:

"Van Wert, Ohio, Dec. 11, 1895.

"John B. Stevenson, Jr., Esq., Philadelphia, Penna.—Dear Sir: I inclose satisfaction piece (copy) that I have sent father for execution. Under our laws, the simplest release on the margin of the record is sufficient, but my experience with corporate mortgages has been that investors were better satisfied to have such matters in full formality. Should your counsel suggest any changes, I will gladly make them. * * *

"Truly,

G. L. Marble."

"Forest Building, 119 S. 4th St.

"Philadelphia, Dec. 14th, 1895.

"G. L. Marble, Esq., Van Wert, O.—My Dear Sir: Referring to your letter 11th inst., would say that anything relating to any indebtedness excepting the mortgage securing the \$50,000 bonds against the Electric Light and Power Co., your father was to pay off. With due appreciation, I would rather not assume any responsibility. Your suggestions, however, appear to be proper and necessary. * * *

"Very resp., etc.,

John B. Stevenson, Jr."

Mr. Marble's letter, which was written just 12 days after the date of the contract now sought to be rescinded, unquestionably and clearly implies that the mortgage referred to was then ready for cancellation, which situation could have existed only on the theory that none of the bonds were outstanding. Nor is there in Mr. Stevenson's response anything to the contrary. But it is insisted by defendant that said bonds (that is, those covered by the \$35,000 mortgage) were issued by the electric company as collaterals for pre-existing debts of said company, and that this was not such an issuance of the bonds as rendered the company liable on them. In support of this contention, defendant cites the case of Farmers' Loan & Trust Co. v. San Diego Street-Car Co., 45 Fed. 518. That case, however, has no application to the case at bar, as the facts in the two cases are entirely dissimilar. Here the bonds were not issued, without authority, as collaterals for pre-existing debts of the electric company, but the manner of their issuance was as follows: The electric plant was first established in Van Wert in December, 1889. The company, which then owned and operated the plant, was wound up in 1892, and its property disposed of at judicial sale. The real purchaser of the property was G. L. Marble; the funds being furnished by his father, J. M. C. Marble, and the purchase being made in the name of A. V. Rice. Soon thereafter, A. V. Rice, in whose name the property then stood, conveyed the same to the new electric company; the consideration of such conveyance being the capital stock of the company, amounting to \$50,000, and \$35,000 of the bonds of the company,—these bonds being the \$35,000 issue of January 2, 1893, to which the pending controversy re-

lates. The bonds afterwards passed into the hands of the defendant, J. M. C. Marble, to reimburse or secure him for the moneys which he had furnished in connection with the enterprise. The history of this transaction, in part, as appears from the testimony of John E. Marble, was entered upon the ledger of the new electric company as follows:

1

September, 1892.

Sept. 1. Plant, Dr.

85,000 00

The plant of the Citizens' Electric Light and Power was purchased at judicial sale, May 3rd, 1892, by Americus V. Rice, in the interest of this company, then proposed to be formed; said plant being located at Van Wert, Ohio.

On this day, this, the electric light and power company, having heretofore been duly incorporated, said Americus V. Rice conveys the said plant to this company at the agreed valuation of \$85,000, further agreeing to make improvements thereon to cost not exceeding \$6,375.56; to assign the moneys in bank, from earnings, amounting to \$74.84; and to assign the unpaid revenue accounts accruing from operation. Said company to assume the current liabilities. Said Rice to take in payment \$35,000 first mortgage 10-30 gold bonds, 6% semiannual, to bear date January 2nd, 1893 (but running from January 1st), and \$50,000 in stock, or its proceeds; he to take absolutely \$4,700 of said stock, and the proceeds of the residue. Until the issue of said bonds, said Rice is credited with the amount thereof.

A. V. Rice, Cr.....	85,000 00
Capital stock, Cr.....	50,000 00
Van Wert National Bank, with whom the account of this company is kept, Dr.....	74 84
To moneys on hand from operation of plant by A. V. Rice, revenue, Cr.....	74 84

The testimony of G. L. Marble explains the original issuance of these bonds more fully, but to the same effect. For instance, the following appears in his testimony:

"Q. Who was the purchaser at the judicial sale? A. Myself. Q. What price was paid for it? A. I don't remember. I think it was \$19,500. I want to say that the purchase was made in the name of A. V. Rice."

Again, in answer to the question, "State whether that thirty-five thousand bond issue was ever sold regularly to any person," he answers:

"No, sir; except in the way I have stated. In the reorganization of the plant, the bond issue and the stock issue was, as stated on the journal, to be taken by A. V. Rice, and the plant furnished complete for it,—that is, that the improvements that were then contemplated were to be completed; General Rice's connection with it being simply the channel of issuing the securities for that purpose."

After the bonds were thus regularly issued, they were, by the defendant, or with his consent, pledged, \$20,000 to the Van Wert National Bank, and \$7,500 to the Bass Foundry & Machine Works. So that the bonds in the case at bar are not open to any of the objections that were urged against the bonds in the case of Farmers' Loan & Trust Co. v. San Diego Street-Car Co., supra. There are yet other

reasons why that case does not apply here, but, in view of what I have just said, it is unnecessary to enumerate them.

But defendant further contends that if it be conceded that the alleged representations as to the bonds were made, and were false, still complainant is not entitled to equitable relief, because no injury resulted from such representations. This contention, to my mind, is not well taken. At the date of the contract, and at the time when complainant gave notice of its rescission, April 14, 1896, and also at the commencement of this suit, April 29, 1896, the evidence indisputably establishes that, of the \$35,000 bond issue, there were outstanding \$27,500. Surely no argument is necessary to show that this bonded indebtedness, and the mortgage securing it, impaired the value of the stock of the electric company, and also of the bonds secured by the \$50,000 mortgage. Neither said stock nor bonds could possibly have been worth at the time of the contract, or at the commencement of this suit, what they would have been worth if the \$35,000 mortgage had not been a lien upon the property. This is well illustrated by the action of the Van Wert National Bank in postponing a substitution of the new for the old bonds until all of the latter were surrendered. Mr. Brumbach testifies that he told Mr. Stevenson that the \$20,000 bonds of the first issue were ready to be delivered for cancellation as soon as the other \$15,000 were taken up. Why was it that the bank required the whole of the old issue to be taken up before accepting the new? Obviously, because \$25,000 in the bonds of the new issue would not be as valuable as even \$20,000 of the old issue, so long as any considerable part of the latter were outstanding. Defendant's counsel suggest, in this connection, that complainant held the promise of defendant to pay off and discharge the \$35,000 mortgage, and that there is no evidence that defendant was insolvent, or unable to do so. These circumstances do not remove from the case the element of injury to which I have adverted; for common experience instructs us that a lien upon property will prejudicially affect its value, whatever may be the ability of the debtor, outside of the incumbered property, to meet the obligation which the lien secures. Persons who contemplate purchasing will not readily accept titles thus incumbered or clouded. It is true that in July, 1896, the bonds were surrendered and the mortgage canceled; but complainant's right to a rescission of the contract must be determined by the facts, concerning the bonds, as they existed at the time of the contract, or not later than the commencement of the suit, and cannot be affected by what may have subsequently transpired. I repeat that when the suit was brought the lien for \$27,500 on the property of the electric company must necessarily have impaired the value of the bonds of said company, secured by a subordinate lien, as well as the value of the stock of the company, and that complainant's right, accruing in part therefrom, to rescind the contract, could not be defeated by a discharge of the prior lien after suit was brought. *Thomas v. Coultas*, 76 Ill. 493; *Merritt v. Robinson*, 35 Ark. 483. From the syllabus in *Thomas v. Coultas*, supra, I extract the following:

"Where a party filed a bill to rescind a contract for the exchange of lands on the ground of fraud in concealing the fact of there being judgments which were liens on defendant's lands at the time, the discharge of such liens, after bill filed, will not affect the complainant's rights in the least. The filing of the bill in such a case is a rescission, and an election to recover back the property given in exchange, and the complainant, after that, could not revive the contract without the defendant's assent."

In *Merritt v. Robinson*, *supra*, the second and third paragraphs of the syllabus, omitting headlines, are as follows:

"(2) * * * If a vendor sells goods which he knows to be mortgaged, without giving information thereof to the purchaser, the sale would be fraudulent. The suppression of the truth is equivalent to a falsehood, when the vendor is under obligation to disclose the truth. (3) * * * Fraud avoids a contract ab initio, and the party committing it can take no advantage of it, nor acquire any rights or interest by means of it. If, therefore, the vendor of mortgaged goods, knowing of the mortgage, conceal it from the vendee, the vendee may, on discovering the fraud, treat the contract as void, and rescind it, by returning, or offering to return, the property, and demanding that given in exchange for it; and the vendor cannot defeat his right to rescind by afterwards procuring a release of the property from the mortgage."

Defendant further insists that complainant did not rely upon the representations as to the bonds, but upon defendant's promise to pay off the debts of the company. With this I cannot agree. It is not necessary to the rescission of a contract, for fraudulent representations, that the complaining party should have relied solely upon such representations, but it is sufficient if they constituted one of the material inducements to his action. 2 *Bigelow*, *Frauds*, 497, 554; *James v. Hodsden*, 47 *Vt.* 127; *Safford v. Grout*, 120 *Mass.* 20; *Fishback v. Miller*, 15 *Nev.* 428. While defendant's promise to pay off the debts of the electric company was broad enough to include the bonds secured by the \$35,000 mortgage, I am satisfied from the evidence that the main object of this promise was to provide for floating debts, and that, as to the bonded liabilities of the company, complainant relied largely, if not altogether, upon the representation that the \$50,000 mortgage was the first and only mortgage. This must be so, since the representation and promise were parts of the same instrument. Besides, complainant testifies positively that the representations as to the bonded indebtedness of the company and its earning capacity did influence him in his purchase, and other facts of the case confirm his testimony on this point. That he believed there were no outstanding bonds other than those secured by the \$50,000 mortgage, and that such belief was a material consideration with him, are shown clearly by the circumstances that when he drew the contract, which, as already stated, was prepared and written out by him, he inserted therein a clause expressly declaring the \$50,000 mortgage to be the first and only mortgage. It is incredible that he would have consummated the trade, had he known that \$27,500 of the \$35,000 bond issue were liabilities against the company. The price to be paid by him for a little more than one-half of the stock of said company, and one-half of the \$50,000 bond issue, was \$15,000; that is to say, he was buying, approximately, one-half of said stock and bonds on a valuation of \$30,000 for the whole. Is it reasonable to suppose that he would have consummated a trade of

this sort had he known that there was a prior mortgage indebtedness on the plant of the company almost equal to its full estimated value? I think not. After careful consideration of all the evidence, I am satisfied that it was represented to the complainant at the time of the contract that the \$50,000 mortgage was the first and only mortgage on the property of the electric company, whereas, in truth and in fact, there were then outstanding, of which the complainant was not informed, \$27,500 of the bonds covered by the prior \$35,000 mortgage. On this ground, complainant is entitled to a rescission of the contract, and a decree to that effect will be entered.

FIRST NAT. BANK OF OMAHA, NEB., et al. v. ILLINOIS TRUST & SAVINGS BANK.

(Circuit Court, N. D. Illinois. December 24, 1897.)

PLEDGE—CONSTRUCTION OF CONTRACT—RIGHTS OF BANK IN COLLATERAL SECURITY.

A note executed to a bank by a borrower contained a printed recital that the maker had deposited collateral security for the payment thereof, "and also of all other present or future demands of any kind of the said bank" against the maker, due or not due. It further provided that the bank should have power to sell the collateral, and apply the proceeds to the payment of the note, and should "return the overplus, if any," to the maker. The maker deposited as collateral certain shares of stock in a corporation, and subsequently increased the amount from time to time in compliance with demands of the bank on the ground that the market value of the stock had declined, leaving the margin below its requirements. *Held*, that the agreement was one of pledge, and to secure payment of the note only, as the power to sell was limited to that purpose, and that, on tender of payment of the note, the bank was not entitled to retain the stock as security for a loan previously made from the bank by the maker for a term of years on real-estate security, and which had been assumed by a subsequent purchaser of the property.

Bill by the First National Bank of Omaha and Herbert E. Gates against the Illinois Trust & Savings Bank. Heard on demurrer to bill.

Esterbrook & Davis, for complainants.
J. O. Hutchins, for defendant.

SHOWALTER, Circuit Judge. On June 28, 1894, John A. McShane, of Omaha, Neb., borrowed from the defendant, a banking corporation doing business at Chicago, \$30,000. A printed blank, used by defendant in such cases, was thereupon filled out by one of its officers, and McShane subscribed the same with his name. The document, barring the date and signature, reads as follows:

"On demand after date, for value received, I promise to pay the Illinois Trust and Savings Bank, or order, thirty thousand dollars in gold coin, or U. S. notes, or treasury notes, which are a legal tender, at its office in Chicago, with interest at the rate of four per cent. per annum, having deposited with it as collateral security for the payment thereof, and also of all other present or future demands of any kind of the said bank against the undersigned, due or not due, 300 shares Omaha Union Stock-Yards Co. stock, the market value of which is now \$——. Said bank has the right to call for any additional

security satisfactory to it, and, if the same is not furnished on demand, may, at its option, declare this note immediately due and payable, without notice to me; and I hereby give the said Illinois Trust and Savings Bank, or its assigns, full power and authority, on the maturity of this note, or at any time thereafter or before, at discretion, to collect or otherwise convert said securities, or either or any part of them, or any substitute therefor, or any additions thereto, and to sell said collateral securities, or any portion thereof, at public or private sale, at the discretion of said bank, without advertising the same, or otherwise giving notice to me (and the said bank may become the purchaser at any public sale), and said bank shall apply the proceeds, after the payment of all expenses and attorney's fees attending said collection, conversion, or sale of the said collateral securities, to the payment of this note, with all interest due thereon, and return the overplus, if any, to me; and, in case the proceeds of said collection, conversion or sale of said collateral securities shall not cover the principle, interest, and expenses, I promise to pay the deficiency forthwith. And I hereby agree that said bank shall have the right, at its option, to change the rate of interest to be paid upon this note, or upon any unpaid portion thereof, upon notice in writing, which changed rate I hereby agree to pay unless the amount of principal and interest then due is paid forthwith. A notice mailed to my address shall be deemed a sufficient notice of the change of rate."

The par value of the shares mentioned was \$100 per share. The market value on June 28, 1894, was \$120 per share. It is the practice with Chicago banks to insist that the value of the collateral deposited with a given note shall exceed the sum borrowed by some 20 or 25 per cent., and if, owing to fluctuations in the market, the value of the collateral declines, the banker will usually demand additional collateral. On January 8, 1895, defendant bank mailed to McShane the following letter:

"Chicago, January 8, 1895.

"J. A. McShane, Esq., Omaha, Neb.—Dear Sir: Please add to your margin on demand loan, and oblige,
W. H. Reid, 3rd V. P.
27,000.
 "30,000.
 "300 Omaha Sk. Yds.
 "3,000 short."

On January 16, 1895, defendant bank sent to McShane a second letter, as follows:

"Chicago, Jan. 16, 1895.

"Mr. John A. McShane, Omaha, Neb.—Dear Sir: Referring to our letter of the 8th inst., would say that we are still without reply to same. Our last quotation on Omaha Stock Yards was 95. At this price you are short about \$11,000. Please forward additional collateral at once, and oblige,
Jas. S. Gibbs, Cash."
 "Very truly yours,

On January 21, 1895, defendant bank sent to McShane a third letter, as follows:

"Chicago, Jan'y 21, 1895.

"J. A. McShane, Esq., Omaha, Neb.—Dear Sir: Please add to collateral on your demand loan, Stock Yds. quoted to-day 111. Your attention will oblige,
W. H. Reid, 3rd V. P."
 "Very respectfully,

On January 28, 1895, McShane replied as follows:

"Omaha, Jan'y 28th, 1895.

"Mr. W. H. Reid, 3rd V. Pt. Ill. T. & S. Bank Chicago, Chicago, Ill. Dear Sir: I am in receipt of your favor of the 21st inst., in regard to additional collateral, and, replying thereto, I will say that I expect to be in Chicago within a day or two, and will arrange the matter satisfactory.
 "Yours, very truly,
[Signed] John A. McShane."

Pursuant to the demand in the foregoing letters, McShane, on the 5th of February, 1895, delivered to the defendant bank 30 additional shares of the Omaha Union Stock-Yards Company, making a total of 330 shares. On July 31, 1895, McShane borrowed \$25,000 more from the bank, and put up as collateral security 250 shares of the Omaha Union Stock-Yards Company stock, and signed a second document, tendered by the bank, the same being the printed form previously used filled out with the amount of the new loan and the specification of the collateral. The total of the two notes thus became \$55,000, there being 330 shares as collateral for the first and 250 shares as collateral for the second. On January 8, 1896, defendant bank sent to McShane the following letter:

"Chicago, Jan. 8, 1896.

"John A. McShane, Esq., Omaha, Neb.—Dear Sir: Please add to the collateral on your loans with us, and oblige,

"Yours, truly,

Jas. S. Gibbs, Cash.

"580 Sh. Omaha S. Y'ds.

"Loans, \$55,000."

On January 16, 1896, McShane responded with the following letter, inclosing therein certificates for 50 additional shares of said stock:

"Omaha, Neb. Jan'y 16/96.

"Ill. T. & S. Bank, Chicago, Ill.—Dear Sir: In compliance with your letter of the 8th inst., I inclose you herewith 50 shares of Union Stock-Yards stock as additional collateral with my loan, making 630 shares held by you. Trusting this will be satisfactory, I am

"Yours, very truly,

[Signed] John A. McShane."

Shortly before January 20, 1896, the bank demanded a still further security, and on the day last mentioned McShane delivered to the bank 50 more shares. On May 12, 1896, defendant sent to McShane another letter, as follows:

"Chicago, May 12, 1896.

"J. A. McShane, Esq., Omaha, Neb.—Dear Sir: 85 is highest for Stock-Yards stock. Please give us additional margin, and oblige,

"680 × 85 = 58,800

W. H. Reid, 3rd V. P.

20% 11,360

\$47,440

"Need \$10,000 more. Loan, 55,000."

Responding to this, McShane delivered to the bank certificates for 100 more shares of the said stock-yards stock. The bank now held the two demand notes, together with 780 shares of the stock as collateral thereto. Three hundred and thirty shares had been deposited as collateral to the first note, 250 shares as collateral to the second note, and 200 shares had been sent in response to the demands heretofore referred to, which concerned both notes. On the 16th of October, 1896, McShane, being liable to the complainant the First National Bank of Omaha on demands aggregating some \$75,000, and desiring further advances, by an instrument in writing sold, assigned, and transferred to complainant Herbert E. Gates, as trustee, all of the shares of stock already mentioned herein, subject to the lien of this defendant. He had represented to the complainant bank and to Mr. Gates that the defendant held said shares of stock as collateral

security for a debt of \$55,000, and no more, and Gates was authorized, in the writing last mentioned, upon payment of the \$55,000 demand, to receive and hold the shares. It appears from other averments in the bill that the purpose of the transfer to Gates was to enable the complainant the First National Bank of Omaha to pay the \$55,000 debt to the defendant bank, and then use the stock as security for the prior indebtedness of McShane and an additional advance of \$4,598.25 made by it to McShane. On the 10th day of February, 1897, complainants tendered to the defendant bank the sum of \$55,000, together with the interest upon the two demand notes heretofore mentioned, and demanded that the 780 shares of stock be turned over to them, at the same time exhibiting the instrument of assignment by McShane to Mr. Gates as trustee. It further appears from the bill that on May 1, 1892, McShane had borrowed from the defendant bank the sum of \$100,000, for which at that time he gave his promissory note, payable in five years from that date, together with a trust deed conveying certain real estate to secure the payment of said note. In May, 1892, McShane sold the property described in the trust deed, and the purchaser from him assumed and agreed to pay the said note as part of the consideration for the property. At the time of the tender last mentioned this note was outstanding, due, and unpaid. By reason of the words, "and also of all other present or future demands of any kind of the said bank against the undersigned, due or not due," in each of the demand notes hereinbefore mentioned, the defendant bank insisted that the 780 shares were held by it as security, not only for the principal and interest of said two demand notes, but for the prior note for \$100,000. Defendant thereupon refused to accept the tender above mentioned, and to deliver the stock. The tender by the complainants has been kept, and is still good, the defendant having waived the payment of the same into court by stipulation. It further appears from the bill that all of the shares except the 300 originally deposited upon the first demand note and the 250 originally deposited on the second demand note were borrowed by McShane from one John A. Creighton at the times when the several deposits were made as already detailed. The borrowing of the first 30 shares was upon the representation of Mr. McShane to Mr. Creighton that the same was to go as additional collateral security upon the one note for \$30,000. The subsequent advances by Mr. Creighton were made upon the representation by Mr. McShane that the stock so advanced was to go as additional security for the two demand notes, aggregating \$55,000; and prior to the last advance of the 100 shares by Creighton to McShane the latter exhibited to the former the letter of May 12, 1896, hereinbefore quoted. Said additional certificates of stock had been issued to said Creighton, and he had indorsed the same in blank. Creighton had no knowledge of the terms of the two demand notes, or of the claim on the part of the defendant bank whereby it proposed to hold the said shares of stock as security for the \$100,000 note, until about the 6th of February, 1897. He thereupon, and on the 10th day of February, 1897, and at the time of the tender and demand hereinbefore mentioned, notified the defendant bank in writing that he had loaned to McShane the 230

shares of stock for the purpose of being hypothecated to secure the \$55,000 and interest, and for no other purpose, and that he had subsequently assigned these shares to Gates, trustee; the sense of the bill being that Creighton, for the benefit of McShane, and to secure to the complainant bank McShane's indebtedness (for a large portion of which Creighton himself was surety), had turned over the shares to Gates. The bill prays, among other things, for an order of court directing the defendant to deliver to complainants the pledged stock upon payment of the \$55,000 and interest.

A simple lien—that is to say, a right to detain chattel property until a given debt be paid, but without any right to sell and apply the proceeds in payment—is one thing; a pledge, since it implies the right in the depositary to sell the deposit, and apply the proceeds to the debt it was given to secure, is another. Shares of stock put up as collateral security constitute a pledge. The two demand notes in the case at bar are the same in form. For convenience, I refer to that of June 28, 1894. This instrument does not create a mere lien, as distinguished from a pledge. The stock deposited was to be “collateral security.” The language of the instrument not only does not express the intent that the stock, or any part of it, was to be simply detained without power to sell, but it affirmatively declares the right to sell. McShane is made to say: “I hereby give the Illinois Trust and Savings Bank * * * full power and authority * * * to sell said collateral securities * * * at public * * * sale.” Then follow the words: “And said bank shall apply the proceeds, after payment of all expenses, * * * to the payment of this note, with all interest due thereon, and return the overplus, if any, to me.” The terms of the instrument cover any and every sale of any and every share of stock deposited which the status of that property as a pledge would have authorized. It is then declared that the proceeds of any sale must be applied on the one specific demand, and the overplus, if any, returned to McShane. That the property deposited may be sold by the pledgee to pay the debt which such property was intended to secure is part of the definition of a pledge. Without such right of sale, there can be no pledge; nor can a given chattel have the status of a pledge as to any debt for the payment of which the pledgee is not authorized to sell; nor, as between parties not under disability, could there be a decree ordering sale of property as a pledge in any case where the pledgee did not himself have the right to sell. A court of chancery does not create rights. It can only decree and enforce a right already vested in the complainant. An agreement between parties that a specific chattel held by one should not be sold to pay a designated debt otherwise than by decree of court, is conceivable. What such an agreement would amount to, and how it should be classified, need not be discussed. The sense that, as concerns the note of 1892 for \$100,000, the defendant bank had the right to detain the stock, but no right, in any event, to sell the whole or any part of it, is not, as I conceive, to be extracted from the agreement which the defendant bank made with McShane. The argument that, as concerns the note of 1892 for \$100,000, the stock is subject at least to a right of detention, or that as to said note there

is at least a lien which may be foreclosed in a court of equity, seems to me unsound. The specification in the contract that the proceeds of a sale by the bank of the stock deposited with that contract must be applied on the \$30,000 demand, and the overplus returned to McShane, is tantamount to a statement that said stock is pledged to secure that one demand, and no other. The additional 30 shares were sent in response to a call, which meant that it should become part of the pledge for the one demand and no other. The second demand note is like the first. The additional 50 shares, and the 50 shares following, and the 100 shares still later were sent in response to calls, which meant that they should be collateral to the aggregate debt of \$55,000, and to no other demand. I do not concur in the view that McShane had bound himself to send the 230 additional shares. He simply chose to do it in response to the letters written from the bank, and he must be held to have done it on the understanding and for the purpose expressed in those letters.

It is urged that the words, "and also of all other present or future demands of any kind of the said bank against the undersigned, due or not due," in each of the contracts, must have a meaning, and that, as applied to the facts, the meaning is that the overplus, in the event of sale, should be returned to McShane only in case the note of 1892 be paid, otherwise to be applied on said note. The context does not warrant this construction. The words in question were merely part of the printed formula used by the bank as applicable to many varying transactions. In the light of the subsequent writings passing between the defendant bank and McShane, it is obvious that he and the bank officer, in failing to erase the words mentioned, did not think of the note of 1892 as being a demand within the meaning of said words. They evidently thought of these words as including any and all such demands as might arise in the course of commercial banking. At that time there was not, nor might there ever be, any such demand against McShane, other than the specific note for \$30,000. On this view, the words quoted were innocuous; it could make no sort of difference whether they were erased or left standing.

It is urged that the words, "and return the overplus, if any, to me," are answered if the defendant bank, after selling the 780 shares, and paying the \$55,000 with part of the proceeds, shall apply the remainder to the note of 1892 for \$100,000. I think not. McShane did not part with his liberty to dispose of the overplus as he saw fit. The defendant bank contracted to return the overplus. This means that, in case of sale, the overplus ceased to be within the dominion of the bank for any purpose of its own; that such overplus must go back to McShane, or to his assignee.

The counsel for the defendant suggests the theory of a banker's lien as applicable to the case. Assuming that there could be such a lien for a demand like that of 1892, how could such lien be asserted in the face of an express contract by the bank to the contrary? It occurs to me that possibly the present controversy might have been determined in an action of replevin, but counsel have agreed to test the rights of the parties by this bill. I assume, therefore, that the case has a footing on the equity side of the court. The demurrer to the bill is overruled.

UNITED STATES v. DES MOINES VALLEY R. CO. et al.
(Circuit Court of Appeals, Eighth Circuit. December 13, 1897.)

No. 816.

1. PUBLIC LANDS—GRANTS TO STATES FOR PUBLIC WORKS—ERRONEOUS CERTIFICATION—CONFIRMATION.

Under the act of March 3, 1871 (16 Stat. 582), whereby the United States confirmed to the state of Iowa and its grantees certain lands erroneously certified to the state by the secretary of the interior, under the grant of July 12, 1862, for aiding in the improvement of the Des Moines river (12 Stat. 543), the United States is estopped from asserting any claim or right to such lands.

2. SAME.

In an act confirming to a state lands erroneously certified to it under a grant for internal improvements, a proviso that nothing in the act shall be construed as to adversely affect any existing right or title, or right to acquire title, under the homestead and pre-emption laws, etc. (Act March 3, 1871; 16 Stat. 582), does not reserve to the United States the privilege of itself asserting the rights of homestead claimants.

3. JUDGMENTS—ESTOPPEL AGAINST UNITED STATES AS FORMAL PARTY.

In a suit in which the government has no interest, but which is brought in its name by a private party, to enforce his own rights, a prior adjudication by a state court, determining the same issues adversely to him, is available as a defense, notwithstanding the formal presence of the United States as party.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

On March 6, 1893, the United States of America exhibited its amended bill of complaint against the Des Moines Valley Railroad Company, James O. West, and Sylvester M. Fairchild, the appellees, wherein it prayed that a certificate whereby the secretary of the interior certified certain lands to the state of Iowa, and a patent for said lands subsequently granted by the state to the Des Moines Valley Railroad Company, and several mesne conveyances whereby said lands had ultimately been conveyed to James O. West, one of the appellees, might each be canceled, set aside, and held for naught, and that said James O. West be forever estopped from asserting a title thereto under the aforesaid certificate, patent, and mesne conveyances. The lands which are affected by the bill of complaint are situated in Dickinson county, Iowa, the same being the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and lot No. 3, all in section 26, township 99, N., of range 37 W. of the fifth P. M.

The controversy arises out of certain congressional legislation in aid of the improvement of the navigation of the Des Moines river, which legislation began with a grant of lands in aid of the improvement of the river, which was made by the United States to the state of Iowa on August 8, 1846. 9 Stat. 77, c. 103. Several acts relative to the subject were passed at various times between August 8, 1846, and March 3, 1871, but the material facts, so far as they are relevant to the present controversy, may be stated as follows: By an act approved on July 12, 1862 (12 Stat. 543, c. 161), congress extended the original grant of 1846 so as to include in the grant to the state in aid of the improvement of the navigation of the Des Moines river every alternate section of land designated by odd numbers lying within five miles of the river between the Raccoon Fork of the river and the northern boundary line of the state of Iowa. Prior to that time the original grant had been construed as not extending above the Raccoon Fork. Railroad Co. v. Litchfield, 23 How. 66. On the assumption that certain lands which would fall within the extended river grant had been sold or otherwise disposed of by the United States prior to the extension of the grant, congress, by the act of July 12, 1862, authorized the secretary of the interior to set apart an equal quantity of other lands within the state of Iowa to make good such deficiency. Under such authority a large quantity of land, including the tract of land now in controversy, was

set apart by the secretary of the interior, and certified to the state of Iowa on June 14, 1866, to supply a deficiency in the extended river grant which was supposed to have been created by a grant made to the state of Iowa on May 15, 1856, to aid in the construction of a railroad from Dubuque, Iowa, to Sioux City, Iowa. 11 Stat. 9, c. 28. The lands which were so certified to the state were subsequently patented by the state to the Des Moines Valley Railroad Company, the lands in controversy in this action having been so patented on February 25, 1869. It was subsequently decided, however, that no deficiency was created in the extended river grant by the act of May 15, 1856, above cited, for reasons which are fully stated in *Wolcott v. Des Moines Co.*, 5 Wall. 681; also in *Homestead Co. v. Valley Railroad*, 17 Wall. 153; and that the assumption which had led to the selection and certification of lands to the state on June 14, 1866, was erroneous. Nevertheless, congress saw fit to confirm the action which had been taken by the secretary of the interior on June 14, 1866, under the act of July 12, 1862, by another act approved on March 3, 1871 (16 Stat. 582, c. 129), which latter act provided: "That the title to the land certified to the state of Iowa by the commissioner of the general land office of the United States under an act of congress entitled 'An act confirming a land claim in the state of Iowa, and for other purposes,' approved July 12, eighteen hundred and sixty-two, in accordance with the adjustment made by the authorized agent of the state of Iowa and the commissioner of the general land office, on the twenty-first day of May, Anno Domini, eighteen hundred and sixty-six, and approved by the secretary of the interior on the twenty-second day of May, Anno Domini, eighteen hundred and sixty-six, and which adjustment was ratified and confirmed by act of the general assembly of the state of Iowa approved March thirty-one, eighteen hundred and sixty-eight, be, and the same is, hereby ratified and confirmed to the state of Iowa, and its grantees, in accordance with said adjustment and said act of the general assembly of the state of Iowa; provided, that nothing in this act shall be so construed as to affect adversely any existing legal rights, or the rights of any party claiming title, or the right to acquire title, to any part of said lands under the provisions of the so called homestead or pre-empted laws of the United States, or claiming any part thereof as swamp lands." James O. West, one of the appellees, by virtue of mesne conveyances, became, on February 9, 1885, and still remains, the owner of whatever title to the land in controversy was granted to the state of Iowa, and by the state to the Des Moines Valley Railroad Company, under and by virtue of the acts of congress aforesaid, and the action of the land department thereunder. Sylvester M. Fairchild, one of the appellees, also lays claim to the property in controversy, his title thereto being deaigned as follows: He filed a pre-emption claim against the land on August 24, 1865. On September 29, 1866, he relinquished his pre-emption claim, and on October 3d of that year entered it as a homestead, and received a receiver's receipt. Fairchild made his final proof as a homesteader on October 25, 1871, and on September 26, 1876, a patent in his favor was issued by the United States, which was duly recorded on October 15, 1884, in the county of Dickinson, Iowa, where the land in controversy is situated. On February 22, 1876, James Stuart and Joseph Stuart, who were then the owners of the railroad title to the land in dispute, and under whom James O. West, the appellee, now claims, filed a suit in the district court of Dickinson county, Iowa, against Sylvester M. Fairchild, the appellee, and his wife, Helen J. Fairchild, to quiet their title to said land as against the claim of Fairchild and wife. An answer was filed by the defendants, wherein they asserted a title to the land under and by virtue of the aforesaid homestead entry of October 3, 1866, and the final proof which was made thereunder on October 25, 1871. This case went to a final decree in the state court on November 16, 1876, whereby it was adjudged and determined that the plaintiff's claim to the land "be established against any and all adverse claims of the defendants, and that said defendants, to wit, S. M. Fairchild and Helen J. Fairchild, be barred and forever estopped from having or claiming any right or title to the premises * * * adverse to plaintiffs." Fairchild and wife subsequently took possession of the land in controversy, notwithstanding the prior decree in favor of the Stuarts, whereupon the appellee James O. West, who had then become the owner of the property, brought an action of ejectment against them to the March term,

1885, of the district court of Dickinson county, Iowa. In this latter suit Fairchild and wife again pleaded the title which they had before asserted in the suit which was brought against them by the Stuarts. They also filed a cross petition in the case, setting up their title under the homestead entry, and praying that, in view thereof, it might be decreed that they were the absolute owners of the property in controversy. This suit, however, resulted, as before, in a judgment in favor of the plaintiff, which was rendered on October 2, 1885, whereby it was adjudged, in substance, that James O. West was the owner in fee of the property in dispute, and that he have and recover the possession thereof from the defendants S. M. Fairchild and Helen J. Fairchild. An appeal was taken from the latter judgment to the supreme court of the state of Iowa, but said appeal was dismissed, on motion of the appellee, on December 23, 1886. The case comes to this court on an appeal taken by the United States from a decree rendered by the circuit court of the United States for the Northern district of Iowa, dismissing the bill of complaint. 70 Fed. 435.

C. H. Childs (Cato Seils, U. S. Atty., on the brief), for the United States.

Craig L. Wright (A. F. Call and E. H. Hubbard, on the brief), for appellee Des Moines Val. R. Co.

J. F. Duncombe, W. S. Kenyon, George H. Carr, and A. C. Parker, for appellee James O. West.

Before SANBORN and THAYER, Circuit Judges, and RINER, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The circuit court reached the conclusion—in which view we fully concur—that this action was brought for the sole purpose of quieting the title to a specific tract of land, which is claimed, on one hand, by the defendant Fairchild by virtue of his homestead entry, and, on the other hand, by the defendant West by virtue of the certification of the land to the state of Iowa on June 14, 1866, and the patent therefor which was subsequently granted by the state to the Des Moines Valley Railroad Company. It is clear, we think, that the government has no interest in the land to be either conserved or protected, and that it has simply permitted Fairchild to use its name as the nominal plaintiff, to the end that his title under the homestead laws may be established at the expense of the title which is asserted by West. The bill does not attempt to conceal the fact that the United States has no pecuniary interest in the controversy, and that its real purpose is to champion the cause of Fairchild, rather than to assert a title of its own, since it is alleged in the bill that the certificate in favor of the state of Iowa, and the patent to the Des Moines Valley Railroad Company, and the various mesne conveyances under which West claims, all of which it seeks to have set aside and annulled, “are a cloud upon the title of said Fairchild, and have prevented, and do prevent, the United States from giving to said Fairchild that full and indisputable title which is his right.” Moreover, the act of March 3, 1871, above quoted in the statement, was passed and approved some years after the decision in *Wolcott v. Des Moines Co.*, 5 Wall. 681, had been promulgated, wherein it was decided, in effect, that the secretary of the interior had erroneously executed the certificate of June 14, 1866, because the railroad grant of May 15, 1856 (11 Stat. 9, c. 28), did not

dispose of any of the lands which fell within the extended river grant of July 12, 1862, and therefore did not create a deficiency in the latter grant such as the secretary of the interior was authorized to make good by setting apart other lands in their place. In other words, congress, with full knowledge of the erroneous action of the land department in the year 1866, saw fit, in the year 1871, to ratify and confirm the title of the state to such lands as it had acquired by reason of such erroneous action of the officers of the land department. It seems obvious, therefore, that the United States, by the act of March 3, 1871, voluntarily relinquished whatever right or title to the land in controversy it then had; that it did so with full knowledge of its rights; and that the sole purpose of that act was to cure an existing defect in the state's title, and to estop the United States from ever after taking advantage of such defect for its own benefit. It is argued, however, that by reason of the proviso contained in the act of March 3, 1871, the government reserved to itself the right to challenge the title of the state of Iowa, and those claiming under it, to the particular tract of land now in controversy, because Fairchild entered the land as a homestead on October 3, 1866. We cannot assent to this proposition. We fully concur in the view of the learned trial judge that the proviso in question did not reserve any interest in the land, so far as the United States was concerned, but was simply intended to leave homestead, pre-emption, and swamp-land claimants unaffected by the government's relinquishment of its own rights. By the act in question congress declared, in effect, that the United States would not thereafter, for its own benefit, question the title to the lands which had been erroneously certified to the state; that the state should hold the lands free from all claims on the part of the government, but subject to such legal rights, if any, as had at the time become vested in any homestead, pre-emption, or swamp-land claimant. It results from these views that, if the present action can be said to have been properly instituted in the name of the United States, as to which question we express no opinion, the action must, in any event, be regarded as one which is brought for the sole benefit of Fairchild, and not for the purpose of redressing any wrong which has been done to the United States, or of recovering any property in which it now retains an interest.

Such being the attitude of the United States with respect to the litigation, the case falls within the rule, which has frequently been applied, that, where the government lends its name as a plaintiff in a suit, not to enforce any public right, or to protect any public interest, title, or property, but merely to enable one private person to maintain a suit against another in its name, a court of equity will hold the nominal plaintiff, even though it is the United States, subject to the same defenses which exist and might be pleaded as against the real party in interest if he were suing in his own name. *U. S. v. Beebe*, 127 U. S. 338, 347, 8 Sup. Ct. 1083; *U. S. v. Des Moines Nav. & Ry. Co.*, 142 U. S. 510, 539, 12 Sup. Ct. 308; *Curtner v. U. S.*, 149 U. S. 662, 672, 13 Sup. Ct. 985, 1041; *Union Pac. Ry. Co. v. U. S.*, 32 U. S. App. 311, 319, 15 C. C. A. 123, and 67 Fed. 975; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850. In the present case the

record shows, we think, that, if Fairchild was attempting to prosecute a suit against West in his own name, he would be effectually barred of his right to the property in controversy by two adjudications which appear to have been made by the district court of Dickinson county, Iowa,—the one on November 16, 1876, and the other on October 2, 1885. The first of these adjudications was a decree in favor of West's grantors in a suit brought by them to quiet the title to the land in controversy against the claim of Fairchild and wife under the homestead entry of October 3, 1866; and the second was a judgment in favor of West in an ejectment suit brought by him against Fairchild and wife, after West had acquired the title to the property, and had been ousted from the possession thereof by Fairchild. It is suggested in behalf of the appellant that these adjudications ought not to be regarded as depriving Fairchild of his right to the land, because his title under the homestead entry, when these adjudications were made, was incomplete, and for that reason could not be asserted as a defense. The record shows, however, that his title under the homestead entry was asserted as a defense in each of said actions, and that, before either action was brought, to wit, on October 25, 1871, he made his final proof as a homesteader, and obtained a receiver's receipt entitling him to a patent; and that, before either action was brought, a patent for the land in controversy was in fact issued to Fairchild, which patent, however, was afterwards, in some manner which is not disclosed by the evidence, obtained by the officers of the land department, and marked "Canceled." It is obvious, therefore, that when the suits in the district court of Dickinson county, Iowa, were brought against Fairchild, his equitable title to the land in controversy under the homestead laws of the United States was as perfect as it could ever become, since no act remained to be done by him which would strengthen his right to a patent. Moreover, under the laws of Iowa, a suit to quiet title such as was brought against Fairchild in 1876 was then, as now, an equitable proceeding, and in 1885 a defendant in an action of ejectment was then, as now, entitled to plead any defense thereto, whether it was of a legal or equitable character. McClain's Code Iowa, §§ 3861, 4503, 4506; *Rosierz v. Van Dam*, 16 Iowa, 175; *Van Orman v. Spafford*, Id. 186; *Kramer v. Conger*, Id. 434; *Shawhan v. Long*, 26 Iowa, 488. In both of said actions Fairchild availed himself of these privileges by pleading the same state of facts constituting an equitable, if not a full legal, defense to the suits (*Simmons v. Wagner*, 101 U. S. 260; *Nycum v. McAllister*, 33 Iowa, 374), upon which the United States now relies to annul the title of the defendant West, and in both of said actions a judgment adverse to the claim of Fairchild was rendered. Inasmuch, then, as the government sues for the sole benefit of Fairchild, and for the professed purpose of reinvesting him with a title which he has lost, we are of opinion that, whether the present action be regarded as brought under the act of March 3, 1887 (24 Stat. 556, c. 376), or as brought in pursuance of its general right to sue, the government should be held estopped by the previous adjudications against the real party in interest in the state court. The subject-matter and the issue to be tried being the same in this proceed-

ing as in the former actions, the losing party on the former trials ought not to be permitted to renew the controversy in the name of a merely nominal plaintiff, and thereby avoid the effect of the former adjudications. *Southern Minnesota Railway Extension Co. v. St. Paul & S. C. R. Co.*, 12 U. S. App. 320, 325, 5 C. C. A. 249, and 55 Fed. 690. This doctrine was applied by this court in the case of *Union Pac. Ry. Co. v. U. S.*, 32 U. S. App. 311, 319, 15 C. C. A. 123, and 67 Fed. 975, which was a suit brought by the United States under the act of March 3, 1887, wherein we held that the United States was bound by an estoppel which might have been invoked against the real party in interest if the suit had been brought in his name, because it appeared that the United States had no substantial interest in the controversy, and was merely a nominal plaintiff.

On the argument of the case some reliance was placed by counsel for the appellant on the decision of this court in the case of *U. S. v. Winona & St. P. R. Co.*, 32 U. S. App. 306, 15 C. C. A. 117, and 67 Fed. 969. It was contended, in substance, as we understand, that the decision in that case lends some support to the view that the United States, in the present action, is not affected by the previous adjudications in the state court of Iowa against the defendant Fairchild. With reference to such contention, it may be said that in the case last cited this court held that the bill was properly filed by the United States under the act of March 3, 1887. Indeed, no controversy arose, or could well have arisen, in that case, touching that issue, because the case was one in which the executive department of the government had erroneously certified certain lands to the state of Minnesota for the benefit of a railroad company, and there was no pretense that the legislative branch of the government had ever confirmed or ratified such erroneous action on the part of the land department. The case was one which was clearly within the provisions of the act of March 3, 1887. We were accordingly of the opinion in that case, which we still entertain, that the United States had not definitely parted with its right to the land in dispute, but had a substantial interest in the controversy, which very properly exempted it in that case from certain defenses which the railroad company might possibly have interposed as against the original pre-emption claimant. In the present case, however, as has already been shown, congress did ratify and confirm the erroneous action of the land department, doing so with full knowledge of all the facts, and by so doing it placed the government in such a position that it can no longer claim that it has any right to the premises in dispute, or any pecuniary interest in the pending action. It sues professedly for the benefit of a private individual, having been placed by the act of congress aforesaid in such an attitude that it cannot assert any right to the property in dispute on behalf of the public. We think, therefore, that the cases are clearly distinguishable; that our former ruling is in harmony with the views heretofore expressed; and that, as applied to the case in hand, our former decision does not support the contention that the United States is exempt in the present action from such defenses as *res judicata*, limitations, and laches, although such defenses could be successfully pleaded as against a person for

whose benefit it sues. Without considering some other questions which were decided by the trial court, it is sufficient to say that, for the reasons already stated, we are satisfied that the bill of complaint was properly dismissed, and the decree to that effect is accordingly affirmed.

COFFEEN v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1898.)

No. 423.

PRIVATE SWITCH—INJUNCTION—PARTIES.

One acting under authority of an ordinance of the city council cannot be restrained, at the suit of the owner of abutting property, from constructing in a public street a private switch, subject to municipal control, and connecting with the line of a public carrier, as the validity of the ordinance granting the right can only be assailed by an officer acting in the name of the people of the state, or by a bill for injunction brought by the city. *Doane v. Railroad Co.*, 46 N. E. 520, 165 Ill. 510, followed.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This appeal is from an order denying a motion to dissolve an interlocutory injunction whereby the appellant, M. D. Coffeen, was restrained "from laying down, constructing, or attempting to lay down or construct a railroad switch track in North Jefferson street or Wyman street, in the city of Chicago, under and by virtue of an ordinance heretofore granted, or alleged to have been granted, by the city council of the city of Chicago to the said defendant, M. D. Coffeen, and from laying or constructing any railroad track or tracks on either of said streets with or without such assumed or alleged authority," etc. The ordinance mentioned was passed on February 3, 1896, and in the first section provides "that permission and authority is hereby granted to M. D. Coffeen or his assigns to construct, maintain, and operate a private single railroad switch for a period of ten years from and connecting with the tracks of the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company at a point east of Jefferson street near its intersection with the Milwaukee avenue viaduct; thence on a gradual curve in a southwesterly direction across Jefferson and Wyman streets, and west on and along the south side of Wyman street to Desplaines." The grant is followed by provisos that Coffeen shall enter into bond to save the city harmless from damage caused by the passage of the ordinance; that the privileges granted shall be subject in all respects to the ordinances in force or that may be passed concerning railroads; and that the switch shall be constructed and maintained under the direction and supervision of the department of public works. The bill which was brought by the Chicago, Milwaukee & St. Paul Railway Company shows that the construction and use of the proposed switch will cause special injury to that company, as owner of more than half of the abutting property, and that no petition, oral or written, was ever made or presented to the city council for the passage of the ordinance. The motion for a temporary injunction, both parties being present, was submitted and determined upon the averments of the bill alone. Thereafter the appellant filed a sworn answer, and later an amended answer, also verified, showing, among other things, that the so-called "Wyman Street" is, and always has been, simply an alley without sidewalks; that after executing the bond required by the ordinance, and receiving from the commissioner of public works a permit to construct the switch, the appellant contracted for the construction and operation of the switch by the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, with whose road the switch was to be connected and operated; and that the switch was constructed by that company prior to February 24, 1896; but that, during the night of that day, the complainant, after having assured the defendant that his track would not be

disturbed, intending and designing to injure him, and to destroy the rental value of his property, as he had been informed and believed, fraudulently and unlawfully caused the switch to be torn up and destroyed, and procured the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company then and there to break the connection between the switch and that company's track, under a threat to discontinue business connections between the two roads; and that thereupon, and by the procurement of the complainant, the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, without the knowledge or consent of the respondent, did tear up and destroy the switch track and its connections, to the great and irreparable damage of the respondent. The motion to dissolve the injunction, submitted, apparently, upon the bill and answer, without further showing on either side, was denied. The court, in its opinion (not reported), declined to express either concurrence in or dissent from the decision in the case of *Doane v. Railroad Co.*, 165 Ill. 510, 46 N. E. 520, then pending in the supreme court of the state on a petition for a rehearing, and, distinguishing this case as involving the use of the street only for a private purpose, which, like the location of a circus or a trading booth, is wholly outside of the city's governmental function, concluded as follows: "The ordinance in question is for a private switch. It is contended that this switch will be used in connection with the P., C., C. & St. L. Ry. Co., but the ordinance is for a private switch. There is no evidence that it has fallen within the control of this railroad or any other railroad company, or that it will be devoted to the public uses such railroad companies subserve. When some railroad company authorized by law as such has accepted this as one of its switches, and thus makes itself responsible for its operation for a public use as well as for damages, it will be in order to dissolve this injunction. As long as the switch remains a private switch, however, the injunction will stand."

Clarence A. Darrow, for appellant.

Burton Hanson, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

We are of opinion that the motion to dissolve the temporary injunction should have been sustained. The privilege granted by the ordinance to the appellant was to construct and maintain for ten years, between the points and on the streets named, a switch "connecting with the tracks of the Pittsburgh, Cincinnati & St. Louis Railroad Company"; and it is not alleged nor shown that the appellant had any purpose to lay down a track without that connection. By the contract alleged that company undertook to construct and to operate the switch, and did construct it, but in violation of its contract and obligation, at the instance of the complainant, severed the connection and destroyed the track. Having procured this to be done, the complainant forthwith brought its bill to prevent reconstruction. The conduct of the complainant, as disclosed in the answer, and not denied, if not in itself a bar, we cannot but regard as a serious obstacle to the granting of the relief prayed in the bill. When an appeal is to be made to a court of equity, it is hardly permissible that there shall first be a resort to force and arms, or to deceit, in order to anticipate the fruits of the suit, or to secure a more favorable position from which to conduct the litigation. To say the least, a complainant appearing in such an attitude should not be allowed the benefit of presumptions in its favor in respect to matters not alleged or proved. Without procuring the necessary connection with the Pitts-

burgh, Cincinnati, Chicago & St. Louis track, the appellant, besides being without authority, can have no motive to relay the switch; and it is not to be presumed that the railroad company, especially in view of its contract, will refuse to permit the connection to be made. If the ordinance permitting the switch to be laid is valid, or can be challenged only in the name of the city or by the public prosecutor, it is not right that the appellant should be enjoined, on the theory that only private aims were to be subserved, from relaying the switch, re-establishing its connection with the railroad track, and securing its operation by the railroad company under the agreement already made for that purpose. He ought not to be forbidden to take the steps necessary to establish the situation on which it was suggested that it would be in order to dissolve the injunction.

The merits of the appeal, it follows, must depend upon the question whether this case comes within the doctrine declared in *Doane v. Railroad Company*. We think that it does. It is true that the switch is described as private, but it was at the same time provided that the privileges granted were to be subject to all ordinances concerning railroads, and when connected, as it must be, with the track of a railroad, it will necessarily become a part thereof. It is common knowledge that in a city like Chicago such structures must be numerous. They are indispensable auxiliaries to the conduct of railroad traffic, and to the convenient doing of the business of a commercial city. They are therefore a proper subject of municipal regulation and control, and, that being so, it follows that the validity of the ordinance can be questioned, on the ground alleged, only by information brought by the attorney general or other officer acting in the name of the people of the state, or by a bill for injunction brought by the city, and that the construction and use of the switch cannot be restrained at the suit of an owner of abutting property. See, also, *Trusdale v. Sugar Co.*, 101 Ill. 561. The appeal is therefore sustained, and the cause remanded, with direction to sustain the motion to dissolve the injunction.

ASPEN MINING & SMELTING CO. v. WOOD.

WHEELER v. SAME.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1897.)

Nos. 942 and 945.

2. PARTIAL SATISFACTION OF JUDGMENT—DIRECTING EXECUTION FOR BALANCE—ASCERTAINING AMOUNT.

Where, on appeal, a final decree fixed the amount due certain heirs, directed that it be distributed according to the laws of descent of the state of Colorado, and that in default of payment executions should issue, and the solicitor thereupon entered satisfaction thereof except as to certain amounts due one heir, an order of the lower court directing the clerk to issue execution thereon to satisfy the decree so far as the right, title, claim, and demand of such heir is concerned, when he or his counsel shall file a præcipe therefor, stating therein the amount claimed, is not an order for an execution for a different amount than that named in such satisfaction, as due to such heir, nor for the amount which may be claimed in such

præcipe, but requires the clerk, from the decree and satisfaction, to compute the amount due, and insert it in the execution.

2. ORDER FOR EXECUTION—AMOUNT OF JUDGMENT—PENDENCY OF OTHER ACTION.

Where the amount the judgment defendants owe one heir is fixed by final decree in a suit to which they were all parties, no claim or bill of another can unsettle it until that decree is modified or a supplemental decree is rendered; and the pendency of such bill or claim is no reason why execution should not issue for such amount.

3. SAME—INTEREST OF ANOTHER IN JUDGMENT.

The fact that a judgment creditor has agreed to pay, or has assigned, part of the judgment to a third person, is no reason why the judgment debtor should not be compelled to pay the judgment.

Appeal from the Circuit Court of the United States for the District of Colorado.

W. H. Tripp (H. L. McNair, C. S. Thomas, W. H. Bryant, and H. H. Lee, on the brief), for appellants.

L. M. Cuthbert (Henry T. Rogers and D. B. Ellis, on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges.

SANBORN, Circuit Judge. On July 30, 1896, the final decree in this suit which was brought by Margaret Billings, formerly the widow, and James O. Wood, Charles E. Wood, Thomas E. Wood, Hiram H. Wood, and William Wood, surviving sons, of William J. Wood, deceased, against Jerome B. Wheeler and the Aspen Mining & Smelting Company, was so modified by the direction of this court that it adjudged that the widow and heirs of William J. Wood, whom we have named, should recover from Jerome B. Wheeler \$195,252.97, and interest from July 16, 1894, and from Jerome B. Wheeler and the Aspen Mining & Smelting Company \$209,328.95, and interest from July 16, 1894; that Wheeler and the mining company should pay these amounts in 30 days; that in default of payment thereof within that time execution should issue therefor in the ordinary form; and that these amounts should be apportioned and paid to this widow and these heirs according to their respective interests therein as heirs of William J. Wood, deceased, under the laws of descent of the state of Colorado. On the next day the solicitor for the complainants in this decree filed a complete satisfaction of it, signed by himself as such solicitor, "except as to the following amounts remaining due to the complainant James O. Wood: From the defendant Jerome B. Wheeler, \$6,973.32, besides the interest thereon from July 16, 1894; from the defendants Jerome B. Wheeler and the Aspen Mining & Smelting Co., jointly, \$7,476.04, besides interest thereon from July 16, 1894." On February 27, 1897, the court below ordered its clerk to issue an execution to the marshal of the district of Colorado, commanding him "that out of the property, goods, chattels, and effects of the said respondents Jerome B. Wheeler and the Aspen Mining & Smelting Company he make and collect a sufficient amount to pay, satisfy, and discharge" this decree "so far as the rights, title, claim, and demand of said complainant James O. Wood thereunder are concerned, and for the purpose of paying and discharging the amounts justly due thereunder to the said com-

plainant James O. Wood, at and upon the filing with said clerk by the said complainant James O. Wood, or his counsel, of a præcipe for said writ, stating therein the amount claimed by the said complainant James O. Wood to be justly due and owing him" under the decree. From this order Wheeler and the Aspen Mining & Smelting Company have appealed. Their objections to it will be very briefly noticed, for they are entitled to no extended consideration. They are:

1. That the order is erroneous because it directs the clerk to issue an execution for such an amount as the appellee shall claim in his præcipe. But the order contains no such direction. It is that the clerk shall issue an execution for the amount justly due to the appellee when the latter files a præcipe showing the amount he claims. The law, the decree, and the satisfaction which the complainants' solicitor filed are the sources from which the clerk must ascertain the amount to be inserted in the execution, and the order neither directs nor assumes that he will obtain it from any other source. The filing of the præcipe merely fixes the time when the execution shall issue, and indicates the amount which the appellee claims.

2. That the decree is joint, and the satisfaction on behalf of some of the complainants satisfies it as to all. But this proposition has no support either in reason or in authority.

3. That one William H. Wood has filed a supplemental bill against the appellants, that proceedings are to be had under it as a separate and distinct suit, and that until the final determination of the proceedings in that suit the amount due to the appellee will remain unsettled and uncertain. But the amount which the appellants owe James O. Wood has been settled and determined by the final decree in this suit, to which they were all parties, and no bill or claim of another can disturb or unsettle it until that decree is modified or a supplemental decree is rendered.

4. That one J. H. Casserleigh filed a notice in this suit from which it appears that he claims to be entitled under a contract with the appellee to one-third of the amount which he may recover under this decree. But Casserleigh is not a party to this suit, and the fact, if it be a fact, that the appellee has agreed to pay, or has assigned, one-half of the amount of the money which he is to recover from the appellants, is no reason why they should not pay the amount of their debt. When they have paid to the marshal the sum which this decree adjudges them to owe to James O. Wood, he and Casserleigh may litigate the question of its distribution, if they choose, but neither of them can again collect any of that debt from the appellants.

5. That the court had no power to issue executions for any other amounts than those named in the satisfaction filed by the solicitor of the complainants. But the court had both the power and the right to direct its clerk to examine both decree and satisfaction to compute the amounts which remained due to the appellee under them, and to insert those amounts in the executions. It was under no obligation to perform this clerical labor itself. The order below is affirmed, with costs.

WHITEMORE v. PATTEN et al.

(Circuit Court, S. D. California. November 15. 1897.)

No. 687.

1. EQUITY PLEADING—EXCEPTIONS TO ANSWER—AMENDMENT.

Prayers to exceptions taken to an answer being purely matter of form, where objection is made on the ground of their omission leave may be given to supply them by amendment.

2. SAME—ANSWER—IMPERTINENCE.

Allegations by defendants that the plaintiff in a bill for an accounting respecting his employment by defendants as agent to sell machinery on commission violated his contract of agency, by neglecting the business, to the damage of defendants, sets out a purely legal demand, not pleadable in an answer to the bill.

3. SAME—MATTERS FOREIGN TO ISSUES.

An allegation in an answer that plaintiff brought the suit in a state distant from that of defendants' residence for the purpose of harassing them, and involving them in large expense, is impertinent.

Bill for an accounting filed by Charles A. Whittemore against William H. Patten and Norman Stafford, co-partners as Patten & Stafford. Heard on exceptions to answer.

Haines & Ward, for complainant.

Trippet & Neale and Oscar A. Trippet. for defendants.

WELLBORN, District Judge. This is a suit for an accounting as to transactions had under a contract, of which the following is a copy:

"This agreement, made this eighth day of Sept., 1885, by and between Wm. H. Patten, Norman Stafford, and John E. Myer, all of Canastota, in the state of New York, co-partners under firm name of Patten, Stafford and Myer, doing business in said Canastota, and Charles A. Whittemore, of Melrose, Massachusetts, witnesseth: That said Patten, Stafford and Myer, in consideration of the promises of said Whittemore hereinafter set forth, do hereby appoint said Whittemore their general agent for the states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island, for the sale of their New York Champion Rakes manufactured by said Patten, Stafford and Myer. Said appointment by said Patten, Stafford & Myer is subject to the following conditions: Said Whittemore is to canvass thoroughly, either by himself or by sub-agents to the above named territory, for the sale of the above-named rakes. He is to use his best possible endeavors to sell said rakes, and to take all possible precautions to sell to responsible parties only. He is to forward all orders taken to said Patten, Stafford & Myer, and to collect and settle all accounts, except as provided below. Said Patten, Stafford & Myer agree to send out to all purchasers of said rakes true and accurate statements of their several accounts, and to use their best endeavors to make collections of all said accounts, to the extent that it can well be done by correspondence from their office. In the event of any litigation being made in the collection of any of said accounts, said Patten, Stafford and Myer agree to bear one-half of the legal costs of such litigation. For said services of said Whittemore, said Patten, Stafford and Myer agree to allow said Whittemore, as compensation, one-half ($\frac{1}{2}$) of the surplus over and above sixteen (\$16.00) dollars for each thill rake, and one-half ($\frac{1}{2}$) of the surplus over and above eighteen (\$18.00) dollars for each rake with pole and whiffletrees; and it is mutually agreed that the prices above stated apply to the said goods free on board the cars at said Canastota. In consideration of the above, said Whittemore agrees to become the general agent of said Patten, Stafford & Myer for the territory above named, and for the purposes above described. He agrees to use his best endeavors to canvass

thoroughly said territory, either by himself or his subagents; to use all possible precautions to sell to responsible parties only; to send all orders to said Patten, Stafford & Myer; and to make the collections of all claims in his territory not made by said Patten, Stafford & Myer from their office as provided above, bearing one-half of all legal costs of litigation incurred in such collections. He further agrees to accept said sums before mentioned as his compensation for said services. It is further mutually agreed that the accounts between the parties hereto shall be adjusted upon the first day of October of each year during the continuance of this contract; that all accounts outstanding in said Whittemore's territory shall be settled as far as possible by that date. It is also mutually agreed that said Whittemore shall have and receive the same profit upon all sales made in territory which has been worked by said Whittemore in accordance with conditions of this contract, whether the same be made by said Whittemore or his subagents, or by said Patten, Stafford and Myer. In adjusting the accounts between said Whittemore and said Patten, Stafford and Myer, the losses occasioned by bad debts, whether the same be in form of notes or otherwise, shall be borne equally by the parties hereto, and the amount of said losses to be borne by said Whittemore shall be deducted from the amount due him as compensation on the basis of the above-named prices. It is further agreed that, in case notes are taken in settlement of accounts, said Whittemore is to accept in settlement of his compensation above named such proportion of said notes as the amount of such compensation bears to the totals of such accounts. This contract is to be renewed from year to year at the pleasure of said Whittemore, provided said Whittemore faithfully fulfills the conditions thereof to be kept by him, and subject to such necessary changes and revisions of prices as the condition of trade and manufacture may allow or require. In testimony whereof, the above-named parties hereto set their hands and seals, and to our other instrument of like tenor and date, the day and year first above written. (I have interlined above in one place.)

"[Signed]

Patten, Stafford & Myer.
"Charles A. Whittemore.

"In presence of

"E. L. Mason.

"F. N. Coghlan."

The bill alleges, among other things, that in 1892 defendants, Patten and Stafford, purchased the interest of John E. Myer in the partnership of Patten, Stafford & Myer, and thereafter, and up to October 1, 1894, continued said business, including that covered by said contract with complainant, under the firm name of Patten & Stafford; that during the continuance of said contract, up to the date last mentioned, said Patten & Stafford accepted complainant's services under said contract; that, on said last-named date, complainant sought to renew said contract in the manner therein provided, and was able and ready to perform all the conditions of said contract on his part, but that defendants refused to renew said contract, or to permit complainant to act as their agent as therein provided. Complainant prays for an accounting as to the business transacted under said contract during the years ending October 1, 1893, October 1, 1894, and October 1, 1895. Defendants have answered the bill, and to their answer complainant has filed numerous exceptions,—14 for insufficiency, and 2 for impertinence. These exceptions do not contain any prayers, but set out verbatim the particular charges in the bill, which it is claimed are inadequately answered, and also the terms of the answers to such charges. The other facts material to the exceptions are stated later on in this opinion.

Defendants object to the hearing of the exceptions on their merits, for the reason that the grounds of the exceptions are not set out with requisite fullness. This objection, I think, is untenable. The rule formerly on this subject, as announced by high authority, was as follows:

"An objection to an answer for insufficiency should state the charges in the bill, and the interrogatories applicable thereto, to which the answer is responsive, and then the terms of the answer, verbatim, so that the court may see whether it is sufficient or not." *Brooks v. Byam*, 1 Story, 296, 4 Fed. Cas. 258; *Crouch v. Kerr*, 38 Fed. 549; 1 *Daniell*, Ch. Pl. & Prac. (6th Ed.) p. 764.

This rule, however, has necessarily undergone a modification, so far as the interrogatories are concerned, in consequence of the order of the supreme court at the December term, 1850, repealing equity rule 40, and dispensing with interrogatories except when complainant desires them to obtain a discovery. See *Hoff*, Ch. Prac. pp. 246, 247. The exceptions are sufficiently explicit.

Defendants further object to the form of the exceptions, for the reason that they are without prayers. In answer to this objection, complainant's counsel state that, in preparing the exceptions, appropriate prayers were omitted through inadvertence, and now asks leave to supply such omissions by suitable amendments. Since the prayer, which constitutes part of an exception to an answer, is purely a matter of form, the leave asked for will be granted.

Defendants seek to justify those parts of the answer challenged by exceptions 2, 3, 4, 5, 6, and 7 on the ground that they have no information or belief as to the matters inquired about, and that such lack of information and belief results from the fact that the business for any one year, as the same was conducted under the contract sued on, was not settled and closed up at the end of each year, but was carried over from year to year, so that it is impossible to determine just how much business should be credited to any one year. This contention is vulnerable. One of the allegations in question, for instance (and it illustrates the others), is that the defendants during the year ending October 1, 1893, sold, pursuant to the contract sued on, 1,805 rakes, for the aggregate sum of \$31,072.54, etc. Defendants simply deny that they sold 1,805 rakes for the sum of \$31,072.54. This denial might be strictly true, and yet the defendants may have sold 1,800 rakes for an aggregate price of \$31,000. Such a denial manifestly does not meet the allegation to which it is addressed, and cannot be justified for lack of information and belief, because, presumably, the number of rakes sold, and the prices for which they were sold, during the year mentioned, are within the knowledge of the defendants, and in no wise affected by the continuity of the business through subsequent years.

The allegations of the bill to which the eighth exception relates, though different in some particulars, are similar in character to the allegations referred to in the ninth, eleventh, twelfth, and thirteenth exceptions, and are as follows:

"That said contract, as originally drawn, contained the following clause respecting the compensation of your orator for his services as the general agent of the defendants in the sale of rakes under said contract, to wit: 'For the said

services of said Whittemore, said Patten, Stafford and Myer agree to allow said Whittemore, as compensation, one-half ($\frac{1}{2}$) of the surplus over and above sixteen (\$16) dollars for each thill rake, and one-half ($\frac{1}{2}$) of the surplus over and above eighteen (\$18) dollars for each rake with pole and whiffletree; and it is mutually agreed that the prices above stated apply to the said goods free on board the cars at Canastota.' And that said terms of compensation are by the last clause of said contract set forth in 'Exhibit A,' hereinbefore quoted, expressly made 'subject to such necessary changes and revisions of prices as the condition of trade and manufacture may allow or require.' And your orator further shows that the conditions of trade and manufacture of said rakes during the year ending October 1, 1893, made necessary such changes and revisions of the said prices named in said contract as to make your orator's profits and compensation for said year one-half of the surplus of the proceeds of said rakes so sold within said territory over and above an average base price of \$13 'free on board the cars at Canastota,' New York, for each of said 1,805 rakes sold by him during said year."

Defendants answer said allegations as follows:

"Defendants deny that the said terms of compensation are by the last clause of said contract expressly made 'subject to such necessary changes and revisions of prices as the conditions of trade and manufacture may allow or require,' but admit that such words are to be found in the contract. These defendants further deny that the conditions of trade and manufacture of said rakes during the year ending October 1, 1893, made necessary such changes and revisions of the said prices named in said contract as to make complainant's profits and compensation for said year one-half of the surplus of proceeds of said rakes so sold within said territory over and above an average base price of \$14 free on board the cars at Canastota, N. Y., for each of the 1,805 rakes alleged to have been sold by him during said year."

The allegations to which the tenth exception relates, are as follows:

"And your orator further shows that the conditions of trade and manufacture of said rakes during the year beginning October 1, 1894, made necessary, for the purpose of computing and ascertaining your orator's just profits and compensation under said contract for said year, such changes and revisions of said prices for rakes named in said contract as to fix the average base price of \$11 for each of said rakes so sold by said defendants within said territory during the year last mentioned."

The defendants answer said allegations as follows:

"The defendants further deny that the conditions of trade and manufacture of said rakes during the year beginning October 1, 1894, made necessary, for the purpose of computing and ascertaining the complainant's just profits and compensation under said contract for said year, such changes and revisions of prices for rakes named in said contract as to fix the average base price of \$11 for each of said rakes so sold by said defendants within said territory during the year last mentioned."

Defendants insist that the allegations of the bill above quoted, and to which those parts of the answer above quoted are responsive, proceed upon an erroneous conception of said contract, and that, therefore, defendants should not be required to answer said allegations more fully, or otherwise than they have already done. Whether or not the bill is defective in assuming that the contract provides for a "base price" or an "average base price," or that there could be, under the contract, changes or revisions of prices for a particular year, without such changes or revisions having been agreed upon by the parties at renewals of the contract, or at other times subsequent to its date, I will not now undertake to decide. The present hearing is not a suitable one for determining the sufficiency or insufficiency

of the bill in the respects named, and said allegations, therefore, should be fully answered.

The fourteenth exception is as follows:

"(14) For that whereas the bill charges, on pages 9 and 10 thereof, the following: 'And your orator shows that all the matters and things in his foregoing bill make a connected series of transactions, and involve a continuous accounting.' The answer to the said averment is in words following, to wit: 'For a fourth and separate defense to the cause of action alleged in the repleaded bill of complaint, defendants allege, on information and belief, the making of the contract Exhibit A between the plaintiff and the defendants and John E. Myer, as hereinbefore fully set forth, and as though set out fully in this count. And defendants further allege that, during the continuance of the business under contract Exhibit A, it has been the practice of having partial settlements in the fall months of each year; that, in said partial annual settlements, all accounts which had been paid in cash to the defendants, or collected by the plaintiff on account of the defendants, were ascertained and settled; that many of the accounts made in the preceding year or years had not, at the time of such settlements, been collected, and some of them in each year were uncollectible and worthless; that it was impossible to make complete annual settlements at the close of each year, so as to wholly close up the accounts made in the previous year; and that the annual settlements and accounts which had been carried over and uncollected when previous settlements were made included any cases where collections on such accounts had been made from year to year in the succeeding year's settlement. Defendants further allege that they have now collected, balanced, and closed up all the accounts to and including the month of September, 1894, and prior thereto, of all rakes sold in the New England territory, either by the plaintiff, his subagents, these defendants, or otherwise, and that, upon balancing up and closing up said accounts to this date under said contract Exhibit A, there is still due these defendants from this complainant the sum of \$95.47, money collected by this plaintiff over and above all commissions, reductions, discounts, or bad debts, legal proceedings, or otherwise, and the expense of collecting the same, and the plaintiff is now indebted to these defendants in the sum of \$95.47, growing out of transactions and sales of rakes in the New England territory under said contract Exhibit A up to September, 1894.'"

That part of the answer objected to here (that is, in the fourteenth exception) does not purport to be a response to the allegation of the bill mentioned in said exception. Moreover, said allegation is simply to the effect that the transactions set forth in the bill form a connected series, which involve a continuous accounting. It will be observed that this allegation does not pretend to assert anything in regard to the particulars of the transactions, nor call for any answer from the defendants as to such particulars. The answer proceeds upon the theory, and avers, substantially, if not in terms, that the transactions referred to are a connected series, involving a continuous accounting. Thus far it meets fully the charge of the bill. The other matters, namely, partial settlements in the fall months of each year, and the final balancing of all accounts up to September, 1894, with its result, are new and affirmative, and not subject to exception. 1 Enc. Pl. & Prac. 898. Therefore, treating that part of the answer now under consideration as a response to the allegation in question, it is not only sufficient, but contains more than the allegation calls for.

That part of the answer to which the first exception for impertinence relates is as follows:

"The defendants, for a third and separate defense to the cause of action alleged in the repleaded bill of complaint, allege, on information and belief, that

on or about the 8th of September, 1895, that the plaintiff and these defendants, together with one John E. Myer, a member of the firm of Patten, Stafford & Myer, to which the defendants are successors, entered into a contract, a copy of which is attached to the complaint, and marked 'Exhibit A,' and made a part hereof, as though fully set out herein; that in and by said contract the complainant agreed to become the agent of the defendants, in and for the territory of the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut, for the sale of harrows, hay rakes, and to thoroughly canvass, by himself or by subagents, the said territory, and to use his best possible endeavors to sell said hayrakes, and to take all possible precautions to sell to responsible parties only; and that said Whittemore entered upon the performance of said contract, and continued for a time to perform the same; and that in the year 1892 this complainant abandoned the territory in which he had the right to sell and agreed to sell horse hayrakes under the contract Exhibit A, and removed to the state of California; and that while the defendants were led to believe by the plaintiff, and did believe, that the plaintiff would return and take up the work under the contract in the New England States, and notwithstanding this expectation, the plaintiff neglected to return, and never has returned, to take up the work in said territory, as provided by said contract Exhibit A, but turned the same over to one G. E. Bryant, of Knox, Maine, who had no practical experience with the trade, and was young in years and in business experience, and did not have the requisite skill and experience to handle the trade in the territory, which the long experience and skill of the plaintiff would enable him to do in the same territory, and in consequence of lack of attention, and the plaintiff not using his best endeavors to sell all of such rakes that he could in said territory of the New England States, and the plaintiff not canvassing thoroughly the said territory, as provided by said contract Exhibit A, defendants' business in said territory was greatly curtailed, hampered, injured, and damaged, to the extent of \$2,000, at least. These defendants further allege, upon information and belief, that had the plaintiff used his best endeavors to thoroughly canvass the territory of the New England States, as agreed by said contract Exhibit A, and as he was in duty bound to do under said contract, and sell all of the rakes that he could, that the defendants' business would have been largely increased in said territory, and the defendants would have received at least \$2,000 more profits from sales of rakes in said territory during the year 1892 than they did receive from said territory, on account of the want of attention and the neglect of this plaintiff."

The matters and things set up in the third subdivision of the answer above quoted constitute a purely legal demand, and therefore are not proper in an answer to a bill in equity. *Lautz v. Gordon*, 28 Fed. 264; *Story*, Eq. Pl. § 398; 5 Enc. Pl. & Prac. 645-647. Moreover, if said matters were of equitable cognizance, since affirmative relief is sought on account of them they are pleadable only in a cross bill. The supreme court of the United States has said that:

"A cross bill is proper whenever the defendants, or any or either of them, have equities arising out of the subject-matter of the original suit which entitle them to affirmative relief which they cannot obtain in that suit." *Kingsbury v. Buckner*, 134 U. S. 650-658, 10 Sup. Ct. 638; 2 Daniell, Ch. Pl. & Prac. (6th Ed.) p. 1550, with citations made in note 2; 5 Enc. Pl. & Prac. p. 632; *Langd. Eq. Pl. § 125; Story, Eq. Pl. § 389.*

That part of the answer objected to by the second exception for impertinence is as follows:

"The defendants, further answering, allege that the alleged cause of action in the bill of complaint accrued in the state of New York, and relates to matters within the state of New York, and the Eastern states of the United States; that the complainant has brought this action in the state of California for the purpose of harassing these defendants, and involving them in a large amount of expense for traveling expenses and attor-

ney's fees necessitated in defending this suit at such a great distance from the point where the alleged contract was made, and the business was to be carried on and transacted under said contract; and the defendants allege that the complainant has brought this suit in this court in the state of California with a view of harassing them and embarrassing them in the defense of the suit, and pursuant to threats and declarations so to do, made a long time previous to the commencement of the suits, and that, in carrying out such threats and unjust and inequitable procedure, the complainant has caused an attachment to issue against property sold by the defendants in the state of California, and the proceeds growing out of said sales."

The matters set up in this last quotation are foreign to any issue in the case. The fourteenth exception will be disallowed, the others will be allowed.

Supplement to Opinion of the Court on Exceptions to the Answer.

(November 22, 1897.)

The fourteenth exception was for insufficiency only, and my ruling on said exception announced in the opinion heretofore filed relates exclusively to that ground of the exception. In view of what is elsewhere said in that opinion, however, as to the necessity for a cross bill where affirmative relief is sought, it should have been further stated, in connection with the fourteenth exception, that the matters set forth in that part of the answer to which said exception relates are not such as require a cross bill. A suit for accounting is peculiar, in this: that if it finally appears, from the account taken, that the balance is in favor of the defendant, the court will give him a decree for the amount thus found to be due him, without a cross bill. 1 Fost. Fed. Prac. § 171; 1 Enc. Pl. & Prac. 99. Such balance, therefore, is pleadable in an answer.

WAGNER TYPEWRITER CO. v. WATKINS et al.

(Circuit Court, S. D. New York. December 13, 1897.)

PATENTS—LICENSES—FORFEITURE—FAILURE TO PAY ROYALTIES.

An exclusive license to make and sell was granted in consideration of the licensee's agreement to pay the patentee \$2,000 within three days, and \$3,000 one month thereafter; "otherwise this agreement to be forfeited within ten days after such default." Provision was then made for royalties of \$4 on each machine; the minimum amount of royalties, however, to be \$2,400 annually. *Held*, that the provision for forfeiture applied only to the preliminary cash payments, and that the license could not, upon the facts proved, be forfeited for nonpayment of the royalties, in the absence of any express provision therefor.

This was a suit in equity by the Wagner Typewriter Company against William E. Watkins and others to remove a cloud upon the title to certain letters patent.

This is an equity action to remove an alleged cloud upon the title of the complainant to letters patent, No. 523,698, granted July 31, 1894, to Franz X. Wagner, as assignee of the inventor, Herman L. Wagner, for an improvement in typewriting machines. The second amended bill, upon which issue was joined, asks for an injunction restraining the defendants from working under the Wagner patent and from asserting or transferring any title thereto. The bill asks further that a certain license agreement, dated February 20, 1894,

be declared forfeited and void, that the defendant Watkins be restrained from asserting or transferring any rights thereunder, and that the defendants be decreed to pay the sums of money due under said license. The principal contention arises over this agreement which was made after the patent had been allowed, but five months before it was actually issued. The agreement is as follows:

"For and in consideration of one dollar to me in hand paid, the receipt of which is acknowledged, I hereby give and grant to W. E. Watkins of Upper Montclair, N. J., his heirs, administrators and assigns, the sole and exclusive right to manufacture and sell anywhere in the world the visible writing typewriter (patents on which were allowed January 9, 1894), of which I am the inventor. The said W. E. Watkins agreeing to pay me on Friday, the 23d day of February, two thousand dollars (\$2,000) in cash, and on or before the 23d day of March, 1894, three thousand dollars (\$3,000) in cash, otherwise this agreement to be forfeited within ten days after such default in payment has been made; and, thereafter, to begin on the last day of December, 1894, a royalty of four dollars (\$4.00) on each machine sold by the said Watkins; the said Watkins agreeing to pay me a royalty of not less than twenty-four hundred dollars (\$2,400) per year. The said Watkins, his heirs, administrators or assigns is also to have the right, any time within a year from this date, to pay me a lump sum of fifteen thousand dollars (\$15,000) in cash. In lieu of all royalties, and I agree for myself, my heirs, administrators and assigns on said payment to make due and legal assignment of all patents, both United States and foreign, covering all the parts in said machine, to said Watkins. I also agree to make application for such additional patents, for any and all improvements already made by me on said typewriter, both United States and foreign, as said Watkins may at any time desire, and upon payment of above sum of fifteen thousand dollars to make due and legal assignment of the same to the said Watkins. The said Watkins agreeing to pay all the expenses in the prosecution of said application for patents. It is understood and agreed that any royalties accruing to me between December 31, 1894, and the day of acceptance by Watkins of the right to pay me the above sum of \$15,000 shall be paid to me in addition to the fifteen thousand dollars. Witness my hand and seal this 20th day of February, 1894.

"[Signed]

Franz X. Wagner. [Seal.]
"W. E. Watkins. [Seal.]"

On the next day, February 21, 1894, Watkins for and in consideration of \$5,000 transferred "a full and undivided one-third interest" in and to the license of February 20th, to John T. Underwood, and on the 23d day of February, 1894, he assigned another one-third interest to Charles F. Lantry. On the 10th of August, 1894, in consideration of \$5,300 Franz X. Wagner assigned to Frank E. Hagemeyer and Charles H. Luddington, Jr., "the said invention embraced in said letters patent," and guaranteed that the patent was unincumbered, except by the license of February 20, 1894. On the 3d of January, 1896, Hagemeyer wrote the defendant Watkins stating that all of Wagner's interest in the patent had been transferred to him (Hagemeyer), and demanding the payment of \$2,400 due for royalties December 31, 1895. On the 5th of February, 1896, Hagemeyer assigned all his interest in the said letters patent to the complainant. On the 7th of February, 1896, Franz X. Wagner and Herman L. Wagner assigned to the complainant, the Wagner Typewriter Company, all their right, title and interest under the agreement of February 20, 1894, "including all rights to royalties under a certain invention designated in said instrument as a visible typewriting machine, together with any and all rights which either of said Franz X. or Herman L. Wagner may have for a forfeiture of the said agreement of February 20, 1894, aforesaid, and the rights thereunder, for a failure to pay said royalties, or otherwise." On the same day—February 7, 1896—Underwood and Lantry transferred to complainant all the rights which they possessed by virtue of the transfers to them from Watkins of February 21st and February 23d of a one-third interest to each in the license agreement. On the 5th of February, 1896, Luddington wrote to Hagemeyer's attorney as follows: "I have or make no personal claim upon any interests or rights that were assigned or conveyed to me by the assignment from Franz X. Wagner to Mr. Hagemeyer

and myself dated August 10, 1894, or the assignment from Franz X. and Herman L. Wagner to Mr. Hagemeyer and myself of the same date. The interests and rights that passed to me under these instruments belong to Mr. William E. Watkins, and were placed in my name for the protection of Mr. Hagemeyer pending the repayment to him of the moneys which he expended for the purchase of the Wagner patents, as is evidenced by the agreement between Mr. Hagemeyer, Mr. Watkins and myself dated August 10, 1894." A copy of an agreement (Exhibit 6) made between Luddington and Watkins, but without date or signatures, was offered in evidence, and substantiates the statements of the foregoing letter. By the terms of the agreement Luddington declared that he held the one-half interest in the letters patent as trustee for Watkins, and agreed to convey to Watkins when \$500 had been paid to him and when Hagemeyer had been reimbursed for the moneys which he had expended. Watkins made the first two payments provided for by the agreement of February 20, 1894. The amount was reduced by a contemporaneous understanding between the parties, but, in legal contemplation, the payments were made as stipulated. Watkins never manufactured or sold under the license and has never paid a dollar of royalty to any one. This action was originally brought in the supreme court of New York on the 14th day of March, 1896. At that time there was owing for royalties the sum of \$2,400, due December 31, 1895. The complainant has invested large sums of money in the business, and is engaged in manufacturing typewriting machines under the Wagner patent. The defendant Watkins insists that he is the owner of rights under the patent, and that he is entitled by virtue thereof to manufacture and sell typewriting machines embodying the invention of the patent. In short, the complainant contends that the agreement of February 20, 1894, is forfeited and void; the defendant Watkins denies this, insisting that it is in full force and is not subject to revocation.

Arthur v. Briesen and Charles Strauss, for complainant.
Charles E. Hughes, for defendant.

COXE, District Judge (after stating the facts). This record presents a legal tangle which is unique and unprecedented. To define with perfect accuracy the rights of all the parties involved in this snarl of titles is a problem the solution of which can hardly be expected of a merely finite intellect. It is thought, however, that the issues involved may be disposed of without attempting so formidable a task. It is unnecessary to consider the testimony relating to the cash payments provided for by the agreement of February 20, 1894, for the reason that the complainant's brief concedes that Wagner received a sufficient amount "to estop him from claiming that he has not been paid." The source from which Watkins procured this money and his alleged indirection towards others in connection therewith are questions wholly immaterial to this dispute. It is enough that the licensee paid to the licensor the full amount agreed on between them. This sum being paid there can be no forfeiture under the written stipulations of the agreement. The only provision for a forfeiture has reference to a default in making these preliminary payments. As the payments were made, the clause providing that in case of nonpayment "this agreement to be forfeited within ten days after such default" never became operative. It is said that Watkins failed to keep the agreement for the reason that he did not pay the expenses incident to the application for additional patents. This proposition cannot be maintained. It is unable to stand alone either on the facts or the law. The license only required the payment of the expenses of such patents "as said Watkins may at any time de-

sire." He was only obligated to pay for such patents as he expressly desired and requested, and no others. The clause in the Luddington agreement is entirely too vague and general to cover the expenses now under consideration, and in no event does it inure to the advantage of the complainant. But on the facts it appears that Watkins has expended and rendered himself liable for several hundred dollars in procuring additional patents. An attempt is made to show that Watkins is acting in hostility to the Wagner patent because he threatened to sue the complainant for infringing some other patent owned by him. Without knowing what his patent covers, it is impossible to make a definite finding that the act of his solicitor in writing to the complainant was in any way hostile to the Wagner patent. It is thought, therefore, that the rights of the parties must be determined upon the written transfers alone, and that the extrinsic evidence is largely irrelevant and throws little light upon the real issue, which is aptly stated by the complainant's counsel as follows:

"What equitable rights has Watkins in said agreement? (of February 20th.) Has he forfeited them? Should the agreement be canceled as to him on complainant's prayer?"

And again,

"The principal contention in this litigation is that Watkins, wholly failing to pay the royalties and moneys due under the agreement of February 20, 1894, has forfeited his rights under said license agreement, and that therefore the court is asked to rescind the same so far as Watkins is concerned."

By the agreement of February 20th Watkins is given the exclusive right, during the life of the patent, to manufacture and sell the patented typewriter. Wagner retained the right to use, but this right, in view of what had previously been conveyed, would seem to be of no practical value. An option was given to Watkins to purchase, within a year, all the Wagner patents for \$15,000, but the option was never exercised. Watkins did not obligate himself to manufacture and sell any given number of machines, but his failure to sell was guarded against by a provision that he should pay a royalty of not less than \$2,400 annually. So that the agreement, so far as applicable to the patent controversy, was an exclusive license to Watkins to manufacture and sell upon the payment of a yearly royalty of \$2,400. As long as this license was in force the entire interest in the patent remained in Watkins. All that Wagner retained was the right to use any machines which he then possessed. The agreement of August 10, 1894, seems to be regarded by both parties as an assignment of the title of the patent to Hagemeyer and Luddington together with the right to collect royalties under the February license. If this be the correct construction, and the court is inclined to the opinion that it is, Wagner retained no interest in the patent of the least value, and the right to demand and receive the royalties vested in Hagemeyer under the tripartite agreement referred to in the letter of Luddington of February 5, 1896.

The effect of the conveyances thus far considered was to vest the entire interest under the patent in Watkins and Hagemeyer. Wagner had no longer any interest. Watkins held an exclusive license

to make and sell, and an undivided half interest in the invention, which was held in trust for him by Luddington, who agreed to convey to Watkins when Hagemeyer was paid the amount due him and he (Luddington) was paid \$500. Hagemeyer had an undivided one-half interest in the invention, and a lien on Watkins' interest until his debt for advances was discharged. In January, 1896, Hagemeyer demanded the royalties accruing December 31, 1895, and in February, 1896, he assigned all his interest in the patent to complainant. On the 7th of February, 1896, Franz X. Wagner and Herman L. Wagner, neither of whom had any tangible interest in the license to Watkins, assigned to the complainant "all their right, title and interest" therein. It will be observed that from the transfers thus far discussed the complainant obtained no right to manufacture and sell, but only the right to use the patented machine. The Hagemeyer assignment to the complainant makes no mention of any right to collect royalties, and, admitting that it conveyed the right to collect future royalties, it could hardly have been the intention to assign the \$2,400 obligation then due, for Hagemeyer had made a formal demand only a month before requiring Watkins to pay to him. The same observations would apply to the assignment from Wagner to Hagemeyer were it not that at that time—August, 1894—nothing was due under the Watkins license, and all the parties to the assignment understood that the transfer of the royalties was the consideration for the \$5,300 paid. Wagner swears to this expressly; that Hagemeyer so understood it is plain from his demand, and it is also conceded by complainant. Watkins never denied the obligation. The most favorable view of the complainant's interest as thus far examined gives it an undivided interest in the right to use the patented machine, and a right to collect royalties coming due after February 5, 1896. The complainant gets its right to manufacture and sell direct from Watkins, he having assigned a two-thirds interest in the license of February 20, 1894, to Underwood and Lantry, and they having assigned to the complainant in February, 1896. If, as the complainant contends, the license was forfeited by the nonpayment of royalty in December, 1895, it may be pertinent to inquire how the complainant could obtain any valid rights thereunder in February, 1896. Assuming that the license is not forfeited, then the complainant has

First. An undivided interest in the patent, carrying with it a right to use the patented machine.

Second. The right transferred by Hagemeyer to collect the royalties due after February 5, 1896, and

Third. A two-thirds interest in a license giving it the right to manufacture and sell the patented machine.

All of the interests not owned by the complainant are owned by the defendant Watkins either individually, or as beneficiary under the Luddington trust.

If it be held that the license is forfeited there still remains the Luddington interest, which it would seem may yet be acquired by Watkins on paying the amounts due to Hagemeyer and Luddington. The court is unable to see how in any event this interest can be confiscated, and Luddington be compelled to convey to the complain-

ant, in the teeth of his agreement to make no assignment "except upon the consent of said Watkins." Is the license forfeited? The complainant expressly concedes the rule "that a mere nonpayment of a license fee does not entitle a party to a decree of annulment," and this is undoubtedly the law. Walk. Pat. § 308. As before stated, there is in the agreement of February 20th, no express stipulation that forfeiture shall follow a breach of the agreement to pay royalties. The only royalty coming due prior to the commencement of this suit, was, on December 31, 1895. Assuming that Hagemeyer, as the owner of a half interest in the patent, could, without the consent of the owner of the other half, declare the license forfeited, he did not do so. He simply demanded that Watkins should pay to him. So far as appears from the proof, Hagemeyer still retains this chose in action against Watkins. Certainly he never transferred it to the complainant. It is not easy to perceive upon what theory the complainant can ask for a forfeiture, and especially in view of the apparent affirmance of the license by the demand in the bill "that the defendants may be decreed to pay to your orator the sums of money due under the said agreement of February 20, 1894." It might with some plausibility be argued, in view of the interest of the other parties in the license, that Hagemeyer had no right to require that the full amount of the royalty should be paid to him, and, therefore, that his demand of January 3d, was inoperative. It is, however, unnecessary to consider this and similar questions, and it is only mentioned to show the complex and anomalous character of the situation, and the difficulty which surrounded all the parties in asserting and maintaining their respective rights. The court has failed to find proof that any one, whether he had the right to do so or not, prior to the commencement of this action, elected to declare the license forfeited. No notice of that character was ever served upon the defendant Watkins. The only obligation resting upon Watkins under the license agreement was to pay the royalty due December 31, 1895. This sum he has not paid. No one has asked him to pay it but Hagemeyer, and the demand was not coupled with a notice that the license would be forfeited in case of nonpayment. If Hagemeyer had the right to make the demand and give the notice, he did not exercise it. No one else has done so. The court fully appreciates the unfortunate position in which the complainant is placed by what it terms the "dog-in-the-manger policy" of the defendant, but, after examining the case in all its aspects, the court is constrained to hold that the complainant's title is too obscure to warrant the decree prayed for. To say the very least, the complainant's title to all the rights under the patent is doubtful, and a forfeiture should not be declared in a doubtful case. The bill is dismissed.

THORPE v. SAMPSON et al.

(Circuit Court, S. D. California. October 5, 1897.)

No. 712.

1. MARRIED WOMAN—SEPARATE ESTATE.

In 1884 certain land in California, known as lots B and C, was conveyed to one C., a married woman, by a deed which did not recite that it was conveyed to her as her separate estate; but the consideration paid was money derived by her from the sale of a certain "lot 13," which had theretofore been conveyed to her by her husband by a quitclaim deed which was solely upon the consideration of "love and affection." *Held*, that lot 13 was the separate property of the wife, and that, therefore, lots B and C, being bought with the proceeds thereof, were also her separate property.

2. QUIETING TITLE—SUIT AGAINST EXECUTOR—CALIFORNIA STATUTE.

It is a clear implication from Code Civ. Proc. Cal. § 1452, that an heir or devisee shall not maintain an action against the executor or administrator to quiet the title to the real estate of the decedent.

3. SAME—JURISDICTION—FEDERAL AND STATE COURTS—PRIORITY.

The rule that, where two courts have concurrent jurisdiction over the same subject-matter, the one before whom proceedings are first commenced, and whose jurisdiction first attaches, will be left to determine the controversy, applies, irrespective of statute, to prevent the maintenance in the federal court of California of a suit by the surviving husband of a decedent, or his grantee, against her administrator, pending administration, to quiet the title to the husband's share of her separate property.

This was a suit in equity by William Thorpe against Thomas Sampson, individually and as administrator of the estate of Mary Chism, deceased, to quiet title to certain real estate.

Richard R. Tanner and F. H. Taft, for complainant.
Works & Lee, for defendants.

WELLBORN, District Judge. This is a suit to quiet title to lots B and C, in block 196, of the town of Santa Monica, Cal. The material facts of the case, as stipulated and shown in evidence, are as follows: On the 1st of May, 1864, one Andrew Chism and one Mary Bankhead were married at the county of San Bernardino, in the state of California, and continued to be husband and wife up to the time of the death of the said wife, on the 1st day of October, 1884. On the 24th day of March, 1884, W. D. Vawter and E. J. Vawter, then the owners of the said property, made, executed, and delivered to Mary Chism a deed, conveying to her all of said property; said deed being for a consideration of \$900, and without any recitals showing that said land was conveyed to the said Mary Chism as her separate estate. Mary Chism died at the county of Los Angeles, in the state of California, on the 1st day of October, 1884, and had theretofore made no transfer or conveyance of said property to any person whomsoever, and was in possession thereof at the time of her death. Andrew Chism survived his wife, Mary Chism, and on the 23d day of March, 1885, by a deed in the form of a quitclaim, and for the expressed consideration of \$100, conveyed all his right, title, and interest in said property to complainant. On the 10th day of March, 1885, upon proceedings for that purpose duly and regularly had in the superior court of the county of Los Angeles,

state of California, letters of administration upon the estate of the said Mary Chism, deceased, were duly granted and issued out of said court to Thomas Sampson, the defendant in this action, who ever since has been, and now is, the duly appointed, qualified, and acting administrator of said estate, and said letters have never been revoked. Notice to creditors of said estate was published by said administrator in the year 1885, and no claims have been filed against said estate. No decree of distribution has been rendered, and said administration is still pending. An inventory of said estate was duly made and filed by said administrator in said probate proceedings aforesaid, and said property was in said inventory appraised as the separate property of Mary Chism, deceased. The petition for letters of administration in said probate proceedings was signed by Andrew Chism and Thomas Sampson, and was filed therein October 14, 1884, and recited, among other things, that the decedent, Mary Chism, left surviving her, as her heirs at law, George Bankhead, a son, aged 32 years; John Crosby, a son, aged 27 years; the petitioner Thomas Sampson, a son, aged 23 years; Samuel Sampson, a son, aged 21 years; Margaret Alice Chism, a daughter, aged 17 years; Robert Chism, a son, aged 14 years; and her husband, Andrew Chism, aged 60 years. The complainant William Thorpe was, at the time of bringing this action, a citizen of the state of New York, and the defendants are citizens of the state of California, and are inhabitants of the Southern district of California; and the value of the property in this action, exclusive of costs and interest, exceeds \$2,000. The \$900 paid to the Vawter brothers, as the consideration for the property, in Santa Monica, conveyed to Mary Chism by them, was money which she had received from John K. Skinner on a sale to him of lot 13, block 101, Bellevue Terrace tract, city of Los Angeles, Cal., and the title to which was acquired by her as follows: Said lot 13 was conveyed by Prudent Beaudry on September 25, 1871, to Andrew Chism for the consideration of \$400. One half of this \$400 was furnished by the son of Mary Chism, and the other half was her personal earnings. On September 26, 1871, Andrew Chism conveyed said lot 13, for the consideration of love and affection, to his wife, Mary Chism. As already stated, Mary Chism subsequently conveyed this said lot, her husband, Andrew Chism, joining in the conveyance, to John K. Skinner, a part of the consideration being \$1,100 cash. Out of this \$1,100 Mary Chism paid for the lots in Santa Monica which are here in controversy. The issues in the case are whether these Santa Monica lots were the separate property of Mary Chism, or the community property of herself and her husband, Andrew Chism; and, if the separate property of Mary Chism, whether or not the complainant can, in this suit, quiet his title to that part thereof, namely, one-third, to which, on a distribution of the estate in probate, he would be entitled as the grantee of Andrew Chism, the surviving husband.

I am clearly of the opinion that said property was the separate property of Mary Chism. Indeed, I can see but little, if any, room for controversy on this point. It is true, as claimed by defendant, that, where land is conveyed to either husband or wife during the mar-

riage, the presumption is that the land so conveyed is community property, and this presumption can only be overcome by clear and satisfactory evidence to the contrary. In *re Boody's Estate*, 113 Cal. 682, 45 Pac. 858; *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743; *Jordan v. Fay*, 98 Cal. 267, 33 Pac. 95. In the case at bar, however, the presumption referred to has been overcome by convincing and uncontradicted proof that said property was bought with money which was the separate estate of the wife, namely, money received by her from John K. Skinner for lot 13, block 101, Bellevue Terrace tract, in the city of Los Angeles. Whatever may have been the character of Andrew Chism's title, as originally acquired, to the property last mentioned, bought of Prudent Beaudry, September 25, 1871, that property, by the deed of said Andrew Chism to Mary Chism, made on the day following, to wit, September 26, 1871, unquestionably became the separate property of Mary Chism. The deed to her, although in form a quitclaim, was solely upon the consideration of "love and affection," and therefore a gift, within the meaning of the California statutes relating to the separate property of married women. *Peck v. Vandenberg*, 30 Cal. 11; *Salmon v. Wilson*, 41 Cal. 595. Even had the deed from Andrew Chism to Mary Chism been for money or other valuable consideration, the property thus acquired would have been her separate property. *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869; *Ions v. Harbison*, 112 Cal. 260, 44 Pac. 572. The fact that Andrew Chism joined his wife in her deed to John K. Skinner is an immaterial circumstance. It was unnecessary for him to have done so, and was, doubtless, a suggestion of the purchaser, prompted only by excessive precaution. The Santa Monica lots, then, having been paid for out of the separate funds of Mary Chism, it follows that said lots were her separate property, and that complainant has no greater or other interest therein than that to which his grantor, Andrew Chism, succeeded upon the death of Mary Chism, as one of her heirs at law.

On the other issue in the case, the contention of the defendant is also well taken. In California the property of an intestate passes to his or her heirs, subject to the control of the probate court, and to the possession of any administrator appointed by the court for the purposes of administration. Civ. Code Cal. 1384. Section 1452 of the Code of Civil Procedure of said state further provides that:

"The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled, or until delivered over by order of the court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings, and fixtures thereon which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do."

The last sentence of this section 1452 clearly implies that an heir or devisee shall not maintain an action for the possession of the real estate of the decedent, or to quiet title to the same, against the executor or administrator. Construing these and similar statutory provisions, the supreme court of said state have held, in a multitude of cases, that an action for the possession of such property cannot be

maintained by the heirs until administration of the estate has been settled, or the property distributed by a decree of the probate court. *Meeks v. Hahn*, 20 Cal. 624; *Chapman v. Hollister*, 42 Cal. 462; *Meeks v. Kirby*, 47 Cal. 168; *Page v. Tucker*, 54 Cal. 121. And the same court has also held, in one case, that, pending the administration of the estate, the heir cannot maintain an action to quiet title. *Harper v. Strutz*, 53 Cal. 665.

Without reference, however, to the statutes of California, or decisions based thereon, except so far as they establish the competency of the probate court to determine questions of heirship, the present suit, it seems to me, is a fit one for the application of the rule of law, recognized and applied universally in this country, that, where two courts have concurrent jurisdiction over the same subject-matter, the one before whom proceedings are first commenced, and whose jurisdiction first attaches, will be left to determine the controversy, without interference from the other. *Sharon v. Terry*, 36 Fed. 337; *Gamble v. City of San Diego*, 79 Fed. 487, and cases there cited; *Brooks v. Delaplaine*, 1 Md. Ch. 354. In the last-cited case the chancellor says:

"When two courts have concurrent jurisdiction over the same subject-matter, the court in which the suit is first commenced is entitled to retain it. This rule would seem to be vital to the harmonious movement of courts whose powers may be exerted within the same spheres, and over the same subjects and persons. * * * Any other rule will unavoidably lead to perpetual collision, and be productive of the most calamitous results."

For the reasons above indicated, this bill will be dismissed. In order, however, that the decree herein may not affect any rights or interests which the complainant may have acquired through *Andrew Chism*, as one of the heirs at law of *Mary Chism*, deceased, the dismissal will be without prejudice to any other proceeding or suit now pending, or that may be hereafter brought, for the determination of such rights or interests.

GRAND TRUNK RY. v. CENTRAL VERMONT R. R. et al.

(Circuit Court, D. Vermont. December 29, 1897.)

COMITY BETWEEN CIRCUIT COURTS — RAILROAD RECEIVERS — DIVERSION OF FREIGHT—INJUNCTION.

Under the rules of comity, which require the decisions of circuit courts to be followed by each other, especially when they relate to the administration of the same subject-matter, a petition by a railroad receiver for an injunction restraining receivers of another line from diverting freight traffic will be granted when the circuit court of another circuit has afforded the same petitioner like relief in a similar case against another company.

This was an intervening petition, filed by *Charles Parsons*, as receiver of the *Ogdensburg Railroad*, in the suit of the *Grand Trunk Railway* against the *Central Vermont Railroad* and others, praying an injunction against the receivers of the *Rome, Watertown & Ogdensburg Railway* restraining them from diverting west-bound freight traffic of their lines from petitioner's road.

Hornblower, Byrne, Taylor & Miller, for petitioners.
Benj. F. Fifield and Chas. M. Wilds, for respondent.

WHEELER, District Judge. The intervening petition of Charles Parsons, receiver of the Ogdensburg Railroad, for restraint of diversion of freight traffic by the receivers herein of the Rome, Watertown & Ogdensburg Line, from his road as a part of that line, has now been heard. The case hereupon does not differ materially from that of the petitioner against the New York Central & Hudson River Railroad in the Southern district of New York, except as to refusals of the petitioner to forward freight without payment of traffic balances. An injunction was granted there to restrain diversion of east-bound freight. Comity between courts requires that decisions of circuit courts should be followed by each other, especially when relating to administration of the same subject-matter, as here, where diversity would create confusion. The refusals to forward mentioned had no reference to the continuance of this freight line, but only to balances, however arising, and were accommodated without reference to it; and, now that they are settled, should have no place respecting its continuance. Following that decision, as it should be followed while it remains in force, the prayer of this petition should be granted, and these receivers should be restrained from diverting the west-bound freight traffic of the Rome, Watertown & Ogdensburg Line from the petitioner's road. Prayer of petition granted.

STATE v. PORT ROYAL & A. RY. CO. et al. KING et al v. SAME.
OGDEN v. SAME. Ex parte BATES.

(Circuit Court, D. South Carolina. January 1, 1898.)

1. RAILROAD RECEIVERSHIPS—ACTIONS FOR DAMAGES—SERVICE OF PROCESS.

The owner of an animal killed by a train while the road was in a receiver's hands sued the railroad company without joining the receiver as a defendant, but process was served only upon the receiver through an agent. The receiver's claim agent appeared and defended the suit, which resulted in a judgment against the company. *Held*, that the judgment was valid, so as to bind the property in the receiver's hands.

2. SAME—PRIORITY OF LIENS.

A judgment against a railroad company for injuries to personal property, when rendered in a suit brought within 12 months from the time the cause of action arose, is a prior lien to that of a railroad mortgage.

3. SAME.

A receivership is not personal, but continuous, so that claims arising against different receivers, one of whom succeeds the other, stand on the same footing.

This was an intervening petition filed by J. B. Bates in the receivership proceedings against the Port Royal & Augusta Railway Company and others, whereby he sought to enforce an alleged lien against the railroad property for the amount of a judgment obtained by him against the railroad company for the killing of an animal by one of its trains.

B. A. Hagood, for petitioner.

S. J. Simpson, for respondents.

SIMONTON, Circuit Judge. This is an intervention by J. B. Bates, claiming payment of a certain judgment obtained by him against the

Port Royal & Augusta Railway Company. Bates was the owner of a Jersey bull, which he alleged was killed on the line of that road, by the train of the road, on November 30, 1892. He put his claim in suit before a trial justice of Barnwell county, making the railroad company defendant, and obtained a judgment, which was entered October 26, 1893, for \$90 and costs. The defense rests upon the fact that at the date of the accident and at the time of the suit the road and its property were in the hands of Comer, receiver; that as a consequence of this the service of process upon an agent of the receiver was not service on the company,—in fact, no service at all,—and that the judgment binds neither the company, which was named as a party, nor the receiver, Comer, who was not sued; and that in no event can the petitioner claim for any demand against Comer, receiver, because the true construction of the order of this court renders the purchaser at foreclosure sale liable only for claims against Averill, receiver. The case was defended before the trial justice by a Mr. Connor, claim agent in the employment of the receiver, was continued at his instance, and on the day to which it was continued judgment was given after trial.

When an insolvent corporation is put into the hands of a receiver, this only effects a change in the management of the property. The receiver is substituted for those who theretofore had governed the corporation, but the title is not changed. *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013. Nor is the existence of the corporation destroyed. *Bank of Bethel v. Pahquipe Bank*, 14 Wall. 398. So the suit will lie against the corporation. But, inasmuch as the receiver was put in charge of and administered all the affairs of the corporation, service of process was properly made upon him through his agent. *Davis v. Gray*, 16 Wall., at page 217.

The agent of the receiver appeared in the case, and defended. The trial was had and judgment rendered. This judgment, having been entered on an action for injury to personal property brought within 12 months from the date of the cause of action, has a lien prior to the mortgage, even if it is not a claim against the receivership.

It is contended, however, that the claim is not against Receiver Averill, but against Comer, receiver. But a receivership is not personal; it is continuous. The individuals holding it represent a condition of things created by the court. As is said in *McNulta v. Lochridge*, 141 U. S. 331, 12 Sup. Ct. 11: "The receivership is continuous. It is analogous to a corporation sole. The action is not against the receiver as a person, but against the receivership. So, a receiver may be sued for the act of his predecessor, without leave of the court." So, in whatever aspect we may view this case, either as a suit against the corporation or as against the receivership, this judgment has a paramount claim. Indeed, it has been held by a court of high persuasive authority that a judgment rendered against a receiver in a state court in an action at law is conclusive as to the existence and the amount of the plaintiff's claim, but the time and manner of its payment are to be controlled by the court appointing the receiver. *Dillingham v. Hawk*, 9 C. C. A. 101, 60 Fed. 494.

Let the petitioner have a decree for the amount of his judgment and interest, with costs.

EDGELL et al. v. FELDER.

(Circuit Court of Appeals, Fifth Circuit. June 23, 1897.)

No. 613.

1. PARTIES IN EQUITY.

In a bill by one member of a partnership to recover salaries and commissions due the partnership, where it is alleged that the other partner refuses to join as a party plaintiff, and has fraudulently conspired with the other defendants to defeat a recovery, such latter partner is a proper and necessary party defendant.

2. APPEARANCE.

Parties who enter a special appearance, and thereupon file motions to dismiss the suit for want of jurisdiction and for want of equity, and to discharge a receiver and dissolve a temporary injunction for want of jurisdiction, and because no previous notice was given of the application for the injunction, and it was issued in term time, without requiring complainant to give bond, must be held to have appeared generally in the cause.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

This was a bill in equity by Thomas J. Felder, a citizen of Georgia, residing in the Southern district thereof, against Alfred N. Hehre, a citizen of New York, George S. Edgell and Austin Corbin, Jr., also citizens of New York, the New England Mortgage Security Company, a citizen of Massachusetts, and five corporations existing under the laws of the kingdom of Great Britain. The defendant George S. Edgell was sued as surviving partner of the firm which was dissolved by the death of Austin Corbin, Sr., and also as co-partner with Austin Corbin, Jr., composing the present partnership doing business as the Corbin Banking Company. The purpose of the suit was to recover compensation for services rendered by the plaintiff individually for the sales and renting of lands under contract from May 1, 1894, to the date of the formation of a partnership between complainant and the defendant Alfred N. Hehre, on or about September 1, 1895; and also for the recovery of complainant's unsettled interest in the earnings of the partnership of Felder & Hehre from September 1, 1895, until the death of Austin Corbin, Sr., June 6, 1896; and also for the recovery of the earnings of Felder and Hehre alleged to be due from the new firm composed of Edgell and Austin Corbin, Jr., from June 6, 1896, to about December 1, 1896. The bill alleged that Alfred N. Hehre was made a defendant because he refused to join as a party plaintiff, and that he fraudulently conspired with the other defendants to defeat the recovery of what was due to the firm of Felder & Hehre. No decree, however, was asked against him. The defendants, being nonresidents of the state, entered a special or limited appearance "for the purpose of making a motion to dissolve the injunction and discharge the receiver appointed in this cause, as well as also to submit a motion for the dismissal of said bill for the want of jurisdiction in the court." The defendants accordingly filed motions to dissolve the injunction, discharge the receiver, and dismiss the bill, setting up that the court was without jurisdiction to hear the cause under the statutes of the United States; that the suit could not be brought in the district of complainant's residence—First, because the defendant Hehre was a real complainant, so far as the recovery sought was for what was due to the firm of Felder & Hehre, and therefore could not be brought in the district where only Felder resided; and, second, because the jurisdiction of the court was not founded "only on the fact that the action is between citizens of different states." It was also set up as a ground for the motions that the bill sought to recover what was due to Thomas J. Felder individually for his services prior to the formation of the partnership of Felder & Hehre, and that Felder had an adequate remedy at law to recover that debt, for which reason the bill was without equity. In the circuit court these motions were denied, and the defendants have appealed.

Webb & Bradshaw, for appellants.
Marion Erwin, for appellee.

Before PARDEE, Circuit Judge, and MAXEY and PARLANGE, District Judges.

PER CURIAM. In the case made by the complainant's bill, Alfred N. Hehre, a citizen of the state of New York, and a member of the co-partnership of Felder & Hehre, is properly and necessarily a party defendant. The said bill shows a controversy within the general jurisdiction of the circuit court for the Southern district of Georgia, the complainant being a citizen of the state of Georgia, residing in the Southern district of said state, and all the defendants being either citizens of other states or aliens, and the matter in dispute exceeding in value the sum of \$2,000, exclusive of interest and costs. The appellants herein, having appeared in the circuit court, and entered motions to dismiss the suit for want of jurisdiction *ratione personæ*, and to dismiss the bill for want of equity, and to dissolve the injunction theretofore issued in the case for want of jurisdiction, and because no previous notice of application therefor was given, and because it was issued in term time, without requiring the complainant to give bond therefor, and that the complainant should execute a bond in such sum as the court might require to protect the defendants against all damages or losses which might be suffered by reason of granting said injunction, and to withdraw the said injunction because issued prematurely, and to discharge the receiver theretofore appointed in the case, must be held to have entered a general appearance to the bill, and thereby waived any privilege they might have had to object to being sued in the district in which the complainant resides, although, by the terms of the writing actually filed with the clerk, the appearance made was a limited appearance. Considering that the court, under the circumstances, had full jurisdiction of the case made by the bill, the issuance of an injunction was a proper exercise of the sound discretion vested in the chancellor, and the same may be said as to the appointment of a receiver, except that the record shows that a receiver was appointed simultaneously with the filing of the bill, and without notice to the parties whose possession was to be disturbed thereby. **Affirmed.**

LESLIE et al. v. LESLIE et al.

(Circuit Court, S. D. California. November 15, 1897.)

No. 736.

EQUITY PLEADING—MULTIFARIOUSNESS.

A bill which seeks to enforce the performance of a trust in real property, and also to quiet complainant's title to the same property, is multifarious.

This was a bill in equity by Ella L. Leslie and Charles C. Leslie against John and George H. Leslie, as trustees under the last will and testament, and codicil thereto, of George Leslie, deceased. The cause was heard on demurrer to the bill.

E. E. Keech and Guthrie & Guthrie, for complainants.
Brousseau & Montgomery, for defendants.

WELLBORN, District Judge. This suit was originally brought in the superior court of Orange county, Cal., and thereafter removed to this court, on account of the diverse citizenship of the parties. Two cases for equitable relief are separately stated in the bill, one being to enforce the performance of a trust in real property, and the second being to quiet the title of one of the complainants to said property. A demurrer to the bill on numerous grounds, including the one mentioned below, has been filed by the defendants since the removal of the cause. Under the state procedure, the complaint, as the pleading was there styled, would have been bad on account of a misjoinder of causes of action. Code Civ. Proc. Cal. § 427; *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449. The general rules of equity practice which obtain in this court conduce to the same result. The bill is multifarious, in that it joins two distinct and unconnected grounds of equitable relief. 1 *Fost. Fed. Prac.* §§ 71-74. For this cause, and without passing upon any of the other objections to the bill, the demurrer is sustained, with leave to complainants to amend within 10 days, if they shall be so advised.

BROWN v. TILLINGHAST.

(Circuit Court, D. Washington, W. D. December 31, 1897.)

1. PAYMENT—RECOVERY ON GROUND OF MISTAKE—SUBSCRIPTION TO NATIONAL BANK STOCK.

A payment made for stock of a national bank under an erroneous belief that all of an increased issue of stock authorized by the stockholders, and of which the stock paid for formed a part, had been sold, and the subscriptions therefor had thus become binding, is not voluntary, and the money may be recovered back, though the facts might have been learned by the exercise of greater diligence and care.

2. NATIONAL BANKS—INSOLVENCY—ASSESSMENT—PARTIES.

The comptroller of the currency and the treasurer of the United States are not necessary parties defendant in an action against the receiver of an insolvent national bank to recover an assessment made by the comptroller, and paid by the plaintiff under an erroneous belief that he was a stockholder.

Suit in equity by H. W. Brown against Phillip Tillinghast, as receiver of the Columbia National Bank of Tacoma, to establish plaintiff's claim as a creditor against the Columbia National Bank for the amount of \$6,250, paid on his subscription for increased capital stock of the banking association, and also to establish a claim as a preferred creditor against the assets for the amount of \$3,050 paid upon an assessment ordered by the comptroller of the currency against the stockholders of said bank. Demurrer to the bill of complaint overruled.

T. W. Hammond, for plaintiff.
Phillip Tillinghast, in pro. per.

HANFORD, District Judge. In the case of *Matthews v. Bank*, 79 *Fed.* 558-560, this court decided that the vote of the stockholders of the Columbia National Bank of Tacoma to increase the capital stock

of said bank to the amount of \$500,000 never became effective because the full amount of the proposed increase was not subscribed or paid for; that the board of directors was not authorized to cancel the increased stock in excess of the amount subscribed and paid for, nor to give the assent of the corporation to an increase to any amount, as only the shareholders had the power to determine whether there should be any increase, and to fix the amount; and that a subscriber for new stock to be issued pursuant to the resolution of the stockholders to increase the capital of the bank to \$500,000 was entitled to recover back the amount paid upon his subscription, and that a vote of the stockholders subsequent to his subscription, and the payment made on account thereof, to increase the capital of the bank to an amount equal to that which had been subscribed for, was not binding upon him, for the reasons that said vote was taken at a meeting not called for the purpose by lawful authority, and his assent was never given to any contract of subscription for increased stock, other than a specified number of shares to be issued according to the original plan. By his complaint in this case, the complainant sets forth, in substance, the same facts as to the ineffective attempts to increase the capital stock of the Columbia National Bank, and that under the original plan to increase the capital of the bank to \$500,000 he subscribed for 50 shares of the proposed new stock, and paid to the bank on account of his subscription \$5,000, and also paid an assessment levied by the bank, amounting to \$1,250; and that, after the bank went into the hands of a receiver, a demand was made upon him to pay an assessment ordered by the comptroller of the currency, and, in compliance with that demand, he did pay \$3,050 to the receiver; that until a time subsequent to all of said payments he was ignorant as to the true facts affecting the legality of the proceedings to increase the capital stock of the bank, and that in making said payments he erroneously believed that the capital of the bank had been increased as proposed, and that he had become liable upon his contract of subscription; and that, if he had possessed accurate knowledge of the facts, and if he had not erroneously believed that the stock had been increased, and that he was obligated to pay for stock of which he had become the owner, he would not have made said payments.

As to all the questions considered and passed upon in the case of *Matthews v. Bank* I now adhere to and follow the ruling in that case. The defendant now contends that the bill of complaint shows upon its face that no deceit was practiced upon plaintiff; that he had means of obtaining knowledge, and by diligence could have ascertained the truth in regard to the transaction before making either of said payments; and that, although he failed to obtain true information, his fault in neglecting to seek for information is inexcusable, and therefore he occupies the position of one who has made a voluntary payment in settlement of a claim asserted against him, and he is not entitled to recover back any part of such voluntary payments. On this point I hold that a payment is not a voluntary payment if made under an erroneous belief on the part of the payor as to a liability to pay, which in fact did not exist, and that money paid under a mistake as to the facts affecting a supposed liability may be recovered back,

although the mistake might have been avoided if greater care had been taken to investigate and ascertain the facts regarding the transaction. U. S. v. Barlow, 132 U. S. 271-282, 10 Sup. Ct. 77.

This demurrer is also based in part upon the ground that there is a defect of parties defendant. It is insisted that the comptroller of the currency and treasurer of the United States are indispensable parties, for the reason that the \$3,050, paid by the complainant to the receiver has been placed in the treasury of the United States, and can only be repaid by the treasurer, under an order to be made by the comptroller of the currency, authorizing such repayment. It has not been usual to join these officers as parties defendant in actions of this nature, and, as they are not within the reach of process of this court, it is not practicable to bring them into the case so as to bind them by any judgment which the court can render. The receiver of an insolvent national bank is authorized to sue and defend actions for the purpose of collecting the assets, and for the adjudication of disputed claims against such bank. The court can only go so far as to render a declaratory judgment, establishing the rights of the respective parties. If the complainant obtains a judgment in his favor, the comptroller of the currency must make an order to pay it. It is not to be presumed that the officers of the government will refuse to pay, in whole or in part, any lawful judgment; but, if there should be an obstinate refusal on the part of the comptroller of the currency, or on the part of the treasurer of the United States, to pay a judgment out of the funds available for the purpose, the complainant must seek for vindication of his rights by an application to a court having jurisdiction at the place where said officers reside for coercive measures. But the possibility of having to work out satisfaction of a judgment with the assistance of a court of another jurisdiction forms no barrier to an adjudication of the rights of the parties within the jurisdiction of this court. If the suit were against the defendant in his capacity as an individual, and if he had no property subject to execution in this district, but did have ample means situated in another state, it could not be insisted that he would not be suable in this court, because the judgment could not be enforced by process of this court, nor could it be urged that persons in another state were necessary parties defendant, because they were in actual possession of the only property available to satisfy a judgment against the defendant. Demurrer overruled.

JENNES v. LANDES et al.

(Circuit Court, D. Washington, N. D. December 31, 1897.)

1. EQUITY PLEADING—SUFFICIENCY OF BILL—NECESSITY OF PRAYER FOR PROCESS.

A bill is not demurrable because it contains no prayer for process where the defendants who are required to answer are named both in the caption and body of the bill.

2. ALIENAGE—NECESSITY OF CONSENT OF GOVERNMENT RENOUNCED.

The consent of the United States is not necessary to enable a citizen to voluntarily expatriate himself, and become a citizen of another country.

8. JURISDICTION—ALLEGATION OF ALIENAGE—SUFFICIENCY.

Allegations in a bill against citizens of the state of Washington that complainant was by birth a citizen of that state, but by her marriage with a British subject, and removal to British Columbia, became a citizen of Great Britain, no law of that country making her a citizen by reason of such facts being pleaded, are insufficient to sustain the jurisdiction of the federal court on the ground of diversity of citizenship.

4. SAME—PLEADING STATUTE OF CANADA.

It will not be presumed, in the absence of a showing that there is a British law conferring it, that the Canadian parliament has power to naturalize a citizen of the United States, and make him a citizen of Great Britain; and the setting out in a bill of a Canadian statute, under which it is claimed the complainant, who is by birth a citizen of the United States, became a British subject, is insufficient to confer jurisdiction on the federal court on the ground that complainant is an alien.

This is a suit in equity, by Lutie Jennes, a married woman, against Henry Landes and others, for an accounting respecting certain property to which she claims ownership. The defendants have demurred to the bill on two grounds, viz.: The bill does not contain a prayer for process, nor designate the defendants who are required to answer, and the bill shows upon its face that the case is not within the jurisdiction of this court. Demurrer sustained.

W. F. Hays and Charles E. Shepard, for plaintiff.

A. R. Coleman and Richard Saxe Jones, for defendants.

HANFORD, District Judge. Both in the caption and in the body of the bill of complaint the defendants who are required to answer are named, and plainly designated. This being so, the bill is not demurrable, because there is no prayer for process.

The complainant was born in the state of Washington, and lived in the state of Washington until her marriage to a British subject, when she removed to, and became permanently domiciled in, British Columbia, and she is now an inhabitant of British Columbia; and in her bill of complaint alleges that by her change of domicile and marriage she has become and is a subject of the queen of Great Britain. The showing that complainant was by birth a citizen of the United States raises a question as to her alienage at the time of commencing this suit, and, as the jurisdiction of this court depends upon diversity of citizenship, it must be alleged positively, and facts must be proven sufficiently to satisfy the mind of the court beyond any question of legal doubt that she is an alien; otherwise the case must be dismissed for want of jurisdiction.

A change of allegiance from one government to another can only be effected by the voluntary action of the subject, complying fully with the conditions of naturalization laws, so that there is concurrent action and assent on the part of both the subject and the government to which the new allegiance attaches. Authorities entitled to great respect have been cited in the argument, holding that it is also necessary to have assent on the part of the government renounced. In my opinion, that rule no longer obtains in the United States, since congress, by the act of July 27, 1868, now re-enacted in section 1999, Rev. St., has expressly declared it to be the policy of our government that the right of expatriation is a natural and inherent right of all people,

indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness. The averment in the bill that the complainant has become a British subject is the statement of a mere legal conclusion, and, in view of the other facts alleged, it is very questionable whether it can be regarded as a sufficient allegation of a jurisdictional fact. It is also questionable whether, if the allegation should be traversed, the complainant would be permitted to sustain the issue on her part by introducing in evidence a British law, if there be one similar to our section 1994, adopting her as a British subject as a consequence of her marriage. Courts are not required to take judicial knowledge of foreign laws; therefore, if it should be necessary to prove the existence of such a law in this case, it should be pleaded. In his opinion in the case of *Pequignot v. City of Detroit*, 16 Fed. 211, Mr. Justice Brown stated that by the sixteenth section of 7 & 8 Vict. c. 66 (1844), it is enacted "that any woman married, or who shall be married, to a natural-born subject or a person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject." If this statute, or any similar British law, is now in force, the complainant did become a British subject by her marriage, and is entitled to sue in this court; but, in my opinion, it is necessary to amend her bill by pleading the statute. Demurrer sustained.

Opinion on Demurrer to Amended Bill.

By her amended bill of complaint the complainant alleges, in addition to the matters set forth in her original bill, that by the laws of the dominion of Canada and the province of British Columbia relating to the subject of citizenship, allegiance, and naturalization of married women, "a married woman shall within Canada be deemed to be a subject of the state of which her husband is, for the time being, a subject," and that it is so provided by a statute enacted by the parliament of the dominion of Canada in the year 1885, the same being section 22 of chapter 113, volume 2 of the Revised Statutes of Canada of 1886. To this amended bill the defendants have also demurred on the ground that the alienage of the complainant, and her right to sue in this court, does not sufficiently appear. Whether the Canadian statute above quoted has the effect to confer upon women who are married to British subjects residing in Canada the rights, and subject them to the obligations, of subjects of the queen of Great Britain, depends partly upon the intent of the Canadian parliament in the enactment, and partly upon the constitution of that government. I will not, at this time, attempt an interpretation of the statute, for, as Canada is not an independent sovereignty, I do not feel justified in presuming, without a further showing, that its parliament has the power to naturalize citizens of the United States so as to complete their change of allegiance from the government of the United States to that of Great Britain. If there is any British law conferring such power upon the Canadian parliament, it should be pleaded, as any other foreign law upon which the rights of a litigant in this court depend. Demurrer sustained.

**ELKHART NAT. BANK OF ELKHART, IND., v. NORTHWESTERN
GUARANTY LOAN CO. OF MINNEAPOLIS, MINN., et al.**

(Circuit Court, E. D. Pennsylvania. December 10, 1897.)

No. 33.

1. PARTIES—WHO NECESSARY IN SUIT TO ENFORCE INDIVIDUAL LIABILITY OF STOCKHOLDERS.

To a bill by a creditor of a corporation averring its insolvency, and demanding the appointment of a receiver, an accounting, and the enforcement of the individual liability of the stockholders, the corporation is a necessary party defendant.

2. FEDERAL COURTS—JURISDICTION—SUIT TO ENFORCE INDIVIDUAL LIABILITY OF STOCKHOLDERS OF A FOREIGN CORPORATION.

Where the jurisdiction of the federal courts depends on the diverse citizenship of the parties, the federal courts of the residence of stockholders of an insolvent corporation, organized under the laws of another state, have no jurisdiction of a suit brought by a creditor of the corporation for an accounting and a receivership, and to enforce the individual liability of the stockholders, if the corporation has not voluntarily appeared in the action. In such case the nonresident corporation cannot be compelled to appear. *Smith v. Lyon*, 10 Sup. Ct. 303, 133 U. S. 315, and *Improvement Co. v. Gibney*, 16 Sup. Ct. 272, 160 U. S. 217, followed and applied.

3. SAME—PLEADING AND PRACTICE.

In such a case, the defendant stockholders who appear may set up this defense by demurrer.

This was a bill in equity by the Elkhart National Bank of Elkhart, Ind., which sued as a citizen of Indiana, against the Northwestern Guaranty Loan Company of Minneapolis, a corporation organized under the laws of Minnesota, and Edward P. Allison and others, stockholders in the Northwestern Guaranty Loan Company, and citizens of Pennsylvania. The Northwestern Guaranty Loan Company was not served with process, and did not appear. The other defendants appeared, and by demurrer denied the jurisdiction of the court. The pleadings are sufficiently set out in the opinion.

M. H. Boutelle, for complainant.

John G. Johnson and W. C. Rodman, for respondents.

DALLAS, Circuit Judge. This is a suit in equity brought by the Elkhart National Bank, a citizen of the state of Indiana, against the Northwestern Guaranty Loan Company, a citizen of the state of Minnesota, and the several other defendants named in the bill, all of whom are alleged to be citizens of the state of Pennsylvania, and residents of the Eastern district of that state. Manifestly, the objection made by these demurrers, that the Northwestern Guaranty Loan Company cannot be required to appear in this district, is supported by the ruling of the supreme court of the United States in *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, which in the later case of *Improvement Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, is referred to as having decided that a suit in which there is more than one plaintiff or more than one defendant must be brought in the district in which all the plaintiffs or all the defendants are inhabitants. The Northwestern Guaranty Loan Company is a citizen and an inhabitant, not of this district, but of the state of Minnesota. It has not voluntarily ap-

peared, and it cannot be compelled to do so. But it is contended that that company only can make objection to its being sued in a district of which it is a nonresident, and that, therefore, the demurrers which have been filed to the bill by other of the defendants cannot, on this ground, be sustained. In *Improvement Co. v. Gibney*, supra, this point was not actually presented, but the supreme court there said:

"When there are several defendants, some of whom are, and some of whom are not, inhabitants of the district in which the suit is brought, the question whether those defendants who are inhabitants of the district may take the objection, if the nonresident defendants have not appeared in the suit, has never been decided by this court. Strong reasons might be given for holding that, especially where, as in this case, an action is brought against the principals and sureties on a bond, and one of the principals is a nonresident and does not appear, the defendants who do come in may object, at the proper stage of the proceedings, to being compelled to answer the suit."

In view of these observations, it seems quite plain that the inferior courts of the United States should regard the broad question whether those defendants who are inhabitants of the district may take the objection that others of them, who have not appeared, are not such inhabitants, as an open one. But the language quoted also imports, I think, that, at least in some cases, the defendants who do appear may object that one who has been joined with them as a defendant is a nonresident and does not appear. In the present case the broad question first referred to need not be decided, and attention may be confined to the narrower inquiry. Can this particular bill be maintained notwithstanding the objection of the defendants who are inhabitants of this district that their co-defendant, the Northwestern Guaranty Loan Company, is not an inhabitant thereof and has not appeared? Whether this inquiry ought to be answered in the affirmative or in the negative depends, in my opinion, upon whether or not jurisdiction of the Northwestern Guaranty Loan Company is practically necessary in order that this court may properly adjudicate the rights of the remaining defendants, and grant, respecting the subject-matter of litigation, the relief which is prayed.

In *Bailey v. Inglee*, 2 Paige, 278, Chancellor Walworth said:

"Persons are necessary parties when no decree can be made respecting the subject-matter of litigation until they are before the court either as complainants or defendants, or where the defendants already before the court have such an interest in having them made parties as to authorize those defendants to object to proceeding without such parties."

In that case the complainant prayed for a discovery, for an injunction to restrain proceedings at law, and for general relief; and it was held that two persons who were jointly liable with the complainant in the action at law were necessary parties, and that the other defendants would have a right to insist by demurrer that they should be made parties. In this case the complainants pray discovery, for an account of the business of the Northwestern Guaranty Loan Company, and for general relief; and the defendants before the court are not liable at all, unless, upon taking the account demanded by the complainant, it shall appear that the company is without sufficient means to liquidate its own obligations. No determination would be complete which should not determine the debts of the com-

pany and its assets applicable thereto. The bill itself is framed in accordance with this view of the matter, and the necessity for an accounting is not obviated by the allegations to the effect that, in addition to all the company's assets, the entire fund sought to be created by enforcing the full statutory liability of the stockholders will not suffice to pay its debts. The bill concedes that there should be an accounting by the corporation, and the stockholders who have appeared have a right to insist upon it; but, in the absence of the corporation, such an account cannot be ordered, nor a decree be made which would be certain and definite or adequately comprehensive.

I have carefully examined the bill. Its prayer for relief may, of course, be taken as indicating the ends which it is purposed to attain, and by what method. It asks:

"That an account be taken, ascertaining the value of all and several the assets, properties, and effects, of whatsoever kind or character, of said defendant Northwestern Guaranty Loan Company, applicable to the payment of its indebtedness; the stockholders of said corporation, and the amount of stock held by each at the date of the adjudication of insolvency of said Northwestern Guaranty Loan Company; the amount of indebtedness of said corporation, and to whom due; the amount due on plaintiff's judgment; and that a receiver herein and in this suit be appointed; and that each of said several stockholders within the jurisdiction of this court, defendants herein, be adjudged and decreed to pay to said receiver, for the equal benefit of your orator and all other creditors of said Northwestern Guaranty Loan Company who may become parties hereto and prove their claims herein, a sum equal in amount to the par value of the shares of stock held by each."

To this prayer for particular relief there is added the usual prayer for general relief, but it has not been suggested that under the latter any decree other than that specially prayed is in fact contemplated, and I do not perceive that any relief which would be agreeable to the frame of the bill could be granted which would substantially vary from that specially prayed. The bill avers, it is true, that the defendant stockholders therein specifically named are "liable to contribute and pay to and for the equal benefit of your orator and the several other creditors of said Northwestern Guaranty Loan Company a sum equal to the par value of the stock held and owned by each of said stockholders." I, however, do not understand it to be contended that this suit could be maintained as one simply for the recovery of a debt alleged to be due by each of the stockholder defendants, respectively, to the complainant and other creditors of the Northwestern Guaranty Loan Company. Indeed, it not only appears from the special prayer of the bill that the complainant's own theory of his suit is quite different, but it also appears from the body of the bill that its special prayer is the necessary sequence of its statements and charges. It expressly states that the liability intended to be enforced against these stockholders of the Northwestern Guaranty Loan Company was assumed only "in case of failure or insufficiency of the assets of said corporation to satisfy its just indebtedness, and in that case only to the extent of the deficiency," and "in an amount not exceeding the par value of the stock held by each, and that each should contribute and pay, to and for the joint and equal benefit of said creditors, such an amount, not exceeding the par value of the stock held by each, as might be required or necessary to make up or

satisfy such deficiency." This being the substance of the complainant's claim of right, the prayer for an account of the assets, and of the holders and holdings of stock, and of the indebtedness of the Northwestern Guaranty Loan Company, seems to me, I repeat, to be a necessary prayer, and, without it, it would be difficult to perceive upon what the equitable jurisdiction of this court could rest. In my opinion, the defendant stockholders are entitled to have the account taken, and this cannot be done in the absence of the Northwestern Guaranty Loan Company. Moreover, the bill contemplates that any sum which may be decreed to be paid shall be paid, not directly to the complainant and other creditors who may join in this suit, but that it shall constitute a fund to be administered by this court, through an independent receiver of its appointment, for the benefit of all who may prove their claims herein. Surely, to such a proceeding the Northwestern Guaranty Loan Company should be a party, not only because of its own interest in the administration and distribution of the fund proposed to be created, but also that the rights of the other defendants may be properly ascertained and equitably dealt with. This court is asked to undertake what it cannot perform. The Northwestern Guaranty Loan Company cannot be brought here, nor can its assets or its books; and the many difficulties that would be encountered in an attempt to take the account which is proposed, and to adjudicate upon claims which might be presented, are obvious, and apparently insurmountable. Even upon the assumption that the constitution and statutes of the state of Minnesota contemplate the enforcement of the liability here asserted otherwise than by its own tribunals and in the manner prescribed by its own laws, it cannot be conceded that they impose upon this court the duty of assuming a jurisdiction which it is not practicable for it to exercise because of its inability to require a corporation of that state to submit to its authority.

I am unable to agree with the learned counsel of the complainant that the objection under discussion is overcome by Equity Rule 47. That rule is without applicability, because the corporation here in question has in fact been made a defendant, and its retention as such party is, necessarily I think, persisted in; and the difficulty here encountered would not be met by a decree without prejudice to the rights of the absent party, for its absence affects, not only its rights, but those of the defendants who are before the court as well. What has been said disposes of the case, and therefore the several causes of demurrer which have not been alluded to need not be discussed. Upon the ground considered in this opinion the demurrers are allowed.

HADDEN et al. v. NATCHAUG SILK CO. et al.

(Circuit Court, S. D. New York. January 13, 1898.)

1. COURTS—FORMER DECISION.

The court will follow its prior decisions in the same case, though made by another judge, and refuse to consider *de novo* questions expressly or impliedly determined by orders and judgments entered in a former hearing.

2. FRAUDULENT TRANSFER—RES JUDICATA.

Attachment and execution liens on personal property will not be set aside for fraud affecting the obligation on which the judgment was recovered, when such judgment has been held valid on a former hearing of the case.

3. SALES—RESCISSION—ELECTION.

In an action by a judgment creditor to set aside a transfer of personal property, and attachment and execution liens thereon, as fraudulent, it is immaterial that the goods for which he recovered his judgment went into the manufacture of the goods in controversy, as by failing to rescind he elected to treat the sale as valid, and is precluded from following the goods. 20 C. C. A. 494, 74 Fed. 429, followed.

In Equity.

This action was brought originally in the supreme court of New York by the complainants as judgment creditors of the Natchaug Silk Company to set aside alleged fraudulent transfers of the property of said company made by its president and general manager, as well as liens by attachment and execution, by virtue of which liens and transfers the defendants claim title to said property. The bill also prays for a receiver and an injunction restraining the defendants from disposing of the property in question during the pendency of the action. A temporary injunction, granted in the state court, was continued by this court after removal of the cause by the defendants. Two motions to dissolve the injunction were made and denied. From the order denying the last motion an appeal was taken to the circuit court of appeals. The opinion then delivered is reported in 20 C. C. A. 494, 74 Fed. 429. After the proofs were taken the defendants renewed their motion to dissolve, and this time the motion was granted by this court. An application having been made by the complainants for a rehearing, the court adhered to its former decision and dissolved the injunction. On both occasions short opinions were delivered. The bill was amended by leave of the court, and additional proof was taken relating to the validity of the Pangburn notes.

William B. Putney and Henry B. Twombly, for complainants.
Edward Winslow Paige, for defendants.

COXE, District Judge. It is, of course, my duty to follow the decisions of this court and of the circuit court of appeals even though a different opinion may be entertained upon some of the propositions involved. Different judges do not make different courts. When the circuit court has spoken through any of its judges its decision should be, and generally is, regarded as controlling upon all the others. This is the spirit of American jurisprudence. We sacrifice much to precedent. A proposition once decided between the same parties on similar facts must stand decided. It is of little moment that the decision was made by another than the sitting judge. If entitled to any consideration this circumstance gives the decision even greater weight. A judge may change his own mind; he cannot change the mind of another. Manifestly, then, the first inquiry is, what has been already decided, and what, if anything, is left open for decision? The motion to dissolve the injunction brought up the

entire controversy for review. With the injunction removed it was possible for the defendants to defeat the main purpose of the action by disposing of the property in dispute. In such circumstances it is plain that the court would have preserved "the existing state of things" if it had supposed that there was a reasonable chance of the complainants' success. The decision dissolving the injunction could have proceeded only upon the theory that the defendants' title to the goods in dispute was good and the complainants' title bad. So much for the effect of the decisions in general. I proceed to the examination of them in detail.

First. The circuit court of appeals. It may fairly be said that the logical conclusion to be drawn from the language of the opinion regarding the first question considered is that the court would have held Chaffee's transfers valid if it appeared that he was vested with unlimited authority. The court holds that "the decisions of the state of Connecticut apparently recognize that a president and unlimited general manager of one of its manufacturing corporations is vested with" power "to sell a large portion of the personal property of the company to one of its creditors in part payment of its debt," and that such a transfer is valid even though the company was insolvent and known by the president to be insolvent at the time of the transfer. In an able opinion the court of appeals of Maryland took an entirely different view of the law. *Hadden v. Linville*, 38 Atl. 40. They were in no way controlled by the decision of the circuit court of appeals, but they proceed to "distinguish" as follows:

"The court did not decide as to the power of Chaffee. As to that, the question was of a character which cannot be determined on affidavits. Nor does he decide what the power of a general manager is in Connecticut, but only what it 'apparently is,' and that it is subject to modification by other facts than those before him in that case."

This distinction, based largely upon the use of the word "apparently" by the circuit court of appeals, is too shadowy to be accepted by this court. It is more apparent than real. I have little doubt that upon the proof then before it the court would have held the sales by Chaffee valid, and failed to do so only because the question "may be controlled by the facts which may subsequently appear as to any limitation of Chaffee's actual powers of which the bank had knowledge."

The only question left open upon this branch of the controversy is whether the subsequent proof discloses such limitation, and also whether the acts of Chaffee were subsequently ratified by the directors. Upon the other question—the validity of the notes upon which the Pangburn judgment is based—the court decided nothing of importance, leaving the question of fact for further examination. The decision of the circuit court of appeals was based wholly upon affidavits, but an examination of the briefs shows that with one exception every proposition now argued was there argued, but, of course, upon a less ample and reliable record. The contention that the bank and the silk company were jointly engaged in a scheme to defraud the complainants does not seem to have been presented. This decision was rendered in May, 1896. When the case was next considered

in November, 1896, the motion to vacate was argued upon full proofs and the most elaborate briefs. In granting the motion upon certain conditions, subsequently supplied, the circuit court begins its opinion with the following proposition:

"Under the decision of the court of appeals two questions and two only are left open, viz.: the sufficiency of the assignment of title to the silk by Chaffee, and the validity of the notes assigned to Pangburn as obligations of the Natchaug Silk Company."

The court then proceeds to close the latter question by holding the following propositions: First, that four of the notes assigned to Pangburn were valid in any view of the case. Second, that "the delivery of a note for indebtedness evidenced by an old one does not extinguish the indebtedness nor render the old note void, unless the creditor by discounting it and crediting the proceeds, or in some other way, agrees to accept it in payment." Third, that though other notes were given in renewal of the notes sold to Pangburn the original debt was not thereby extinguished, and he could recover upon the notes held by him by surrendering all subsequent notes which were delivered as evidences of such debt. Fourth, that Pangburn was manifestly entitled to recover a greater sum than the value of the property attached. An application for a rehearing was made by the complainants. The precise grounds for the application do not appear; inferentially, however, it was based upon an alleged mistake as to the value of the property attached. In denying this motion the court said:

"The mistake which was made as to the value of the goods attached, in no way affected the decision of this motion, which held that the bank was entitled to recover not only on the notes for which no renewals were found, but also on those where the bill book showed renewals, provided all the notes of the renewal series were filed. Upon re-examination of the case I am still of the opinion that it is for the plaintiffs to show failure of consideration for the original notes, and that the proof does not do this."

On the 26th of January, 1897, an order, reciting that all of the notes of each series were deposited with the court, was signed and entered, dissolving the injunction. I cannot escape the conviction that this decision establishes the proposition that the transfer to Pangburn was not fraudulent, and that his attachment and judgment are good and valid unless defeated by proof that the original notes were without consideration; in other words, that the debt was not owing from the silk company to the bank. So that upon the law which this court is constrained to accept the case stands thus: The complainants must establish the following propositions: First. Such a limitation upon Chaffee's authority as to render the transfer or sale by him unauthorized. Second. That his acts were not ratified by the directors. Third. That the silk company was not indebted to the bank upon the notes sold to Pangburn. Unless the complainants establish all three of these propositions they cannot succeed; if they fail on any one the bill must be dismissed. With the issues thus narrowed there can be but one result. I am unable to see that the proof limits the authority of Chaffee, or that the case is any stronger for the complainants than when the facts appeared by affi-

davit. Chaffee was general manager from the organization of the company, and by virtue of the by-laws was given "entire charge of the business and affairs of said company." In addition he was president of the company, and had, in fact, managed the company's affairs with a power autocratic and unquestioned. The directors did nothing. They were of the conventional American type—mere figureheads and dummies. Their names might serve to decorate the company's paper and cajole the public into thinking that their connection with it was a guaranty of its financial ability, but, in fact, they took no part in its affairs, and, for all practical purposes, might as well have resided in Patagonia or Siam. One of them thus describes his connection with the company:

"I took no active part in the management of the company. I attended some of the meetings of the directors. Q. Did you do anything at the meetings you attended? A. Yes, generally smoked pretty good cigars. Had a pretty good time. Incidentally discussed business. Did not interfere with Mr. Chaffee's business. Always left everything to him. Never questioned him as to what he did with the manufactured silk, whether he sold it or turned it out for debt. There was not the slightest question as to his power on my part or the other directors. He could do anything he liked."

In leaving the affairs of the silk company in the hands of one man these directors were no more reprehensible than thousands of others who are daily doing the same thing. It is not likely that directors in this country will take any higher view of their responsibilities or exhibit any increased diligence in the discharge of their duties so long as the rule continues to be maintained that ignorance is a sure protection against liability. The proof upon this branch of the case is fully as strong for the defendants as when the facts appeared by affidavit only. No limitation upon Chaffee's authority, known to the bank, has been shown.

Assuming that Chaffee acted beyond the scope of his authority, the question still remains, did the directors ratify his acts by not objecting after they had full knowledge of what he had done? The following authorities sustain the proposition that where an act is done by the president or general manager of a corporation, which requires the concurrence of the board to make it valid, if the transaction is made known to them and they do not dissent within a reasonable time, their intelligent acquiescence is tantamount to an affirmative ratification: *Indianapolis Rolling-Mill v. St. Louis, Ft. S. & W. R.*, 120 U. S. 256, 7 Sup. Ct. 542; *Pennsylvania R. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770; *Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36; *Creswell v. Lanahan*, 101 U. S. 347.

But if the court should reach the conclusion that all the transfers from Chaffee are void the complainants could not succeed; there would still be standing as an insuperable barrier across their path the Pangburn judgment, which, without doubt, has been held valid by this court. Whether the claim of Pangburn should be limited to the notes actually transferred to him and described in the petition of the receiver as "doubtful debts," presumably worth but \$200, is a question which was decided by this court in dissolving the injunc-

tion. So, also, is the question that the holder of the original notes can recover by surrendering all subsequent notes delivered as evidences of such debt. The point that the bank was implicated, through the knowledge of its cashier who was also director of the silk company, in the fraudulent representations made by the silk company, which induced the sale by the complainants, was there presented and fully argued. The question is not referred to in the opinions, it is true, but this may be due to the fact that the court thought the evidence insufficient to establish fraud on the part of the bank. That the point was considered there can be no doubt. Assuming it to be true, I deem the fact immaterial, that the goods sold by the complainants went into the manufacture of the silk which is the subject of this controversy. The complainants, upon the theory that they were defrauded, might have disaffirmed the sale and followed their goods. They did not do this, but on the contrary proceeded upon the theory that the sale was valid and passed the title to the silk company. The proofs now are somewhat more ample upon the question of the Pangburn notes than at the former hearing, but are insufficient to warrant the court in disregarding the decision then made. The notes in the possession of the court should be destroyed or canceled, and there should be no doubt that none of them is included in the claim of the bank against the silk company. As an appeal may be taken, no injury can result in postponing the cancellation until the litigation is finally ended. Upon the whole case I am convinced that this court is precluded from examining these questions *de novo*, and that upon the law, as it now stands, the bill must be dismissed.

CAROLAN v. SOUTHERN PAC. CO. et al.

(Circuit Court, N. D. California. December 20, 1897.)

No. 12,511.

1. MASTER AND SERVANT—PERSONAL INJURY—ASSUMED RISK.

A servant employed by a railroad company to assist in loading freight into its cars from a wharf cannot recover from his employer for an injury received in handling such freight, and due solely to the negligent manner in which the boxes to be loaded had been piled on the wharf by a connecting carrier, the danger being as obvious to the plaintiff as to the defendant.

2. SAME—UNSAFE PLACE TO WORK.

The rule requiring a master to furnish his employé with a safe place to work has no application in an action by a servant of a railroad company employed in loading freight into its cars from a wharf, to recover for injuries resulting from the negligent manner in which the freight was piled on the wharf by a connecting carrier, where no defect in the wharf nor the appliances furnished by the master is alleged.

This is an action by Patrick Carolan against the Southern Pacific Company and the Pacific Mail Steamship Company to recover for personal injuries. The defendant railroad company demurs to the complaint.

Reddy, Campbell & Metson and Ira D. Orton, for plaintiff.
McGowan & Squires, for defendant Southern Pac. Co.
Ward McAllister, for defendant Pacific Mail S. S. Co.

HAWLEY, District Judge (orally). This action is brought by the plaintiff to recover damages for injuries alleged to have been received by him, by reason of the negligence of the defendants. The facts set out in the complaint are as follows: That on or about the 30th day of June, 1897, the Pacific Mail Steamship Company unloaded a large quantity of tea in boxes, and piled the same on its wharf in the Bay of San Francisco, in the city and county of San Francisco, near a track where the defendant Southern Pacific Company operated trains; that said tea was so piled in order that the same might be conveniently loaded by the said defendant Southern Pacific Company in its said cars; that said boxes of tea were piled by said defendant Pacific Mail Steamship Company from 14 to 16 feet high on said wharf, and were carelessly and negligently piled so as to easily fall and collapse when subjected to any weight or strain; that on and prior to said 30th day of June, 1897, the said plaintiff was employed by defendant Southern Pacific Company as a laborer to assist in loading merchandise into the cars of defendant from the wharf of said Pacific Mail Steamship Company, in said city and county of San Francisco; that on said 30th day of June, 1897, by direction of said defendant Southern Pacific Company, plaintiff was engaged in assisting to load a car of defendant with said tea contained in said boxes, piled as aforesaid upon said wharf; that, in the course of performing his duty of assisting to load said tea into said box cars, the plaintiff, by direction of defendant Southern Pacific Company, climbed on top of said boxes of tea, and was engaged in handing said boxes therefrom to other employes of the defendant; that, while he was so engaged, said pile of tea boxes collapsed, and precipitated the plaintiff about 12 or 14 feet to the floor of the wharf, causing him to be severely injured and bruised; that, by reason of being so precipitated, a bone of plaintiff's leg was fractured, and the skin and flesh thereof torn and lacerated, and he was hurt and bruised in other portions of his body, both internally and externally.

A party charging negligence as a ground of action must plead it. The complaint must show that the master, by his acts or by his omissions, has violated some duty incumbent upon him, which caused the injury complained of. The allegation of the complaint in this respect is:

"That said accident was caused solely by reason of the plaintiff being put to work on top of said tea boxes, which were carelessly and negligently piled in such a manner as to easily fall and collapse; that, by reason of said boxes of tea being so carelessly and negligently piled, the place where plaintiff was directed to work, and where he was working at the time of receiving the injuries aforesaid, was unsafe; that the unsafe condition thereof was unknown to plaintiff, but was known to defendants, or might have been known to them, and each of them, by the exercise of ordinary care."

There is no allegation that the plaintiff did not know, or he could have known by the exercise of ordinary care, the unsafe condition of the boxes of tea. It does not appear from the allegations

in the complaint that the injuries which the plaintiff received were caused by any defective or unsafe appliances furnished by the master. The Southern Pacific Company had nothing to do with the piling of the boxes of tea on the wharf, which, according to the theory of plaintiff, was the only thing which made the place unsafe.

It is manifest, upon these facts, that the plaintiff is not entitled to recover, unless from other allegations of the complaint it clearly appears that the defendant failed in its duty to provide the plaintiff with a safe place in which to work, or failed to furnish him with safe appliances with which to perform his work. The Southern Pacific Company is not shown to have had any authority or duty to perform in piling the boxes. On the other hand, it is affirmatively shown that the injury which plaintiff received was not caused by any fault or negligence of the railroad company, but was occasioned by the handling and transportation of the boxes of tea in the performance of the work—usual and ordinary in its character—which the plaintiff was employed to do, and came within the risks of his employment, assumed by him at the time.

In *Kohn v. McNulta*, 147 U. S. 238, 241, 13 Sup. Ct. 298, where an employé of a railroad company was injured by having his arm crushed between the deadwoods while he was attempting to couple two freight cars, differing with his employer's cars in structure, the court said:

"It is not pretended that these cars were out of repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods or bumpers of unusual length to protect the drawbars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervener was * * * a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to any one. Under those circumstances, he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

In *Southern Pacific Co. v. Johnson*, 16 C. C. A. 317, 69 Fed. 559, 572, where it was claimed that Johnson, an engineer in the employ of the company, lost his life either by falling off or being thrown from the running board of the locomotive, by reason of a defective engine furnished by the railroad company, the circuit court of appeals for this circuit said:

"The act of Johnson in going out on the running board while the train was in motion, to tap down the check valve, was incidental to the business of an engineer. It was usual, customary, and necessary to be done, according to the witnesses. It entered into the nature of his employment, and became one of the duties thereof, and he assumed the ordinary risks connected therewith."

It is in this class of cases that the principle expressed by the maxim, "*Volenti non fit injuria*," has the effect to debar the plaintiff from a remedy which might otherwise be open to him.

As was said in *Mundle v. Manufacturing Co.*, 86 Me. 400, 403, 30 Atl. 16:

"It would not be just for one who has voluntarily assumed a known risk, or such as might be discovered by the exercise of ordinary care on his part, and for which another might be culpably responsible, to hold that other responsible in damages for the consequences of his own exposure to those risks which were known and understood by him."

Moreover, the facts alleged in the complaint are wholly insufficient to bring this case within the rule that the master must provide his employé with a safe place in which to work.

In *Callan v. Bull*, 113 Cal. 593, 603, 45 Pac. 1017, the court said:

"The rule which requires the master to provide a safe place and safe appliances for the servant is applied when the place in which the work to be done is furnished or prepared by the master, as in the case of a ship or a mill or a factory, or when the machinery or other appliances with which the servant is employed to work are furnished by the master; but it has no application when the place at which the work to be done or the appliances for doing the same are prepared by the servant himself."

See *Armour v. Hahn*, 111 U. S. 313, 318, 4 Sup. Ct. 433; *Coyne v. Railway Co.*, 133 U. S. 370, 10 Sup. Ct. 382; *Marsh v. Herman*, 14 Minn. 537, 50 N. W. 611; *Butler v. Townsend*, 126 N. Y. 105, 111, 26 N. E. 1017; *Kelley v. Norcross*, 121 Mass. 508; *Mining Co. v. Clay's Adm'r*, 51 Ohio St. 542, 38 N. E. 610; *Flynn v. City of Salem*, 134 Mass. 351.

This case is clearly distinguishable from that of *Elledge v. Railway Co.*, 100 Cal. 282, 34 Pac. 720, cited by the plaintiff. There the plaintiff was employed by the railway company as a laborer, and was engaged in loading stone upon a car. The car was placed by the defendant within 10 feet of a cliff of rock, which the plaintiff supposed to be secure. He had no knowledge or means of knowledge of its being unsafe, and it was alleged that the defendant knew at the time it directed him to load the stone that said cliff was insecure and dangerous and liable to fall. The plaintiff was injured by the sliding rock and earth which fell from this cliff. The facts elicited at the trial were that the agent representing the railway company knew that the cliff of rock was unsafe and dangerous, owing to a seam or crack which was visible only from the rear, and had not been seen by the plaintiff, and could not be seen from the front where he was put to work. The case was therefore within the rule that it was the duty of the master to provide the employé with a safe place in which to work. As the master knew that the place was unsafe, and had not warned the men of the danger, the plaintiff was entitled to recover.

But in the present case the wharf where the plaintiff was put to work is not alleged to have been unsafe. The only danger alleged relates exclusively to the handling of the freight which had been carelessly piled upon the wharf by the Pacific Mail Steamship Company, for the purpose of being loaded upon the cars of the Southern Pacific Company. It was in the handling of this freight by the plaintiff and his fellow servants—not by any defects in the appliances furnished by the railroad company, nor danger at the place where he was employed—that plaintiff was injured. Suppose that in the *Elledge* Case there had not been any embankment or cliff of rocks, and that *Elledge* had been directed to aid and assist other workmen in loading the rock on the car of the railway company, which had been carelessly and negligently thrown into a pile by other parties, and that, in climbing on top of the pile to remove a stone therefrom, another stone in the pile had become displaced, and fell against *Elledge*, in-

flicting an injury; could it be said that the place at which he was directed to work was unsafe? There is always more or less danger in handling freight, either in loading or unloading cars; but my attention has not been called to any case where the master has been held responsible for an injury received by an employé engaged in that business, while simply doing the work he was employed to perform. In all the cases where a recovery has been had, the injury was occasioned by the place at which he was put to work being unsafe, by reason of some defect in the platform or wharf where freight was piled, which was known to the master and unknown to the servant, or by reason of some defect in the appliances furnished by the master to the servant.

It necessarily follows from the views already expressed that the complaint does not state facts sufficient to constitute a cause of action against the Southern Pacific Company, and it is therefore unnecessary to consider the other points raised by the demurrer. The demurrer is sustained.

UNITED STATES v. CENTRAL PAC. R. CO. et al.
(Circuit Court, N. D. California. December 23, 1897.)
No. 4,857.

PUBLIC LANDS—PRE-EMPTION—EXTENT OF CLAIM.

A pre-emptor, settling on and improving an 80-acre tract of government land, is not entitled to extend his claim over an adjoining 80 acres in another section, upon which he has not made any improvement, nor done any act evidencing his claim, as against a subsequent grantee of the government, merely because he was entitled to pre-empt 160 acres.

This is an action by the United States against the Central Pacific Railroad Company, E. R. Lunt, and K. J. Nichol to cancel a patent to certain land.

H. S. Foote, U. S. Atty., and Samuel Knight, for the United States.
Joseph D. Redding, and Wm. Singer, Jr. (Wm. F. Herrin, of counsel), for defendants.

MORROW, Circuit Judge. The act of July 25, 1866 (14 Stat. 239), granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, Or., provided, in section 2:

"That there be, and hereby is, granted * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof."

The map of location of the route of the California & Oregon Railroad & Telegraph line, under this statute, was filed in the office of the secretary of the interior on the 13th day of September, 1867, and on the 29th day of October, 1867, the lands lying within the limits of the grant were withdrawn from sale by the commissioner of the

general land office. The E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 33, in township 22 N., of range 4 E., Mt. Diablo base and meridian, is situated within the primary limits of this grant, and a patent was issued therefor on the 24th of January, 1880, to the Central Pacific Railroad Company, as the successor to the land interests of the California & Oregon Railroad Company. The present action is brought by the United States to cancel the patent for this subdivision of land, on the ground that the patent was issued through mistake, inadvertence, and error, the right of a pre-emption claimant having attached at and prior to the time the line of railroad was definitely fixed and located. It appears that in 1858 one Michael Lannon settled upon the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 34, township 22 N., of range 4 E., and that in May, 1871, he built a house and moved upon the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 33 in the same township, having some time prior thereto cleared, fenced, and had an orchard and vineyard on the last-named tract of land. The E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 33, and the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 34 were adjoining subdivisions of the public, unsurveyed lands, containing 80 acres each, and constituting together the limit of 160 acres of a pre-emption claim under the laws of the United States. Michael Lannon qualified himself to pre-empt land February 11, 1867, by filing his intention to become a citizen of the United States. The official plat of the survey of the land in question was filed in the United States land office December, 1878, and Michael Lannon filed his pre-emption, declaratory statement for the land May 21, 1879. It is contended that, as Lannon became a qualified pre-emptor February 11, 1867, and was at that time a settler upon public unsurveyed lands of the United States, his pre-emption claim had attached when the map of the location of the railroad was filed with the secretary of the interior on the 13th day of September, 1867. He was a settler on the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 34, but the question remains, was he at that time a settler on the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 33,—the land involved in this suit? The evidence in the record does not establish that fact. He did not build a house and move upon the last-named subdivision until May, 1871. It is true, he claims to have made some improvements on this subdivision of land prior to that time, but not earlier than 1869,—two years after the right of the railroad company had attached. The only claim he appears to have to this particular subdivision, as against the claim of the railroad company, is the fact that he was entitled to pre-empt 160 acres of land, and the particular subdivision of section 34, upon which he settled in 1858, and resided upon down to 1871, contained only 80 acres; that the adjoining subdivision of section 33, containing 80 acres, made up the full tract of 160 acres, and both together constituted his pre-emption claim. This is, clearly, not sufficient. As the land was unsurveyed, Lannon could not initiate his claim by taking proper proceedings in the land office, but he could have indicated his purpose to claim the land by some act of settlement or residence upon or cultivation of this particular subdivision, and, to establish a better right than the claim of the railroad company on this ground, it should appear that he made this claim prior to September 13, 1867, when the right of the railroad

company to that section became fixed by the location of the line of the road. Having a residence upon a subdivision of section 34, it was not necessary that he should move upon section 33 in order to make a subdivision of that section part of his pre-emption claim of 160 acres, but he was at least required to place some improvement upon it in the way of clearing, fencing, or by cultivation, to indicate that it was part of his claim, and, failing in this, I am of the opinion that there was no priority in the pre-emption claim to the land in dispute, that the grant to the railroad attached at the time the line of the road was definitely fixed, and that the patent was properly issued. In this view of the evidence, it will not be necessary to consider the question whether public land could be deemed pre-empted prior to the filing of the declaratory statement by the settler in the land office. *Railroad Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98. Let a decree be entered in favor of the defendants.

FIRST NAT. BANK OF CHICAGO, ILL., v. MITCHELL.

(Circuit Court, D. Connecticut, January 3, 1898.)

No. 435.

CONTRACTS OF MARRIED WOMEN—CONFLICT OF LAWS—FOLLOWING STATE DECISIONS.

A decision by the supreme court of Connecticut, in insolvency proceedings, that a contract of guaranty dated and signed by others at Chicago, and to be performed in Illinois, which was afterwards signed by a married woman in Connecticut, and then delivered by her husband in Illinois, was, as to her, a Connecticut contract, and invalid under the law of that state for want of capacity to make such a contract, will be followed by a federal court in an action against her on the guaranty.

This was an action at law by the First National Bank of Chicago against H. Drusilla Mitchell, a married woman, upon a contract of guaranty.

Case, Bryant & Case, for plaintiff.

Hungerford & Maltbie, for defendant.

TOWNSEND, District Judge. Action on a guaranty, heard upon complaint and answer and an agreed statement of facts. The defendant is a resident of Connecticut, and a married woman, having been married in 1857, and having resided continuously at Bristol, Conn., since that time. Defendant's husband, G. H. Mitchell, was a member of a co-partnership, Morse, Mitchell & Williams, doing business at Chicago. At the request of her husband she signed a guaranty, which was taken by him to Chicago, and there delivered to the plaintiff. The guaranty was dated at Chicago, and had been signed by the members of the firm there before it was signed by the defendant. Plaintiff claims that, although defendant did not personally leave the state of Connecticut, yet as the written contract was dated at Chicago, and was delivered by her husband at Chicago, and was to be performed there, defendant must be taken to have made the contract at Chicago, and, as in Illinois a married woman is allowed to

contract for all purposes, defendant could so contract in Illinois, and is bound by the guaranty. After this suit was brought defendant made an assignment in insolvency. The plaintiff presented the claim herein involved to the commissioners on her estate, and it was allowed by them, and the case was taken by her trustee in insolvency by appeal to the superior court, and upon reservation to the supreme court of errors of Connecticut, where precisely the same facts were presented and passed upon. The court there held that defendant, being a married woman, had no capacity to make any such contract; that to sign the guaranty in Connecticut, and authorize her husband as her agent to deliver the guaranty at Chicago, was to enter into a contractual relation in Connecticut which she had no capacity to do; that, therefore, she could not, while in Connecticut, authorize her husband to take the guaranty to Chicago and deliver it; and that, therefore, it was never delivered by her.

Before considering the legal propositions involved in this decision, the question arises whether this court will enforce against a married woman, who has always resided in Connecticut, a contract made by her by a writing sent to another state, she not personally leaving the state of Connecticut, which the highest court of Connecticut has pronounced invalid and unenforceable in that state. In *Milliken v. Pratt*, 125 Mass. 375, the facts were practically identical; the guaranty in that case having been taken by the husband to the state of Maine. The court held that the contract was made in Maine, and valid in Massachusetts, saying:

"If the contract is completed in any state, it makes no difference, in principle, whether the citizen of this state goes in person or sends an agent, or writes a letter across the boundary line between the two states."

In finally deciding the question, however, the court lay stress upon the fact that at the time of the trial of the case the wife could have legally made the contract in Massachusetts, saying:

"The question, therefore, is whether a contract made in another state, which a married woman was not at the time capable of making under the law of this commonwealth, but was then allowed by the law of that state to make, and which she could now legally make in this commonwealth, will sustain a case against her in our courts."

And *Milliken v. Pratt* also seems to hold that the guaranty made in Maine, as above stated, would not be enforceable in Massachusetts if Massachusetts had not consented to such enforcement, saying:

"As the law of another state cannot operate nor be executed in this state by its own force, but only by the comity of this state, its approbation and enforcement here may be restricted by positive prohibition of statute. A state may always by express enactment protect itself from being obliged to enforce in its courts contracts made abroad by its citizens which are not authorized by its own laws. * * *. It is possible, also, that in a state where the common law prevails in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it may be inferred that such an utter incapability, lasting throughout the joint lives of husband and wife, must be construed as so fixed by the settled policy of the state, for the protection of its own citizens, that it could not be held by the courts of that state to yield to the laws of another state in which she might undertake to contract."

In *Bell v. Packard*, 69 Me. 105, a married woman sent a contract to Maine, where she could have legally made it, and the supreme

court of Maine held that the contract was made in Maine, and was valid and enforceable there.

In *Bowles v. Field*, 78 Fed. 742, a married woman residing in Indiana, while transiently in Ohio, gave a note as surety for her husband. The laws of Indiana allowed married women to contract for all purposes, except as especially provided, and among the exceptions was a contract for suretyship. The court held that, having a general power to contract, this particular limitation could have no extra-territorial force. The court said: "It is not charged that she went to Ohio, and executed the notes as surety for her husband, for the purpose of evading the law of her domicile." This seems to be an intimation that, if she had not had a general power to contract, and had remained in Indiana, the contract would not have been enforceable.

The common law, which makes the contract of a married woman invalid, must still be accepted as the general rule for those states which have not made exceptions by statute. The three cases cited above, holding the contract of a married woman valid, are in states where a woman has the general power to contract, and it is implied in two of those decisions that the state of her domicile would have had the power to protect a married woman from the result of her contract made while personally present in such state, if it had chosen to do so.

It may be admitted that, as stated by Judge Story in his *Conflict of Laws*, § 103, in regard to incapacity incident to coverture, "the law of the place where the contract is made or the act is done now governs." And that, as stated in *Scudder v. Bank*, 91 U. S. 406, "the validity of a contract is to be determined by the law of the place where it is made." Yet I do not think this principle has yet been carried so far in any decided case as a judgment for the plaintiff in this case would require.

The capacity of citizens of a state, so long as they actually remain within the borders of the state, would seem to be a matter of local law, to be controlled by the laws of the state, and not to be evaded by the simple device of sending or mailing a letter to some other state. Suppose that the laws of some state should provide that infants might attain their majority and become capable of contracting at the age of 18 years, could it be held that a minor 18 years old in Connecticut could, by mailing a contract to that state, subject his property in Connecticut to execution, against the will of his guardian, and against the determination of the legislature and courts of Connecticut? "It may be said, generally, that wherever the decisions of the state courts related to some law of a local character which may have become established by those courts, or has always been a part of the law of the state, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the federal courts. Where such local law or custom has been established by repeated decisions of the highest courts of the state, it becomes also the law governing courts of the United States sitting in that state." *Bucher v. Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. 974; *Burgess v. Seligmann*, 107 U. S. 20, 2 Sup. Ct. 10.

In the present case, the law by which the invalidity of a contract is established is the common law, and the decisions that a married woman has capacity to make such contracts are founded upon local statutes. In these circumstances I think it is the duty of this court to follow the decision of the Connecticut court of last resort. Let judgment be entered for defendant.

CHESAPEAKE & O. RY. CO. v. STEELE (two cases).

(Circuit Court of Appeals, Sixth Circuit. January 4, 1898.)

Nos. 508 and 509.

1. NEGLIGENCE—EVIDENCE.

Where evidence that a crossing signal was given greatly preponderates, the question of negligence is still for the jury, when there is substantial evidence tending to prove that it was not given in sufficient time to constitute a warning.

2. RAILROAD CROSSINGS—WARNING SIGNALS.

Crossing signals must be given at such times and places, taking into consideration the speed of the train, obstruction to sound, and all other circumstances, as will enable a careful and prudent man to act upon the warning.

3. CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Contributory negligence is a matter of defense to be established by the defendant, and, in the entire absence of proof, it will be presumed that decedents who were killed in a collision at a railroad crossing stopped, looked, and listened before going upon the track.

4. RAILROAD CROSSING—CAUTION—INSTRUCTION.

It is not error to refuse to instruct that it was the duty of decedents to stop, look, and listen, at a certain point a few feet from the track, before going upon the crossing, when stopping at such point in itself involved a danger to which the attention of the jury was not drawn.

5. SAME—PRESUMPTION.

An instruction that, if the jury believed decedents could have heard the noise of the approaching train in time to have avoided the collision, they may presume, from the fact that they went upon the track, that they did not listen, is properly refused, as it eliminates the matter of the crossing signal, and does not take into consideration the presumption that decedents knew the danger and exercised reasonable care.

In Error to the Circuit Court of the United States for the District of Kentucky.

Richard and John Steele, brothers, were killed at a place where the public road crosses the Chesapeake & Ohio Railway at grade, by a collision with a fast-moving passenger train, while driving in a buggy across the railroad track. The administratrix of each brought suit against the railroad company for an alleged negligent killing, and these two suits, dependent on the same facts, were tried by the same jury, who found for each plaintiff a separate verdict. Proper judgments were rendered thereon, from which separate writs of error have been sued out by the railroad company.

The issues upon which the case turned were whether the railroad company was guilty of negligence in respect to the precautions it had observed in relation to this crossing, so as to give persons crossing its track, at the time and place of the collision by which the deceased were killed, proper and reasonable warning of the approach of its train, and whether the deceased had been guilty of such contributory negligence as to prevent a recovery.

The facts necessary to be stated are these: The general course of the turnpike road on which the deceased were traveling was north and south, and

that of the railroad east and west, and they crossed at nearly a right angle. The deceased were returning to their homes from the house of one Moore, who lived about one mile north of the railroad. They lived some distance south of the railroad, but were familiar with this crossing. The crossing was a particularly dangerous one, inasmuch as both the railroad and public road approached the crossing through considerable cuts, and a traveler going south on the highway could get no view of the track or of a train on the track, after leaving a point about 200 feet north of this crossing, until he reached a point 19½ feet from the center of the track. Neither could a lookout upon an engine approaching from the east, as was the train with which the deceased collided, see any one approaching this crossing from the north until this point on the right of way and on a level with the railroad cut was reached. If the traveler was driving, as was the case with the deceased, the horse would be about within striking distance of a passing train before persons in a vehicle would be clear of the obstructions to a view of a train approaching from the east. The deceased were young men, warmly wrapped up, the day being cold, snowy, and blustery. When they left Moore's house the sides of their buggy top were strapped down, and their ears were protected, one by the side pieces of a cap drawn down, and the other by ear bobs fastened under the chin. The train with which they collided was a fast passenger train, traveling at a speed of full 50 miles per hour. There was a station whistling post 1,700 feet east of this crossing, where it was customary for crossing whistles to be blown for this crossing. The engineer upon the engine drawing the approaching train was the only eyewitness of the collision, the deceased being instantly killed. This witness in his evidence stated that when from 50 to 60 yards of this crossing he saw the head of the horse driven by deceased as soon as it passed a fence post at the point where the railroad cut intersected the turnpike cut. This was 19½ feet from the center of the track. He next saw the buggy top as it came into view, and then the deceased sitting in the buggy, the sides of the buggy being then up, as he states. He says they seemed to be driving pretty fast, and to increase their speed as they crossed the track. The alarm was sounded and brakes applied, but all efforts to avoid a collision were in vain, the buggy being struck just as the horse passed uninjured across the track.

The negligence of the railroad company, if any, consisted in not giving reasonable notice of the approach of its train to this crossing. Section 773, Ky. St., requires every railroad company to erect a signal board at every grade crossing of a public highway. There was such a crossing post and sign at this crossing. There was also a whistling post 1,700 feet east of this crossing. By section 786 of same Statutes, the whistle is required to be sounded at least 50 rods before crossing a highway at grade, and that the whistle shall be sounded or bell rung continuously until such crossing shall be reached. The signal for a station is one long blast of the whistle, for a crossing two long and two short blasts, and the danger signal is a succession of short blasts.

The following is a summary of the evidence bearing upon the question as to whether a warning was given before reaching this crossing: Owens, the engineer, and Wyant, the fireman, testify that the whistle was sounded at the whistling post and the bell rung from there to the crossing. Stephenson, the conductor, Stratton, the baggage master, and Judd, a brakeman, testify to a distinct recollection of hearing the crossing signal given before the alarm was sounded. H. L. Rowe, a passenger, testifies to a habit of noticing train signals, and to a positive recollection of hearing a crossing signal about one-half minute before an alarm whistle. W. C. Payne, an express company route agent and a passenger on this train, testifies positively to a similar recollection. He says he had a railroad connection to make at Lexington, and was watching the movement of the train with interest, hoping to have time in Lexington to get supper before his train should leave. James Stafford and wife, Sarah Stafford, who lived in the vicinity of the crossing and knew the locality of the whistling post and crossing, both testify to hearing the crossing signal given, and shortly afterwards the alarm signals, and give a circumstance calculated to strengthen their recollection. W. H. Shoemaker, who lived 300 yards from the whistling post, also says he heard the crossing

signal, followed in a short time by alarm signals, but gives no special reason for noticing or remembering. Opposed to this was the evidence of several witnesses, who either say that the signal was not given or that they did not hear it, though they had opportunity to hear it if it had been sounded. They may be summarized thus: L. S. Price, a passenger, heard the danger signal, but did not hear the crossing signal, and thinks he would have heard it if it had been given. A. J. Thomas, a passenger, heard danger signals, but did not notice crossing signal. Cannot say that it did not sound. J. O. Walker, a passenger whose attention was attracted by danger signal, did not hear crossing signal. Thinks it probable he would have heard it. Mrs. Worthington, a passenger, had her attention first attracted by the putting on of the air brakes, and about same time heard alarm whistle. Was noticing the progress of the train, and says she thought they were nearing Lexington, and did not hear any crossing signal. Will Ellis was the witness most relied on to prove the company's negligence. This witness lived near the whistling post, and was standing out in his yard when he heard the train give one long blast for Colby station,—the station about three-quarters of a mile east of this crossing. Knew the crossing signal to be two or three long blasts. The train had not regularly whistled for this crossing, though they frequently did. Heard the train coming something over a quarter of a mile before it reached the whistling post. Saw it as soon as it came out of the cut between Colby's and whistling post. Was attracted by the rapidity with which the train was coming, and watched it until it passed whistling post, and was out of sight in the cut west of the post. He states very positively that the engine did not whistle at the post, nor until out of sight and near the crossing, and that the signal it then gave was three sharp quick blasts, which he says is the danger signal. This witness says that, standing where he stood, he could see the train for about one-third of the way down the cut towards crossing, and that it did not give any signal until clear out of his sight and close to the crossing. On cross-examination he was asked if it whistled any more after he heard the three short, sharp blasts. He answered, "Yes; it blew three short blasts, and then blew again; the second time, two or three times." Being again interrogated as follows, "Then I understand you heard this engine blow three short blasts, and then there was a perceptible pause, and then it blew three short blasts again; that is the fact, is it?" he answered, "Yes, sir." "Q. And after it blew those three short, sharp blasts a second time, it began to slow down? A. Yes, sir. Q. You could tell that it began to slow down? A. I could hear the air of it; the pressure and stop." On re-examination he was asked as follows: "Q. In reference to the question of Judge H., you said you heard quick blasts of the whistle,—some blasts on the track after the train got out of your sight? A. Yes, sir. Q. And then, as the train was about to slow down, you heard three more? A. Yes, sir. Q. What kind of blasts? A. They were not quick together, like those others." Zack Mason, who at the time lived near this crossing, was in a lane near by and in sight of the crossing. Heard the alarm signals. Knew the difference between crossing and alarm signals. Did not hear any signal for the crossing. If it had blown at the whistling post, says he "would have heard it." This was the whole of the evidence upon the matter of signals on approaching this crossing.

John T. Shelby and Humphrey & Davie, for plaintiff in error.

Bronston & Allen and Morton & Darnall, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

It has been most earnestly argued that the evidence tending to prove negligence in respect to the giving on this occasion of the usual and customary crossing signal was not such as required the submission of that question to the jury. If we confine our attention to the

mere question as to whether any crossing signal was given, it must be admitted that the decided weight of proof was that such a signal was given. If, however, the evidence tending to show a neglect of such precaution amounted to something more than a mere scintilla, it was properly submitted to the jury, and a verdict against the weight of evidence was remediable only upon a motion for a new trial. *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463; *Insurance Co. v. Randolph*, 24 C. C. A. 305, 78 Fed. 759; *Railway Co. v. Slattery*, 3 App. Cas. 1155.

Even upon this aspect of the question of negligence, it cannot be safely said that there was not some substantial evidence tending to show that no warning was given other than the alarm sounded when the deceased were in the act of crossing. The evidence for the defendants in error amounted to something more affirmative in character than a mere statement, by witnesses who might have heard, that they did not hear. One or more of the witnesses for defendants in error were attentive to the movements of the train, and were able to say that no signal other than the alarm signal was given on this occasion. That such evidence was entitled to less weight than that of a witness who testifies to having heard proper crossing signals given is very obvious, and the jury were so advised. Still it is not possible to say that where two witnesses have equal opportunities, and gave equal attention to their surroundings, the denial by one of an occurrence testified to by the other does not make a conflict of evidence. The testimony of the witness Ellis was clearly affirmative in character. He heard the station whistle for Colby about one mile east of this crossing, and saw the train when it first came in sight east of the whistling post, and watched it closely and attentively until it reached and passed the whistling post, and disappeared in the cut between the post and crossing. He says, in a very positive way, that it sounded no whistle until out of sight, and very near the crossing, when he heard an alarm signal of three sharp, quick blasts. It is true that on cross-examination he says that, after a pause, these three blasts were repeated, and were "not so quick together" as the first set, and were followed by the slowing down of the train. It has been argued that the set of longer blasts heard by Ellis was a crossing signal, and that the witness has simply reversed the order in which the two sets of blasts were given, and his evidence, therefore, not in conflict with that of the witnesses who say that a crossing signal was first given, followed shortly by the alarm. This was clearly a question for the jury, for the witness does not say that the second set of blasts were long, but only that they were not so quick as the first. It is altogether probable that the alarm signal was repeated more than once, for Owens, the engineer, says he began whistling as soon as he saw deceased, and continued until he "struck the buggy." Owens describes the alarm signal as "a few short blasts,—four or five." A slight interval and a slight prolongation of some of the second set of blasts would account for the difference noted by Ellis. But the negligence of the railroad company may as well consist in the insufficiency of a signal in respect to timeliness as in a failure to give any. Grade crossings are the source of innumerable collisions.

At such a crossing, the rights of the general public traveling the common highway and of the railway company are mutual and reciprocal, and, although common convenience gives to the train of a railway company precedence in the use of such a crossing, it is upon condition that the former will give due warning of its approach, so that a vehicle upon the highway may stop and wait for the other to pass. In the case of *Improvement Co. v. Stead*, 95 U. S. 161, Mr. Justice Bradley, for the court, thus defined these mutual rights, by saying:

"If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way, but is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot, but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslacked speed is desirable, watchmen should be stationed at the crossing."

Upon this subject the trial judge thus stated the rule in reference to the effect of the speed of a train upon this matter of the timeliness of a crossing signal:

"If it was given, the next inquiry is, was it given in such a manner as to be a warning to those parties? It is of no value unless it prevents those who have a right to go upon the railway track to keep off, while the train is using it or approaching it to use it. Now, in considering the question, you should consider all the evidence fairly and impartially, and say, if there was a warning given for this crossing, was it a proper and reasonable warning; and, in considering that, it is important for you to consider the speed at which the train was coming, because you would readily see that a train coming at twenty or thirty miles an hour might give a warning that would be a real warning, and which would prevent accident, whereas, a train coming forty or fifty or sixty miles would not be in time to prevent others from going upon the crossing. The obligation of the company was to give a warning, and give such a warning, under all the circumstances, as would prevent a careful and prudent, cautious man from using the track, and thus endangering his own safety. The rapidity with which the train was coming as to this crossing is not of itself negligence. If the warning was given, and was given at such a place and at a time as to prevent any damage or injury which might result to those using the public highway, then the fact that the train was coming at forty or fifty miles an hour would not of itself be negligence."

To this we add that where, as in this case, the approaches to a grade crossing are through cuts, so that a traveler on the highway has no view of the track, and where both the noise of an approaching train and the shriek of a whistle must be much obstructed and muffled, it becomes highly important that the warning of an approaching train shall be given by whistle, and at such a point or points as will

most effectually serve to give timely notice to one traveling on the public highway. The customary place for giving such signals by trains approaching this crossing from the east was at the whistling post 1,700 feet east of the crossing, and the effort of the railroad company was to show that the usual signals were on this occasion given at that post. If given there, the train would reach the crossing, at the speed it was traveling, in about 22 seconds. Upon this question the testimony of the witness Ellis was highly pertinent, even if he mistook a crossing signal for an alarm, and mistook the order in which the two distinct signals were given. If no signal was given until the train had passed out of his sight in the cut between the post and crossing, it was a question for the jury to say whether, looking to the speed of this train and the blind character of this crossing, it was due diligence to neglect giving a crossing signal at the whistling post, and before entering the cut between the post and crossing, and whether, if given at the crossing, it would more likely have been heard than if given near the crossing and in a cut.

We come now to the question of contributory negligence. The court properly instructed the jury that this was a defense, the burden of supporting same being on the defendant. The exception taken to this part of the charge must be overruled. In courts of the United States this has long been the established doctrine. *Railroad Co. v. Gladmon*, 15 Wall. 401; *Hough v. Railway Co.*, 100 U. S. 213; *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653; *Railroad Co. v. Volk*, 151 U. S. 73, 14 Sup. Ct. 239; *Railroad Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104.

The sixth and ninth requests made by plaintiff in error for special instructions included an instruction that the burden was on the plaintiffs to prove that they were in the exercise of due care and caution in going upon the crossing. These requests involved the converse of the rule on the subject of contributory negligence, inasmuch as, in the absence of all evidence, there is a presumption that decedents were in the exercise of due caution, and the burden of proving that they were not rests upon the defendant throughout the case. *Railroad Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104. These requests, for this reason, were properly denied.

The fifth and seventh requests were intended to raise the question that, under the circumstances of this case, it was the duty of decedents to stop, and look and listen, before going upon this crossing. We think their vice lies in the fact that they included an instruction to stop by turning their buggy across the highway and parallel to the railroad at a point where they could observe the track both ways. The place indicated by both requests was between the track and a fence post on the side of the highway which, by measurement, was precisely 19½ feet from the center of the track. No view of the track for any distance was obtainable by persons driving until after the buggy itself had passed beyond this post. If we allow for the width of the buggy and for the distance a passing train would overlap the center of the track, it will appear that there was barely space for such a position to be taken. A traveler of ordinary prudence, and particularly persons with a nervous or restless horse, might well hesi-

tate if required to occupy such a position alongside of a train traveling at nearly a mile a minute. Under such circumstances, it might well be left to a jury to say whether ordinarily prudent persons would not be in the exercise of due and reasonable caution if, when approaching this crossing, they should stop and listen before driving so near the track, even though from the point of stopping no view of the track could be obtained. This instruction, if given, would preclude all inquiry into the question of the dangers incident to assuming a position so near a passing train, where there was so little room for the proper management of a horse, and whether some other precaution had not been observed which, under the circumstances, was equally as prudent as the one indicated. If it be assumed, for illustration, that the decedents did stop and attentively listen just before coming out of the highway cut, and that they heard no crossing signal nor the noise of the train, by reason of the obstructions to sound caused by the cut through which the train was approaching and the adverse direction of the wind, and were thus led to believe that the crossing was safe, the jury would have been obliged, if this instruction had been given, to find for the railroad company, although they might be of opinion that no signals for the crossing were given, and that the conduct of decedents, under the circumstances, was that of reasonably prudent and careful persons. So, if it had appeared that decedents had stopped before driving out on the railway right of way, and that one of them had gotten out of the buggy, and from the side of the track looked both ways, and, seeing no train and hearing no warning, had undertaken to drive across, this, too, would be, under this instruction, no answer to the charge of contributory negligence. The instruction was too narrow, by excluding consideration of all but one mode of approaching this crossing with due care, and in condemning every other suggested precaution. It is true that the place indicated was the only place from which travelers seated in a vehicle could look before crossing. But there may be circumstances when due care would be exercised by reliance on listening alone, and the circumstances of this case were such that it was not error to let the plaintiffs go to the jury upon the question as to whether some other precaution than the one suggested by this instruction would not have been the observance of reasonable care. That there was no evidence tending to show that either of the suggested precautions were taken finds its sufficient answer in the fact that there was no evidence at all as to the conduct of decedents before they were seen in the act of driving upon the crossing. That they were driving and not standing when the engineer first saw them is entirely consistent with the presumption that they had stopped and listened before undertaking to cross. If one of the deceased had theretofore gotten out, and from the side of the track looked east for an approaching train, he would have commanded only some 800 feet of the track. If this train had been beyond the nearest cut, and as far east as Colby, a station east some three-fourths of a mile, he would not have seen this train, and yet before he could have returned to his buggy and crossed the track he would have been run down by this very train, unless warned of its approach by the noise it made in time to wait its

passage. If the burden of proving that decedents were in the exercise of due care was upon the plaintiffs as something to be proven as a condition of recovery, the absence of any evidence tending to show that they had stopped and looked and listened where the train could be observed, or had stopped and listened before reaching the place where they could see and be seen by an approaching train, would be fatal to this case. But such is not the rule in the courts of the United States. That decedents were in the exercise of due care is a presumption which stands in place of evidence until it is shown that they had been guilty of contributory negligence. In the absence of evidence to the contrary, the presumption is that decedents did stop and listen before they came out where they were seen by the only eyewitness, and that not hearing crossing signals, or the noise of the approaching train, they unconsciously drove into a position of peril.

The eighth request preferred by plaintiff in error was in these words:

"If the jury believe from the evidence that the decedent could have heard the noise of the approaching train in time to have avoided the collision, had he listened for it, it has a right to presume from the fact of his going upon the crossing that he did not listen; and such failure, if there was such, constituted negligence which will prevent a recovery."

This instruction eliminates the matter of a crossing signal altogether, and puts the defense upon the presumption that, because decedents drove upon this crossing in time to collide with an approaching train, the jury might presume that they had done so without listening, if from the evidence they believed that, if they had listened, they would have heard "the noise of the approaching train." The instruction takes no account of the fact that the decedents were acquainted with the dangerous character of this crossing, and had the highest known incentives to the exercise of care and caution before going upon the crossing, where their lives would be in danger in case of a collision. The rule imposing upon the defendant the burden of showing contributory negligence would be easily overcome if this is the law. If to stop and listen before going so near the track as to be able to both look and listen was, under the circumstances of this case, the exercise of due care, which, as we have already decided, was a proper question to go to the jury, then the presumption, in the absence of evidence, is that they did so stop and listen.

That the jury might rightly infer that they had not so stopped and listened, if there was any sufficient evidence tending to rebut the presumption raised only by the absence of evidence, is most obvious; and so evidence that persons driving as these decedents had heard the noise of a train approaching this crossing under like circumstances was, of course, competent upon the issue as to whether they had stopped and listened or been in any way attentive to the danger of this crossing. The rule that contributory negligence is a defense, to be made out by the defendant, rests upon the presumption of the exercise of due care and caution,—a presumption which is removed whenever there is evidence sufficient in law, if credited, to establish contributory negligence. In the case of *Railroad Co. v. Gentry*, cited above, an instruction almost identical with the one now

under consideration was asked and refused. This refusal was approved by the supreme court which said:

"There was no evidence upon which to rest such an instruction. As already stated, no one personally witnessed the crossing of the track by the deceased, nor the running of the flat car over him. Whether he did or did not stop, and look and listen, for approaching trains, the jury could not tell from the evidence. The presumption is that he did; and, if the court had given the special instruction asked, it would have been necessary to accompany it with the statement that there was no evidence upon the point, and that the law presumed that the deceased did look and listen for coming trains before crossing the track. In *Improvement Co. v. Stead*, 95 U. S. 161-164, the court, speaking by Mr. Justice Bradley, upon the subject of the relative rights and duties of a railroad company and the owner of a vehicle crossing its track, said: 'Those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care.' This principle was approved in *Railroad Co. v. Griffith*, 159 U. S. 603-609, 16 Sup. Ct. 105. Manifestly, it is not the duty of the court, when there was no evidence as to the deceased having or not having looked and listened for approaching trains before crossing the railroad track, to do more, touching the question of contributory negligence, than it did, namely, instruct the jury generally that the railroad company was not liable if the deceased, by his own negligent conduct, contributed to his death, and that they could not find for the plaintiffs unless the death of the deceased was directly caused by unsafe switching appliances used by the defendant, and without fault or negligence on his part."

It would have been improper to instruct the jury as requested without also instructing them as to the presumption that they had not only listened, but had stopped and listened. Concerning the conduct of the deceased, after they were seen by the locomotive engineer, the trial court in its charge said:

"Now, in regard to the duty which devolved upon the decedents at the time, I should say that they, in the emergency upon them, were not guilty of negligence, even although they did not adopt the plan and method of getting out of the impending danger which a cool, calm man, sitting calmly by, would have taken, but that you must consider, in considering contributory negligence, what a cautious man would probably have done under the circumstances which surrounded them."

To this no exception was taken, and, indeed, none could be well taken. If deceased were guilty of contributory negligence at all, it was in negligently driving into the position from which escape was most doubtful when warned of danger by seeing or hearing this train. The charge of the court upon the degree of care required from travelers approaching a grade railroad crossing, and upon the effect of contributory negligence, was clear and sound so far as it went, and has not been excepted to, save in the matters already discussed.

Where the undisputed facts of a case are such as that no other reasonable inference can be drawn than that of negligence, it is the plain duty of a trial court to so instruct. Under such a state of facts negligence becomes a question of law. *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85; *Blount's Adm'x v. Grand Trunk Ry. Co.*, 22 U. S. App. 129, 9 C. C. A. 526, and 61 Fed. 375; *McLeod v. Graven*, 19 C. C. A. 616-622, 73 Fed. 627. The obstructions to sight and sound were so serious in approaching this crossing that

it was clearly the duty of decedents to have exercised a degree of care commensurate with its dangerous character. If, with reasonable prudence, the decedents could have stopped where they could both look and listen for an approaching train, they were bound by every consideration of self-preservation to do so. If, however, they could not, with reasonable safety, stop at a place where they could both see and hear, it was all the more imperative that they should stop and listen at the most favorable point near the crossing, and a failure to so stop and listen, under the circumstances of this case, would be inexcusable negligence, and an instruction to this effect might have been properly given. There is nothing in the cases of *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, or *Railway Co. v. Farra*, 31 U. S. App. 306, 13 C. C. A. 602, and 66 Fed. 496, which, under the remarkable character of this crossing, would have made such an instruction improper. But no request for such an instruction was made. The requests which included the subject of stopping included either a stopping at a particular place, or a proposition as to the burden of proof in conflict with the well-settled doctrine of this court concerning contributory negligence.

The error assigned because of the refusal to instruct the jury to find for the plaintiff in error must be overruled, for the reasons already indicated in this opinion. There is no error, and the judgment must be affirmed.

GITTINGS et al. v. LOPER.

(Circuit Court, E. D. Pennsylvania. November 27, 1897.)

No. 5.

1. PLEADING—STATEMENT OF CLAIM—DENIAL OF ANTICIPATED DEFENSE.

It is not a legitimate function of a statement of claim to reply to an anticipated affirmative defense.

2. PLEADING—AFFIDAVIT OF DEFENSE—CONTENTS OF SAME.

Where, in a suit brought upon two drafts, the plaintiffs' statement of claim avers that the drafts were purchased by the plaintiffs "prior to the date of the payment thereof, and for a valuable consideration, without notice," it is not incumbent upon the defendant to reply to such irregular and premature matter in his affidavit of defense.

This is a suit to recover the sum of \$3,000 upon two drafts in the possession of the plaintiffs. The statement of claim alleged that the drafts had been purchased by the plaintiffs "prior to the date of payment thereof, and for a valuable consideration, without notice of any adverse claim or equity of the defendant." The affidavit of defense, after setting out that the acceptance by the defendant of the drafts had been procured by means of false and fraudulent representation, alleged that the defendant "is advised that the averment in the statement that the plaintiffs purchased the drafts for a valuable consideration, without notice, is an averment of a legal conclusion, and not a statement of fact requiring a denial, and, moreover, relates to matter of rebuttal, which need not be denied by the affidavit of defense." This was a rule upon the defendant to show cause why judgment

should not be entered in favor of the plaintiffs and against the defendant for want of a sufficient affidavit of defense.

Daniel J. Myers, for plaintiffs.

J. Howard Gendall, for defendant.

DALLAS, Circuit Judge. If this affidavit shall be supported by evidence, the burden will be shifted to the plaintiffs to establish that they took the paper in suit without notice of the fraud alleged, before maturity, and for value. *Investment Co. v. Russel*, 148 Pa. St. 496, 24 Atl. 59; *Simons v. Fisher*, 17 U. S. App. 1, 5 C. C. A. 311, and 55 Fed. 905. This burden cannot be evaded by the averment that the plaintiffs purchased the drafts "prior to the date of the payment thereof, and for a valuable consideration, without notice." It is not a legitimate function of a statement of claim to reply to an anticipated affirmative defense, and it is not incumbent upon a defendant to rejoin to any such irregular and premature replication. If this were not so, a plaintiff might defeat such a defense as is interposed here, by merely alleging the existence of the facts necessary to avoid it, and so escape from the requirement that he shall overcome it, if proved, by exculpatory evidence. If the plaintiffs are bona fide holders, they can readily show it; but the defendant may not have knowledge, or be informed, upon the subject, and to require him to make affidavit respecting it would be neither reasonable nor fair. The rule for judgment is discharged.

BELLEVILLE & ST. L. RY. CO. v. LEATHE.¹

(Circuit Court of Appeals, Seventh Circuit. January 3, 1898.)

No. 414.

1. RES JUDICATA—JUDGMENT OR DECREE FOR DEFENDANT.

A judgment or decree for the defendant does not necessarily establish the truth of all the defenses where several are pleaded.

2. SAME—DECREE DISMISSING BILL.

An action having been brought against a railroad company for a debt, it caused one L., who, it was claimed, had assumed payment of its debts, to be notified thereof, and authorized him to use its name in defending the suit. L. accordingly assumed the defense, without himself becoming a party, and also brought a suit in equity in the name of himself and the railroad company to enjoin the prosecution of the action at law. By the answer filed in the injunction suit issues were raised, both as to the liability of the company for the debt, and the assumption of the debt by L. The action at law resulted in a judgment against the company, and the injunction suit was dismissed on the merits. *Held*, that neither the judgment nor decree was conclusive of L.'s individual liability, and he was entitled to litigate that question in a subsequent suit against him personally.

In Error to the Circuit Court of the United States for the Southern Division of the Southern District of Illinois.

This action was brought by the Belleville & St. Louis Railway Company, the plaintiff in error, for the use of Edward L. Thomas, against Samuel H. Leathe, the defendant in error, upon an alleged promise of the latter to the railway company named to pay the company's indebtedness, including one of \$60,000 to Thomas. The first count of the declaration alleges the promise,

¹ Rehearing, denied March 5, 1898.

and the consideration upon which it was made, and the existence and nonpayment of the debt. The second count, in addition to the averments of the first, alleges that at the September term, 1893, in the circuit court of St. Clair county, Ill., Edward L. Thomas brought an action against the plaintiff to recover the amount so due him; that the plaintiff caused the defendant to be notified of the pendency of that action, and authorized him to use its name in defending the same; that in pursuance of the notice the defendant employed counsel, filed pleas, and entered upon the defense; that the issue in that cause was whether the amount claimed by Thomas was then due and payable to him; that upon the trial, upon evidence introduced by both parties, the court gave judgment for Thomas for \$53,022.23, which judgment is in full force and effect, and remains unpaid. The third count, besides repeating the averments of the first and second, alleges that while the action in the circuit court of St. Clair county was pending for trial the defendant, Leathe, in his own name and in the name of the plaintiff and the Belleville City Railway Company, to which the property of the Belleville & St. Louis Railway Company had been transferred, filed in said court a bill for an injunction to restrain Thomas from recovering judgment against the plaintiff upon said indebtedness; that, among others, one of the issues made by the bill and answer thereto was whether the amount claimed by Thomas from plaintiff was then due and payable, and whether the defendant, by reason of a certain deed and the consideration therefor, had assumed the payment of the plaintiff's debts, including that to Thomas; that a full hearing was had upon that issue, and it was then and there fully adjudicated, the injunction denied, and the bill dismissed; that thereupon judgment was rendered in the action at law in favor of Thomas for the sum above named; that it was then and there adjudicated that the said sum was due and payable to Thomas, and that the defendant had assumed the payment thereof,—all which the plaintiff offered to prove by the record of the proceedings, judgment, and decree referred to. The only plea interposed was the general issue. At the hearing the plaintiff dismissed the first count of the declaration, and in support of the other two put in evidence transcripts of the record of the judgment at law and of the decree in equity in the state court. The transcript of the chancery suit contains the evidence on which the decree was based. No other evidence was offered, and thereupon the defendant moved the court, which, by agreement in writing was trying the case without a jury, to exclude the evidence offered. That motion the court afterwards sustained, and gave judgment for the defendant. The exclusion of the evidence is shown by a proper bill of exceptions, and error is assigned upon the ruling. Among the authorities cited on behalf of the plaintiff in error are: *Durant v. Essex Co.*, 7 Wall. 107; *Aurora City v. West*, Id. 102; *Cromwell v. Sack Co.*, 94 U. S. 351; *Lyon v. Manufacturing Co.*, 125 U. S. 698, 8 Sup. Ct. 1024; *Outram v. Morewood*, 3 East, 346; *Freem. Judgm.* §§ 249, 270; *Black, Judgm.* §§ 548, 614.

Chas. W. Thomas, for plaintiff in error.

G. A. Koerner, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after the foregoing statement, delivered the opinion of the court.

A fuller statement of the facts is not necessary to an understanding of the propositions of law on which our decision must turn. It may be that by reason of the facts alleged the defendant in error was estopped by the judgment at law to deny the amount of the indebtedness of the railway company to Thomas, but the question of his personal liability to pay that debt was not an issue in that action, and therefore could not have been concluded by the judgment. The proposition on which chief reliance is placed by the plaintiff in error is that the liability of the defendant in error to pay the debt was determined by the decree in the chancery suit. Together with various

other matters of defense set up in the answer to the bill in that case, the promise of the defendant in error on sufficient consideration to pay the debts of the railway company, including that to Thomas, was definitely averred; and, the bill having been dismissed after a hearing upon the merits, it is insisted that the decree of dismissal is an adjudication between the parties of all the issues, and therefore a conclusive determination of the alleged liability of the defendant in error. The proposition is not sound, and is believed to be without support in the decided cases. It is, of course, true, and the doctrine is everywhere recognized, as declared in *Durant v. Essex Co.*, 7 Wall. 107, that a decree in absolute terms dismissing a bill is "an adjudication of the merits of the controversy," but that does not mean that such a decree must be regarded as establishing conclusively the truth of all matters of defense alleged, when more defenses than one appear to have been pleaded. "It is a general rule that a valid judgment for the plaintiff definitely and finally negatives every defense that might and should have been raised against the action" (Black, *Judgm.* § 354); but the converse—that a judgment or decree for the defendant establishes the truth of all defenses pleaded, no matter how many or various—is not true. The authorities on this point are consistent, though in respect to the burden of proof, and perhaps other phases of the subject, they are not in entire harmony. *Van Fleet*, Former Adj. § 279. For the present purpose it is enough to quote a passage from the opinion of the supreme court in *Russell v. Place*, 94 U. S. 606, 608:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

In *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 329, 16 Sup. Ct. 564, where *Russell v. Place* and other cases are cited, it is said:

"The elementary rule is that, for the purpose of ascertaining the subject-matter of a controversy, and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined."

The judgment below is affirmed.

CITY OF MILWAUKEE, WIS., v. SHAILER et al.
(Circuit Court of Appeals, Seventh Circuit. January 3, 1898.)

No. 418.

MUNICIPAL CORPORATION—CONTRACT—DAMAGE.

A city cannot recover damages for failure to complete a tunnel in accordance with a contract which provides that, in case of default on the part of the contractors, the city should complete the work at their expense, when the tunnel, as constructed by the city, is essentially different in plan and cost of construction from that contemplated by the agreement.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

In this case the court directed a verdict in favor of the defendant upon the principal claim, and in favor of the plaintiffs upon the counterclaim. The appeal is by the city alone, and one of the specifications of error, perhaps the only available one, is that the court erred in directing a verdict in favor of the plaintiffs and against the defendant upon the counterclaim. The substance of the amended declaration is that the plaintiffs, Robert A. Shailer and Charles R. Schniglaue, citizens of Michigan, on June 30, 1890, entered into a contract with the city of Milwaukee, represented by its board of public works, for the construction, according to plans and specifications, of an intake tunnel under Lake Michigan, with shafts and other connections, at stated prices per lineal foot; that the plans and specifications were unfit and impossible of performance, and that the officers who represented the city in the making of the contract fraudulently withheld from the plaintiffs knowledge which they possessed of the material in the bed of the lake likely to be encountered in the prosecution of the work, and fraudulently furnished information concerning test borings which had been made; that the plaintiffs were thereby deceived, and, after making large expenditures, were unable to proceed with the work, to their damage in the sum of a quarter of a million dollars. The city, besides denying the alleged deceit and the insufficiency of the plans and specifications, answered that the plaintiffs had ratified the contract by proceeding with the work and receiving payments thereon, and by assigning the contract to the Shailer & Schniglaue Company, a corporation, which in the same court was prosecuting a suit to recover the balance alleged to be due on the contract, and also pleaded a counterclaim on account of alleged breaches of the contract, consisting in failure and refusal to prosecute and complete the work, according to the plans and specifications, within the time specified, or within a reasonable time thereafter, and in the abandonment of the work before completion. It is also alleged that the board of public works, exercising the authority possessed under the contract and the statute of the state, declared the plaintiffs to be in default, and determined the amount of damages sustained by the city to be \$113,266.78, for the recovery of which, and the additional sum of \$45,000, claimed as liquidated damages under the provision of the contract for delays in completing the work, judgment was prayed. In the contract and specifications, as they appear in the record, there are the following, with other, provisions: "(1) The drawings form a part of the specifications, and each are hereby declared to be a part of the contract. (2) All the work during its progress, and on its completion, shall conform exactly to the lines and grades shown on the drawings mentioned in the specifications, and given by the engineer in charge, subject to such changes and modifications as the board of public works may deem necessary during its execution. (3) The board of public works, and it only, reserves the right to make any changes in the plans and specifications which they may deem necessary or desirable, and the contractors shall furnish any additional materials and do the work necessitated by such changes; the price of such extra work to be agreed upon by the board of public works and the contractor before the work is commenced. If the changes herein mentioned should diminish the amount of work to be performed or material to be furnished, the amount of the same, at a fair and reasonable valuation, shall be deducted from the contract price. (4) And the

said party of the first part (meaning the contractors) hereby further covenants and agrees, to and with the said city of Milwaukee, that he will complete the said work in manner and form aforesaid on or before the 1st day of June, A. D. 1891, and does hereby mutually agree between the said parties hereto that the said board of public works shall have the right and power, and the same is hereby reserved to said board, to adjust and determine finally all questions—First, as to the proper performance of these presents and the doing of the said work by the said party of the first part, and, in case of the improper or imperfect performance thereof, to suspend the said work at any time, or to order the entire reconstruction of the same, if improperly done, or to relet the same to some other competent party, and, in case the said work shall not be prosecuted with such diligence and with such number of men as to insure its completion within the time limited by these presents, to suspend the said work, and relet the same to some other competent party, or employ men and secure material for the completion of the same, and charge the cost thereof to the party of the first part; and, secondly, as to the amount earned under these presents by the party of the first part according to the true intent and meaning thereof. And it is further mutually agreed that any and every such adjustment and determination by the said board of public works shall be final and conclusive between the said parties to these presents, and binding upon them."

The evidence shows without dispute that the contractors, after constructing the shaft on shore, proceeded from that end with the work of opening the tunnel for the distance of 1,640 feet, when, on October 1, 1891, a deposit of gravel was encountered, from which there came such an influx of water that, notwithstanding all efforts at pumping, the tunnel was filled, and the water rose in the shaft to the level of the lake. On April 6, 1892, the board of public works, on the recommendation of the city engineer that a change of location of the line of the tunnel was necessary on account of the enormous flow of water at the face of the work, which made it impossible to continue on the line prescribed, adopted a resolution that the line "be so changed as to make a detour at a point 25 feet in the rear of the present bulkhead, going south at an angle of about 38 degrees from the present line," but not declaring how far the changed course should be followed, or at what point, if at all before reaching the other shaft, there should be a return to the original line. On the new course the work progressed for the distance of about 100 feet, and the same obstruction as before was encountered, and further attempt in that direction was abandoned. Under a verbal understanding, the contractors made an effort to escape the obstacle by drifting to the north, and on June 13, 1892, wrote to the chairman of the board, asking a formal order for their protection, and on the ensuing 16th the board made an order "that the contractors * * * be permitted to build a solid bulkhead immediately west of the curve in said tunnel, which deflects to the south, and that they be further permitted to branch from said tunnel at a point immediately west of this bulkhead to the northward for a distance not to exceed 20 feet, and then construct the tunnel on the line due east, ascending at a grade of not to exceed one foot in eight, until they shall have reached a point in the red clay above the water channel eastward of the face of the present easterly excavation upon the old line of the tunnel."

On the 18th the contractors wrote to the secretary of the board acknowledging receipt of a copy of the order, and saying: "We trust that there is no misunderstanding in relation to raising the grade of tunnel, etc. Your resolution says that 'we be permitted to build a solid bulkhead,' etc., and that we be permitted 'to go northward,' etc. It is with the distinct understanding that the proposed change is ordered by the board, and that we will be paid for the expense incurred by reason of said change, that we proceed with the work indicated in said resolution. The writer has no doubt, from his conversation with the board, that this is their intent and meaning; but at the same time, on reading the resolution, it would lead one to think that it was a favor which the board were granting us, and not an order for change in the plans and specifications. Please reply to the above at your earliest convenience, thereby obliging." On the 20th the secretary answered: "* * * The board consents to your request that the line of the tunnel and the grade

thereof be changed. Our resolution is not in the shape of the granting of a favor, but is the act of consenting to the proposed changes, both in the line and in the grade of the tunnel. We do not wish to have it understood as a positive arbitrary order from the board to make such change. There is no doubt as to the understanding that the board proposes to pay for the construction of the tunnel on the proposed line and grade as per your contract with the city for the tunnel work and for the extra expense incurred in hoisting the necessary material to the construction of the tunnel at the higher elevations. If this is not satisfactory, you will please state the points of your objections without delay." On July 20th following the contractors wrote to the chairman of the board explaining what they had been doing, and the difficulties encountered, and, concluding, said: "* * * It seems to us altogether too hazardous an undertaking to proceed without further information as to the extent and character of the pocket which has been encountered, and we therefore do not wish to avail ourselves of the permission granted to do so. We hope you will deem it advisable to at once have several borings made, and meanwhile we will crowd the work on the lake shaft."

There was further correspondence concerning the proposed borings, which it was supposed would take from one to two months to make, and the contractors turned their attention to the sinking of the other shaft at the crib in the lake. The construction of that shaft was attended with difficulties on account of the breaking in of the sand, creating hollow places under the crib, and frequent letters of complaint on that account were sent to the contractors by officers of the city. On January 3, 1893, the board of public works passed an order, reciting the delinquency of the contractors, and requiring them to proceed on or before the ensuing 20th with the construction of the tunnel and shafts at either one or both ends of the work with such diligence and number of men as to insure early completion of the work, failing which the board would suspend the work, and prosecute its completion, as required and provided by law. To this the contractors, on the ensuing 16th, answered, explaining that work on the shaft had been impracticable on account of the conditions of the weather and ice in the lake, and concluding: "* * * As far as the work from the shore end is concerned, we were under the impression that you did not deem it advisable to proceed further in an easterly direction, and with a radical change of grade, until the sinking of the lake shaft had been successfully accomplished. If we are wrong in the above, and you desire us to proceed from the shore end, please issue at once the necessary order, as provided in the contract, for a change in the plans and specifications. We would respectfully request that you give us a thirty-days extension of the time from the date named in your said communication of January 3d, and we will take advantage of any let-up in the severe winter weather, and before the thirty-days extension has expired we will endeavor to have the work in full operation. Assuring you that it is our purpose and intention to crowd the work to completion with all practicable speed, we remain." Thereupon, on the same day, the board entered an order that the time be extended from the date specified in the order of the 3d for 30 days on the work at the crib and for 10 days on the work from the shore end. On February 8, 1893, the board passed an order "that the city of Milwaukee consents that Shaller & Schniglaui may proceed with work on the intake tunnel and shaft without waiving any rights which may be now possessed by them to repudiate the contract for its construction for any cause. This consent is given on condition that all rights now possessed by the city are and shall be preserved."

On February 13th the contractors wrote to the board: "Gentlemen: Under the terms of your communication of the 8th inst. which we understand preserves to us all the rights we would otherwise possess, we shall begin work upon the necessary preparations to proceed with the lake shaft, now in course of construction, during the present week, and shall proceed with the work with all possible dispatch. The shore end of the new intake tunnel having been abandoned upon the line of grade originally called for by the plans and specifications, at a point about 1,600 feet from the shore shaft, it will devolve upon your board to make the necessary changes in the plans and specifications to show us what grade and line you desire us to follow in the prosecution of the work from the shore end, and we request you to do this at the earliest

possible moment, so that there may be no delay on that account. As was verbally stated to you by our Mr. Shailer at the board meeting, held Saturday, 11th inst., after a careful study of the borings submitted to us, it is our settled opinion that the only feasible grade on which this work can satisfactorily continue from the shore end will be at a lower level than that on which we encountered the water and sand stratum. From the boring made at the lake shaft it is apparent that this shaft must be sunk through this same water-bearing stratum of gravel and sand, and which would be encountered at about a grade minus ninety. If it is possible to build the shaft through this stratum, and get into the rock below, it is our opinion, based on borings made, that the tunnel can be successfully constructed at a lower level; but until it is demonstrated that the shaft can be built through said stratum, we deem the successful completion of the work uncertain. * * * To which on the 15th the secretary of the board answered: "In regard to the shore end of the new intake tunnel having been abandoned, we wish to correct you in stating that the work was abandoned by you, but that neither the line nor grade has been permanently abandoned by this board, although an effort was made to avoid the difficulties by an attempt to get around it to the south, which failed. If you consider the difficulties at the end of the original tunnel too great to be overcome, and you conclude that you can prosecute your work better by lowering the grade sufficiently to avoid the water and sand stratum which you encountered, the board will consent to such grade and change, if you will indicate at what point you propose to commence the same, and how far you propose to extend it before resuming the inclination of the present tunnel. We do not consider that the progress of the work in the tunnel should wait until it is demonstrated that the shaft can be built through the different strata or material, for we entertain no doubt as to the possibility of successfully completing the work. Hoping to hear from you without delay as to the suggested change of grade, I remain." On the 18th the contractors replied: "We are unable to agree with the conclusions stated in the letter from your secretary of the 15th inst., which does not appear to be based on any action of the board. The tunnel stands abandoned on the original grade, in our view. The responsibility, therefore, rests upon the board to act in conformity with the contract, and make such change in the plans and specifications as it may deem necessary or desirable. If the board desires to lower the grade, it will, of course, be necessary to begin far enough back of the bulkhead to avoid flooding from the water encountered in the old drifts. Please give the matter your immediate attention, as we desire to avoid all delay. * * *

On August 5, 1893, the contractors wrote the board as follows: "As you are doubtless aware, the work of sinking the lake shaft for the new water intake is at a standstill. Under the agreement with you dated February 8, 1893, we have faithfully tried to put down said shaft according to the plans and specifications accompanying our contract for this work. It has been thoroughly demonstrated that it is impracticable, and in our judgment impossible, to sink the shaft through sand to the depth which the boring made on the site indicates as necessary, by underpinning with brick under high pressure. All our men, with the exception of the watchman, are discharged, and are awaiting further orders." To which on the 7th the board replied: "This work, however, must be proceeded with, as it is necessary that the same be completed as speedily as possible. You will therefore oblige this board by stating at your very earliest opportunity as to what you propose to do at either one end or the other towards completing the contract for this work." To that on the 8th the contractors responded: "Regarding the work from the shore end, by referring to our letter, February 13, 1893, you will find our position in the matter; and can only add that we have never received the order we therein requested. * * * It having been demonstrated that the shaft cannot be put down according to the plans and specifications forming a part of our contract, it will devolve upon your board to make the necessary changes in the same, and we hold ourselves in readiness to proceed with the work on receipt of such orders, and compliance with the contract regarding changes."

There followed negotiations for the construction by the contractors of a steel shaft inside of the iron tubing which had been put in, but no agreement was reached, and on October 17, 1893, the board determined, upon a series of

recitals, that the work of the contractors be suspended, and that the board would proceed with the construction and completion of the work. And to a notification of this order the contractors on the 21st responded: "* * * The undersigned utterly dispute the right of said board to take any such action, and repudiate and deny the alleged facts and premises on which the same purports to be based; and they deny the right of the city and of the board of public works to do any work at their expense. If there is any work to be done under the contract between us and the city, we are ready and hereby offer to do it. In the absence of any further communication to the contrary, we cannot but look upon the action taken as a willful repudiation by the city of the contract with us, and a refusal to let us do any further work under the same. * * *" Thereupon the board proceeded with the work, letting the construction of the shaft at the crib to other contractors, and employing laborers by the day to finish the construction of the tunnel, which was accomplished by a detour to the northward for a distance of more than 50 feet from the original line, and continuing by an ascending grade until the stratum of water-bearing gravel had been passed, and then descending and returning gradually towards but reaching the original line only at the point of connection with the crib. The record also shows the order of the board, made after the completion of the work, determining the cost thereof, and declaring the amount chargeable to the defendants in error.

W. H. Timlin, for plaintiff in error.

James G. Flanders, for defendants in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

It is not important, as we conceive, to determine whether, by the order of April 6, 1892, and the subsequent efforts made to find a way around the obstacles encountered in the shore end of the tunnel, there was a permanent, or only a temporary and tentative, abandonment of the line and grade defined by the original plan and specifications. The more reasonable view, perhaps, is that the abandonment should be deemed to have been temporary only, and conditional, while experiments were made to find a more practicable route. The engineer of the city had reported the prescribed line to be impracticable, but the resolution of the board was silent on that point, and was too indefinite in respect to the course and ending of the detour ordered to be regarded as establishing a new line, or as amounting to an irrevocable abandonment of the old line; but it necessarily resulted that, when the work was taken out of the hands of the contractors, and the board of public works undertook to complete the tunnel, it was bound to proceed on the line of the agreement, and could not then change the line, and have the right to charge the contractors with the extra expense of construction. By the contract power was reserved to the board to change the plans and specifications, but with equal explicitness it was provided that the price of extra work caused by a change should be agreed upon by the board and by the contractors before the work should be commenced. Practically, therefore, no change involving extra work could be made except my mutual agreement, and it certainly was not in the power of the board to suspend work by the contractors, and then adopt new plans to be worked out at their expense. If the original line was practicable, the board had its choice, to finish the tunnel on that line

and to look to the contractors for the expense in excess of the contract price, or to treat the contract as at an end and do with the work as it saw fit. If the line was impracticable, the contractors, on the discovery of the fact, were entitled to abandon the work, and it was not in the power of the board to require of them, against their consent, to construct a tunnel on different plans and specifications. That the tunnel as constructed was essentially different in plan and in the cost of construction from that of the contract, the proof in the record leaves no doubt; and, this point being controlling of all others in the case, there was no error in withdrawing the case from the jury. The judgment below is affirmed.

BURROWS v. NIBLACK.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1898.)

No. 381.

1. ARREST OF JUDGMENT—PLEADING.

Under the Illinois statute (2 Starr & C. Ann. St. c. 110, § 58) a motion in arrest of a judgment in assumpsit, rendered after waiver of jury, will not lie where the finding of the court is based on the whole declaration, though the special counts are defective, or because of a defective count, when the declaration contains a good count.

2. SAME.

A motion in arrest of judgment can only be maintained for a defect apparent on the face of the record, and the evidence is no part of the record for this purpose, and cannot be considered.

3. REVIEW ON ERROR—TRIAL TO COURT—FINDINGS.

Where a jury is waived, and the court makes a general finding upon evidence produced, and not upon an agreed statement of facts or case stated, the appellate court cannot consider alleged error in making the finding.

4. SAME—AGREED STATEMENT.

A judgment at law, entered on an agreed statement of facts or case stated, under Rev. St. §§ 649, 700, can be reviewed on error only as to questions of law.

5. NATIONAL BANKS—PURCHASE OF ITS OWN STOCK.

The purchase of its own stock by a national bank, not for the purpose of preventing, or necessary to prevent, a loss upon a debt previously contracted, is illegal, and the bank may maintain an action at law to recover the money paid therefor without tendering back the stock.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Of the five counts in the declaration in this case two are common counts in assumpsit and three are special. The averments of two of the latter are to the effect that on March 10, 1893, the plaintiff in error, William F. Burrows, sold, and of the third that he surrendered, to the Chemical National Bank of Chicago, 100 shares, which he owned, of the capital stock of that bank for the sum of \$10,000, which sum, upon his then and there delivering to the bank the certificates of stock, was paid to him by the bank, which was represented in the transaction by its president; that on the ensuing May 8, 1893, the bank having become insolvent, John P. Hopkins was appointed receiver by the comptroller of the currency; that on January 9, 1894, Hopkins having resigned, Eli C. Tourtelot, Jr., who brought the suit, was appointed in Hopkins' stead, and, he having resigned pending the action, William C. Niblack, the defendant in error, was appointed his successor, and by order of the court

substituted as plaintiff in the case. It is further alleged, in the first of the special counts, that "the sale and transfer of the stock to the bank were not made to prevent loss upon a debt previously contracted in good faith"; in the second, that the sale and transfer were "not necessary to prevent loss upon a debt previously contracted in good faith"; and in the third, that by means of the transaction the capital stock of the bank was reduced by the sum of \$10,000. In each of these counts it is charged that the sale and purchase or surrender of the stock were contrary to the statute in such cases provided. Docket entries show that a jury was waived by a stipulation in writing, and the issues submitted to the court, which made a general finding for the plaintiff, and "from the evidence, both oral and documentary," found the sum of \$11,926.66 to be due the plaintiff from the defendant; that thereupon the defendant interposed a motion in arrest of judgment, which the court overruled, and gave judgment upon the finding. A bill of exceptions in the record shows that the cause was submitted to the court upon an "agreed statement of facts," corresponding, in substance, with the averments of the special counts of the declaration which allege a sale of the stock, and that thereupon, "upon full consideration of the case stated," the court found the facts to be true as stated, and that the sale of the stock to the bank, and the payment therefor, were in contravention of section 5201 and 5204 of the Revised Statutes of the United States, and therefore illegal, null, and void, and the plaintiff, consequently, entitled to recover of the defendant the sum paid, with interest. The grounds stated in the motion for arrest of the judgment were, in substance: First, that the declaration is defective; second, that the finding was a general one upon the whole declaration, and the special counts defective; third, that upon the evidence adduced no judgment can be sustained on the common counts, and that the special counts are insufficient. The assignment of errors contains three specifications: First, the court erred in finding for the plaintiff and against the defendant; second, the court erred in overruling defendant's motion in arrest of judgment; third, the court erred in entering judgment in favor of the plaintiff and against the defendant.

Mason B. Loomis and Albert H. Veeder, for plaintiff in error.

James W. Duncan and Hiram T. Gilbert, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

By statute in Illinois, a judgment will not be arrested because of a defective count in a declaration which contains a good count. *Iowa State Traveling Men's Ass'n v. Moore's Adm'rs*, 34 U. S. App. 670, 19 C. C. A. 662, and 73 Fed. 750; 2 Starr & C. Ann. St. § 58, c. 110. The common counts of the declaration in this case being undeniably good, the first and second grounds of the motion in arrest of judgment were necessarily without merit, and the third ground is unavailing "because a motion in arrest of judgment can only be maintained for a defect apparent upon the face of the record, and the evidence is not a part of the record for this purpose." *Bond v. Dustin*, 112 U. S. 604, 608, 5 Sup. Ct. 296. This disposes of the second specification of error, and, if the judgment is to be treated as one rendered upon a general finding by the court, and not "upon an agreed statement of facts or case stated," the first and third specifications also present no question. The decisions to that effect are numerous. See *Bond v. Dustin*, *supra*; *Martinton v. Fairbanks*, 112 U. S. 671, 5 Sup. Ct. 321; *Boardman v. Toffey*, 117 U. S. 272, 6 Sup. Ct. 734; *Jenks' Adm'r v. Stapp*, 9 U. S. App. 34, 3 C. C. A. 244, and 52 Fed. 641; *Skinner v. Franklin Co.*, 9 U. S. App. 676, 6 C. C. A. 118, and 56 Fed. 783; *Dis-*

tilling & Cattle-Feeding Co. v. Gottschalk Co., 24 U. S. App. 638, 13 C. C. A. 618, and 66 Fed. 609; Phipps v. Harding, 34 U. S. App. 148, 17 C. C. A. 203, and 70 Fed. 468; Woodbury v. City of Shawneetown, 34 U. S. App. 655, 20 C. C. A. 401, and 74 Fed. 205; Seymour v. White Co., 34 U. S. App. 658, 20 C. C. A. 402, and 74 Fed. 207; Fourth Nat. Bank of St. Louis v. City of Belleville (decided Nov. 18, 1897, by this court) 83 Fed. 675. In *Bond v. Dustin*, supra, it is said that "since the statute [of March 3, 1865, re-enacted in sections 649 and 700 of the Revised Statutes of the United States], as before, a judgment upon an agreed statement of facts or case stated, signed by the parties or their counsel, and entered of record, leaving no question of fact to be tried, and presenting nothing but a question of law, may be reviewed on error." See, also, *Supervisors v. Kennicott*, 103 U. S. 554, and cases there cited. That the agreement in this case, though perhaps sufficient in substance for the purpose, was not intended or understood to present a case stated, is shown by the lack of any statement in it to that effect, and by the fact that it was not entered of record, in or before the entry of the judgment, and that the court, instead of stating simply a conclusion of law, made a general finding, which was duly entered as the foundation of the judgment, reciting that oral as well as documentary evidence was heard. The bill of exceptions, which it may be observed was not necessary in an agreed case, is ambiguous, if not inconsistent, in its statements. After setting forth the agreement of the parties, it says that, "upon full consideration of the case stated, as aforesaid, the court [instead of declaring a conclusion of law merely] found the facts to be true as above stated," implying, perhaps, especially since the contrary is not stated, that other evidence than the agreement was received in proof of the facts. If, however, questions of practice be disregarded, and the agreement of the parties be treated as showing a case stated, or as being the equivalent of a special finding of facts by the court within the meaning of sections 649 and 700 of the Revised Statutes, all objections to the pleadings which might be avoided by amendment must be regarded as waived (*Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. 831), and the only question to be considered is whether the facts stated in the agreement justified the judgment entered. The principal objections urged are: (1) That the validity of the purchase by the bank of its own stock can be questioned only by the government; (2) that the alleged liability of the bank for the return of the money can be enforced only in a court of equity; and (3) that a tender back of the shares of stock purchased was essential to the right of recovery of the price paid. The first objection is based upon that line of decisions of which illustrations are found in *Bank v. Matthews*, 98 U. S. 621, *Bank v. Whitney*, 103 U. S. 99, and *Thompson v. Bank*, 146 U. S. 240, 13 Sup. Ct. 66; but the present case, as we think, is governed rather by the principles declared in *McCormick v. Bank*, 165 U. S. 538, 17 Sup. Ct. 433, and *Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, where the line of cases mentioned is distinguished. The transaction here in question was not a purchase made for the purpose of preventing, or which was necessary to prevent, loss upon a debt previously contracted, but, as set forth, it was a bald purchase by the bank of its own stock for

cash, and necessarily involved for the time being a reduction pro tanto of the corporate stock. Even if it were not forbidden by the statute, the transaction would be inconsistent with public policy and with established principles of law. The suggestion that a reduction of stock by a national bank may be lawfully made under section 5143 of the Revised Statutes is irrelevant, because it is not shown, and without proof is not to be presumed, even if it were conceivably possible, that this transaction could have been justified under the provisions of that section. The purchase was outside of and beyond the powers of the bank, and therefore, as a corporate act, was void from the beginning; and, while it appears from the agreement that the certificates of stock were indorsed in blank, and delivered to the president of the bank, the latter did not thereby acquire, nor the plaintiff in error part with, title to the stock. The money having been unlawfully paid out, the bank had an immediate right of action to recover it in an action of assumpsit. It was not necessary to go into equity, nor to offer a return of stock. The judgment of the circuit court is affirmed.

STEPHENSON et al. v. MONMOUTH MIN. & MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1897.)

No. 482.

1. DEFECTIVE STATUTORY BONDS—VALIDITY AT COMMON LAW—PUBLIC IMPROVEMENTS—CONTRACTORS' BONDS.

A contractor's bond, securing the payment of material furnished and labor performed in the construction of a public improvement, containing unauthorized conditions protecting the city, and naming the city as obligee, instead of the people of Michigan, as required by How. Ann. St. Mich. § 8411b, is invalid as a statutory bond, but valid as a common-law obligation.

2. SAME—BOND TO CITY—SUING IN CITY'S NAME.

A creditor having a beneficial interest in such a bond may maintain an action thereon in the name of the city as plaintiff, without the consent of the city.

3. SAME—LIABILITY OF ALDERMEN.

An action cannot be maintained by a creditor of a contractor against aldermen of a city for failure of the city to take a statutory contractor's bond, with the people of Michigan as obligee, when the city took a valid common-law bond, with the city as obligee, and the creditor has not asked or been refused the consent of the city to maintain an action on the bond in its name.

In Error to the Circuit Court of the United States for the Western District of Michigan.

This is an action on the case against the plaintiffs in error, who were aldermen of the city of Menominee, Mich., for failure of the city council of Menominee, Mich., to require a contractor to execute a bond as required by Act No. 94, Laws Mich. 1883, being sections 8411a, 8411b, and 8411c, How. Ann. St. Mich., which are as follows:

"8411a. The people of the state of Michigan enact, that when public buildings, or other public works, or improvements are about to be built, repaired or ornamented under contract, at the expense of this state, or of any county, city, village, township or school district thereof, it shall be the duty of the board of officers or agents contracting on behalf of the state, county, city, village, township or school district, to require sufficient security by bond for

the payment by the contractor and all sub-contractors for all labor performed or materials furnished in the erection, repairing or ornamenting of such building, works or improvements.

"§411b. Such bond shall be executed by such contractor to the people of the state of Michigan, in such amount and with such sureties as shall be approved by the board, officer or agent acting on behalf of the state, county, city, village, township or school district as aforesaid, and conditioned for the payment by such contractor, or any sub-contractor, as the same may become due and payable, of all indebtedness which may accrue to any person, firm or corporation on account of any labor performed or materials furnished in the erection, repairing or ornamenting of such building or works. Such bond shall be deposited with and held by such board, officer or agent, for the use of any party interested therein.

"§411c. Such bond may be prosecuted, and recovery had, by any person, firm, or corporation, to whom any money shall be due and payable, on account of having performed any labor, or furnished any materials in the erection, repairing, or ornamenting of such building or works, in the name of the people of this state, for the use and benefit of such person, firm or corporation: provided, that the people of this state shall, in no case brought under the provisions of this act, be liable for costs."

There was evidence showing that the city council of Menominee contracted with one John Larson for the construction of a public sewer, taking from him a bond, with sureties, in the penal sum of \$40,000, payable to the city of Menominee, and conditioned as follows: "Now, the condition of this obligation is such that if the said contract shall be executed, and the said John C. Larson shall promptly and faithfully perform his said contract, and shall well and truly keep and perform all the terms and conditions of said contract on his part to be kept and performed, and shall indemnify and save harmless the said city council of Menominee, and the said city of Menominee, as in said contract stipulated, and said John C. Larson and all his subcontractors shall make payment for all labor performed and material furnished in carrying on or completion of the improvements called for by said contract, then this obligation shall be void; otherwise it shall remain in full force and virtue." The charter of the city provides for the election of a city attorney, and constitutes him the legal adviser of the council, and gives him a seat and voice in the council, and makes his approval of all contracts with the city and all bonds to be taken "as to form and execution" necessary "before such contract shall take effect." The bond actually taken from Larson was in writing, approved, "as to form and execution," before the contract or the bond executed by him was approved and accepted by the council. No other bond was required from said Larson. There was also evidence that the defendant in error furnished material and supplies to said Larson to the extent of more than \$6,000, which have not been paid for, and which were furnished for the work which he contracted to do, and that he is now wholly insolvent. The plaintiffs in error (who were defendants below) were members of the city council when the contract with Larson was made, and present and assenting to the acceptance and approval of the bond taken from the contractor. There was a jury, and verdict in favor of the defendant in error for \$6,676.59, and judgment accordingly.

B. J. Brown, for plaintiffs in error.

E. C. Eastman (F. O. Clark, of counsel), for defendant in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

After making the foregoing statement, the opinion of the court was delivered by LURTON, Circuit Judge.

Public officers having ministerial duties to perform, in which private individuals have a direct interest, are liable to such individuals for any injury sustained by them in consequence of the failure to perform such duties. *Amy v. Supervisors*, 11 Wall. 136-138; *Add. Torts* (1st Eng. Ed.) 458-463, et seq.; *Cooley, Torts*, 379; *Ferguson*

v. Earl of Kinnoull, 9 Clark & F. 250; Raynsford v. Phelps, 43 Mich. 342, 5 N. W. 403; Teall v. Felton, 1 N. Y. 537; same case, in error, 12 How. 284-291; Hathaway v. Hinton, 46 N. C. 243. The Michigan act of 1883, heretofore set out, made it the duty of the city council to take a bond, with sureties, conditioned for the protection of those who should furnish labor or materials in the performance of the public works contracted for by the city. The total neglect of this duty, under the well-settled rulings of the supreme court of Michigan, is the neglect of an administrative act for which an action will lie by any individual of the class for whose benefit the bond is required, for any injury sustained by him. Owen v. Hill, 67 Mich. 43, 34 N. W. 649; Plummer v. Kennedy, 72 Mich. 295, 40 N. W. 433; Wells v. Board, 78 Mich. 260, 44 N. W. 267. But if the act to be done be not one merely ministerial, but one which partakes of the judicial function as involving the exercise of judgment and discretion, the officer will not be liable, unless actuated by malice, even if he falls into error from which an individual may suffer. Kendall v. Stokes, 3 How. 86, 98; Ferguson v. Earl of Kinnoull, 9 Clark & F. 250; Cooley, Torts, 379; Add. Torts (1st Eng. Ed.) 457 et seq.; Raynsford v. Phelps, 43 Mich. 342, 5 N. W. 403; Van Deuson v. Newcomer, 40 Mich. 90; Hoggatt v. Bigley, 6 Humph. 236.

The fault of which plaintiffs in error were guilty was not in neglecting the duty imposed by this statute by failing altogether to require a bond for the protection of those furnishing the contractor with material, but in taking a bond in which the obligee is the city of Menominee, instead of the people of Michigan, as prescribed by the statute, and by including in the same bond a condition for the fulfillment of the contract with the city by the contractor. The question as to whether an error in respect to the terms of the bond in the matters mentioned is a mistake in respect to a mere ministerial duty, for which these officials would be liable, although individuals may suffer from the mistake, is one not free from doubt. It would seem that a distinction might well be drawn between such cases as Owen v. Hill, Plummer v. Kennedy, and Wells v. Board, cited above, and that presented by the facts shown by this transcript. But has the defendant in error sustained an actionable injury by the mistake in making the city of Menominee the obligee in the bond, or by including a condition for the protection of the city against a breach of the contract between the city and Larson? That the statute contemplated a bond payable to the people of the state of Michigan, and conditioned only for the payment of labor and supply claims contracted by the contractor or subcontractors, is very obvious. But the inclusion in a statutory bond of conditions not authorized by the statute, if the good and bad conditions be severable, will not invalidate the bond. U. S. v. Bradley, 10 Pet. 343. The condition for the protection of the city, though not expressly authorized by any statute or provision of the charter, is not ultra vires, and constitutes a valid common-law obligation, though voluntary. U. S. v. Tingey, 5 Pet. 115; U. S. v. Bradley, 10 Pet. 343; Supervisors v. Coffenbury, 1 Mich. 355; Knapp v. Swaney, 56 Mich. 345, 23 N. W. 162; Board v. Grant (Mich.) 64 N. W. 1050. The fact that the bond taken was

made payable to a promisee other than the people of the state of Michigan, as required by the statute, invalidates it as a statutory bond. *Supervisors v. Coffenbury*, 1 Mich. 355; *Town of La Grange v. Chapman*, 11 Mich. 499; *U. S. v. Linn*, 15 Pet. 290. But a bond which is vitiated as a statutory bond, because running to a promisee whom the statute does not authorize to become the obligee, may be good as a common-law bond, if the conditions of the bond are such as are authorized by law, and the obligee named be not incompetent to become a party to such an obligation. *U. S. v. Tingey*, 5 Pet. 115; *U. S. v. Bradley*, 10 Pet. 343; *U. S. v. Linn*, 15 Pet. 290; *U. S. v. Hodson*, 10 Wall. 395; *Bay Co. v. Brock*, 44 Mich. 45, 6 N. W. 101; *Board v. Grant (Mich.)* 64 N. W. 1050; *Governor v. Allen*, 8 Humph. 176; *Thompson v. Buckhannon*, 2 J. J. Marsh. 416; *Montville v. Haughton*, 7 Conn. 543; *Vanhook v. Barnett*, 15 N. C. 268; *Sweetser v. Hay*, 2 Gray, 49; *Claason v. Shaw*, 5 Watts, 468; *Thomas v. White*, 12 Mass. 369; *Horn v. Whittier*, 6 N. H. 88; *State v. Thompson*, 49 Mo. 188.

There was authority of law for requiring a bond from any contractor for a public work conditioned for the payment by the contractor of all his labor and material debts incurred in the work. Neither was the city of Menominee disqualified or incompetent to be a party to such a contract, as a municipality of the state of Michigan. *Knapp v. Swaney*, 56 Mich. 345, 23 N. W. 162. A bond taken under this statute, and running to the board of education of Detroit, was held to be a good common-law bond, upon which an action would lie in the name of the board for the use of individuals furnishing materials to a contractor with the board. *Board v. Grant (Mich.)* 64 N. W. 1050. The powers of a municipal corporation under the laws of Michigan are much wider than those of a board of education. The city had the power to contract for the public work undertaken by Larson, and the power to take from him a bond conditioned for the payment of labor and material claims. The duties of a mere promisee in such a bond are purely nominal, and only for the purpose of furnishing some one who might be a plaintiff. The bond taken is in furtherance of the statutory purpose, and a legislative policy; and we see no reason why the substitution of the city as obligee should vitiate the bond as a common-law obligation. This was the view entertained by the trial judge, who instructed the jury that this was "a good bond, upon which the city could maintain an action against the sureties,—for the nonpayment of this very debt which Larson incurred." The obligors have chosen to make the bond payable to the city as trustee for those entitled to its benefit, and we think it is not vitiated as a common-law obligation because it runs to the city of Menominee.

That the bond is dual in respect to beneficiaries and conditions does not affect its validity, the conditions being divisible. Even a statutory bond is not invalidated by the inclusion of conditions not authorized by the statute, if the good and bad conditions are severable. *U. S. v. Bradley*, 10 Pet. 365; *Board v. Grant (Mich.)* 64 N. W. 1050. In the case last cited, the bond was one substantially like that taken by the city of Menominee, and included a condition

against the breach of the contractor's contract with the board, and another for the payment of the contractor's debts for labor and materials. The conditions were held to be severable, and the bond valid. The objection that the city as obligee might, by conduct or consent, release or discharge the sureties on this bond without the consent of those interested, is unmaintainable. So far as the bond is for the protection of the city, it may deal with it as it chooses; but, so far as it is for the benefit of third persons, it is a mere trustee, and could do nothing which would legally discharge the bond or affect the interests of the beneficiaries. *Horn v. Whittier*, 6 N. H. 88, 94; *Mountstephen v. Brooke*, Chit. 390. We have a case, then where the city has taken a valid common-law bond running to itself, and conditioned that the principal obligee shall pay all debts incurred by him in the course of his contract with the city for labor or materials. It is clear that the city could authorize the use of its name as plaintiff in an action upon this bond for the use of the Monmouth Mining & Manufacturing Company, as a company which had a debt against Larson, the obligor in the bond, for materials furnished him for carrying out his contract with the obligee in the bond. That this creditor could not sue as plaintiff upon that bond is also clear, for no one can sue as plaintiff who has not the legal interest, unless permitted to do so by statute. *La Grange v. Chapman*, 11 Mich. 499; 3 Enc. Pl. & Prac. 639, and cases cited.

The circuit judge instructed the jury to find for the plaintiff below, upon the ground that the plaintiff had no remedy upon this bond. Upon this subject he said:

"Now, turning to the bond which was taken in this case, I am entirely satisfied that while it is a good bond,—a good common-law bond in the hands of the city of Menominee,—and might be enforced by the city, yet that the plaintiff has no direct interest in it; not being a common-law bond in that particular, he could not maintain an action upon it; the action must be brought in the name of the person to whom the bond runs; and, in view of the law which prevails in this state that an action at law may not be brought upon a contract which is for the purpose of giving a third person, other than those to the contract, a benefit, as may be done by law in some states, notably New York, and some others which have adopted the same doctrine, yet, having regard to that rule that a third person for whose benefit a contract is made cannot maintain an action at law upon it, but a suit must be brought in the name of the party to whom the stipulation is given, I cannot see my way clear to finding any remedy to this plaintiff in the bond which the board took."

Here, in our judgment, was the error of the learned judge. It is true that no action by the defendant in error as plaintiff would lie upon this bond; but that would also be the case if the bond had run to the people of the state of Michigan. The difference resulting from the mistake in drawing the bond so as to run to a promisee not authorized by the statute is, that if the bond had run to the statutory obligee, the statute itself granted authority for the starting of a suit in the name of the people of the state of Michigan for the use and benefit of any one intended as a beneficiary; while there is no statutory authority by which defendant in error might have used the name of the substituted obligee as plaintiff for its use and benefit. That no one can use the name of another as plaintiff without his con-

sent given in fact or by legal intendment is clear. *Washington v. Young*, 10 Wheat. 404. But when a public municipality charged with the duty of taking and holding the bond required by this statute takes a bond properly conditioned, but running to itself, it does, by legal intendment, consent to the use of its corporate name as plaintiff by any one beneficially interested in the bond thus taken, when indemnified against costs. No express authority of law is needed to authorize the use of the name of the city as plaintiff under such circumstances. The cases of *Kiersted v. State*, 1 Gill & J. 231, and *Ing v. State*, 8 Md. 287, though differing in facts, are in point as to the principle.

But upon another ground the same result must be reached. If the consent in fact of the city is essential to the bringing of a suit upon the bond in which it is the obligee, we think it devolved upon the plaintiff to show that consent had been refused. The gravamen of the suit is that the plaintiff below has lost its debt by the mistake made in taking a bond which ran to the city. But if a bond was taken good at common law, upon which an action will lie in the name of the obligee therein as plaintiff for the use and benefit of the plaintiff below, then it was its duty to resort to that bond; and, if the consent of the city to the use of its name as plaintiff was essential, it should aver and prove that consent was refused, though indemnity against cost was tendered. This, it must be remembered, is an action for damages; and, if nothing stood in the way of a remedy upon the bond which was taken but the permission of the obligee to the bringing of a suit in its name as nominal plaintiff, it should have requested such permission. It was the plain duty of plaintiff to have minimized its loss as far as it reasonably could. For this error the judgment must be reversed, and a new trial awarded.

HOLM et al. v. ATLAS NAT. BANK.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1898.)

No. 425.

1. BANK'S NOTICE OF INFIRMITY IN NOTE—KNOWLEDGE OF OFFICER.

The facts that the president of a corporation for which a bank discounted notes, in the ordinary and usual course of its business, was vice president of the bank, and that the secretary, who represented the corporation in the transaction, was also a director of the bank, do not charge the bank with notice of a secret infirmity in one of such notes, where neither of such officers represented the bank in the transaction.

2. NOTES—BONA FIDE HOLDER—PAYMENT.

A bank returned a note at maturity to a customer, for whom it had been discounted, and who had indorsed it, listing it with paper it had that day paid for the customer at the clearing house, in accordance with an arrangement between them. It also made entries on its books as though the note had been paid. The customer, however, erased the note from the list, and returned it unpaid, and the bank entries were erased. *Held*, that such transaction did not constitute a payment with bank, so as to revest the title to the note in the indorser, or deprive the bank of its previous character of bona fide holder.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

The Atlas National Bank, the defendant in error, brought suit in the court below to recover of the plaintiffs in error the amount of a promissory note dated February 18, 1893, for \$4,000, payable to the order of the John V. Farwell Company, six months after date, at the Bank of Eau Claire, in the city of Eau Claire, Wis., executed by them under their co-partnership name of Nels Holm & Co., and signed also by the firm of Holm & Thompson. The defenses alleged and which were the subject of contention were (1) illegality of the consideration of the note; (2) that the Atlas National Bank was not a bona fide purchaser for value; (3) that the note before suit had been paid to the Atlas National Bank by the John V. Farwell Company. At a former trial of the case a judgment was rendered for the defendants below, which was reversed. *Bank v. Holm*, 34 U. S. App. 472, 19 C. C. A. 94, and 71 Fed. 489. At the last trial, upon the close of the evidence, the court directed a verdict in favor of the Atlas National Bank; and, to review the judgment rendered on the verdict, this writ of error is sued out.

James Wickham and R. M. Bashford, for plaintiffs in error.

H. M. Lewis, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, delivered the opinion of the court.

We held when this case was previously before us that the note in suit was invalid, except in the hands of an innocent purchaser. It was therefore incumbent upon the Atlas National Bank to establish that it was a bona fide holder of the note for value, before maturity. We are of opinion that this is shown beyond peradventure. The note was one of 40 or 50 pieces of commercial paper, amounting in the aggregate to over \$50,000, which were discounted by the bank for the John V. Farwell Company, on April 7, 1893, in the usual course of its business, and without notice of its illegality. The amount of the discount was passed to the credit of the John V. Farwell Company in account, and was checked out within three or four days thereafter. The transactions between the bank and the John V. Farwell Company were large, amounting to several hundred thousand dollars per annum, and at times running up to a million dollars a year. The evidence wholly failed to impeach the good faith of the bank with regard to the purchase of the paper, or to suggest notice of any infirmity in its origin. There was nothing to cast a shadow on the transaction or to put the bank on inquiry. The fact that John V. Farwell, the president of the John V. Farwell Company, was also vice president of the bank, and a stockholder therein, and that J. T. Chumasero, the secretary of the John V. Farwell Company, was a director and stockholder of the bank, and that others not named were holders of stock in both corporations, does not militate against the bona fide character of the holding of this paper by the bank. In the discounting of this paper, the bank was represented by its president, C. D. Grannis, and the John V. Farwell Company by its secretary, J. T. Chumasero. Assuming that the latter was chargeable with notice of the infirmity in the consideration of this note, neither because Chumasero was a stockholder and a director of the bank, nor because the president of the John V. Farwell Company was also a

stockholder and the vice president of the bank, was the Atlas National Bank so chargeable, neither acting for the bank. In the discounting of this paper the officers of the John V. Farwell Company stood as strangers to the bank. The interest of the company was opposed to the interest of the bank, and the presumption is that the officers of the John V. Farwell Company would not communicate to, but would conceal from the bank any knowledge they might have of the secret infirmity in the consideration of this note. "Where an officer of a corporation is thus dealing with them in his own interest opposed to theirs, he must not be held to represent them in the transaction, so as to charge them with the knowledge he may possess but which is not communicated to them, and which they do not otherwise possess, of facts derogatory to the title he conveys." *Barnes v. Gas Light Co.*, 27 N. J. Eq. 33; *Bank v. Christopher*, 40 N. J. Law, 435.

Being, then, bona fide holders of this note for value, before maturity, we proceed to inquire whether the bank, by its subsequent conduct, forfeited its right as such holder, and whether the note can be deemed to have been paid by the John V. Farwell Company. The bank was accustomed to clear for the John V. Farwell Company at the Chicago clearing house, and, on the evening of each day, made up a list of the paper which it had paid for the John V. Farwell Company, sent the list with the paper represented therein to and received from the latter company a check for the amount. Nearly all the commercial paper discounted by the bank for the John V. Farwell Company was made payable at the office of the latter company, and the makers of such paper, being largely merchants residing without the city of Chicago, remitted directly to that company; and the bank was accustomed to send the notes discounted for the Farwell Company to its office a day or two before maturity, when, if the makers had remitted or otherwise arranged for the paper, the Farwell Company would check for the amount. The note in question, with two other notes of the same parties made at the same time, were payable at the Bank of Eau Claire, in Wisconsin. The other notes, which matured May 21, 1893, had also been discounted by the bank for the John V. Farwell Company before the discounting of the note in suit, and were forwarded by the bank to Eau Claire for collection, one of them being paid, and the other protested. When the note in suit was about maturing, the note teller of the bank, remembering that the other note had been sent to Eau Claire, and protested for nonpayment, and had been subsequently paid by the application of the dividends from the assigned estate of Holm and Thompson, sent the note in suit to the John V. Farwell Company with, and marked upon, the clearing statement of August 17th. The note teller stamped the note with the clearing house conditional stamp, and made his debit and credit entries with respect to it on his book, as though it would be or had been paid by the John V. Farwell Company. He credited bills receivable for the note, and charged the clearing house work for the amount. The John V. Farwell Company struck out from the clearing-house statement the amount of this note, and returned a check for the balance,

also returning this note. On the next morning the teller of the bank canceled the clearing house conditional stamp by running his pen through it, and erased the entries upon the books which had been made the previous day, except that the entry on the bills receivable account was left intact, and the note re-entered in that account as of August 18th. This transaction, however, not being sanctioned by the John V. Farwell Company, cannot operate as payment, or avail to re-vest the title to the note in the latter company. The entries were canceled. Payment was not made, and the title to the note remained in the bank. If it may be said that the bank desired the present payment of the note by the indorser, it acceded to forego its desire. The bank had the legal right to pursue the maker without present resort to the indorser, and it could lawfully assent to the indorser's desire that the maker should first be pursued. It is, however, said that this was done by arrangement between the bank and the John V. Farwell Company, so that the bank should continue to be the holder of the note, and be able, as a bona fide holder for value, before maturity, to collect the amount of it. Assuming the truth of this contention, it is still true that the bank was the bona fide holder of this note for value, before maturity, and that it had not been paid the amount. If the bank could properly have insisted that the indorser, the John V. Farwell Company, should pay it the amount, and could have retained sufficient of the moneys of the John V. Farwell Company then on deposit in the bank for the payment of this note, it was not obliged so to do, and owed no duty to the plaintiff in error so to do. It had the legal right, however the transaction may be regarded upon moral grounds, to hold this note, and pursue the makers, instead of the indorser; and, if thereby the John V. Farwell Company is enabled to obtain an unfair advantage over the makers of the note, it is still no defense to the note by the makers as against the bank, the bona fide holder for value, before maturity. *Bank v. La Follette*, 72 Fed. 145. The judgment is affirmed.

OMAHA NAT. BANK v. MUTUAL BEN. LIFE INS. CO.

(Circuit Court of Appeals, Third Circuit. November 19, 1897.)

No. 35.

1. LIFE INSURANCE—CONSTRUCTION OF POLICY.

Under a life insurance policy containing nonforfeiture provisions declaring that, upon default after payment of two annual premiums, the net reserve, "less any indebtedness to the company on this policy," would be applied to the purchase of nonparticipating term insurance, a payment of a premium part in cash and part by a loan from the company, evidenced by a certificate signed by insured, reciting that the company has loaned the amount on the policy, constitutes an indebtedness due the company, within the meaning of such provisions.

2. SAME—TENDER—EXTENSION OF TERM INSURANCE.

When, under the nonforfeiture terms of a defaulted life insurance policy, the net reserve, less indebtedness to the company, has been applied to the payment of term insurance, the insured cannot, two years after such de-

fault, and within a few days before the time of the expiration of the term insurance, extend the same by tendering the amount of such indebtedness. 81 Fed. 935, affirmed.

In Error to the Circuit Court of the United States for the District of New Jersey.

This was an action by the Omaha National Bank against the Mutual Benefit Life Insurance Company to recover upon two policies insuring the life of Frank C. Johnson. The defendant had judgment (81 Fed. 935), and the plaintiff brings error.

Artemas H. Holmes and Edward Q. Keasbey, for plaintiff in error.
J. O. H. Pitney and R. V. Lindabury, for defendant in error.

Before DALLAS, Circuit Judge, and BUTLER, District Judge.

DALLAS, Circuit Judge. This was an action upon two life insurance policies, which, except as to their distinguishing numbers, are precisely alike. They respectively bear date as of January 15, 1891, and by each of them, in consideration of the payment of a certain annual premium on each November 11th during the continuance of the policy, the defendant insured the life of Frank C. Johnson, the amount insured being payable at his death. They also provided that, in case the premiums were not paid when due, the policies should cease and determine, subject to the company's nonforfeiture provisions, which, with the accompanying table, is indorsed on the policies, as follows:

"The Mutual Benefit Life Insurance Company, Newark, N. J.

"Nonforfeiture Provisions.

"When, after two full annual premiums shall have been paid on this policy, it shall cease or become void solely by the nonpayment of any premium when due, its entire net reserve by the American Experience Mortality and interest at four per cent. yearly, less any indebtedness to the company on this policy, shall be applied by the company as a single premium at the company's rates published and in force at this date, either, first, to the purchase of nonparticipating term insurance for the full amount insured by this policy, or, second, upon the written application by the owner of this policy, and the surrender thereof to the company at Newark, within three months from such nonpayment of premium, to the purchase of a nonparticipating paid-up policy, payable at the time this policy would be payable if continued in force. Both kinds of insurance aforesaid will be subject to the same conditions, except as to payment of premiums, as those of this policy. No part, however, of such term insurance, shall be due or payable unless satisfactory proofs of death be furnished to the company within one year after death; and if death shall occur within three years after such nonpayment of premium, and during such term of insurance, there shall be deducted from the amount payable the sum of all the premiums that would have become due on this policy if it had continued in force.

"The following table shows the amount that the company agrees to loan (being one-half of the reserve) upon a satisfactory assignment of the policy as collateral security; also, the additional time for which the insurance will be continued in full force after lapse by the nonpayment of premium, or the value of the policy in paid-up insurance upon surrender within three months from date of lapse. The figures given are based upon the assumption that the premiums (less current dividends) have been fully paid in cash. If there be any indebtedness upon the policy, the values as stated in the table would

have to be reduced proportionately upon the principles stated in the policy. The indebtedness, if any, may be paid off in cash, in which case the figures in the table will apply.

Number of Years Pre- mium Paid.	Company will Loan.	IN CASE OF LAPSE OF POLICY.		
		Years.	Extended Insurance. Days.	Paid-Up Policy.
2	170	2	193	\$ 690
3	250	3	258	1,030
4	340	4	287	1,360
5	440	5	274	1,690
6	530	6	217	2,010
7	630	7	121	2,320
8	720	7	340	2,630
9	830	8	160	2,930
10	930	8	310	3,230
11	1,030	9	62	3,510
12	1,140	9	152	3,790
13	1,240	9	216	4,060
14	1,350	9	258	4,320
15	1,460	9	279	4,580
20	2,000	9	160	5,720
25	2,540	8	191	6,650
30	3,040	7	116	7,390
35	3,500	5	320	7,980
40	3,930	4	92	8,480

"Cash loans not made for less than fifty dollars.

"B. J. Miller, Mathematician."

The first three annual premiums were duly settled, but there was a failure to pay or settle the fourth premium when it became due, namely, on November 11, 1893. Consequently, the right of the plaintiff to recover turned upon the construction and effect to be given, under the admitted facts of the case, to the nonforfeiture provisions, in connection with a certain certificate of loan hereafter to be particularly mentioned; and the question was and is whether the insured was entitled to term insurance for a period continuing beyond the date of his death, or only for a shorter period, which expired while he was still living, namely, upon February 23, 1896. The plaintiff contended in the court below, and in this court, that the term insurance should be held to have continued until after the death of the insured—First, because there was no "indebtedness to the company on this policy," within the meaning of the contract and of the word "indebtedness" as used in the nonforfeiture provisions; and, second, because, even if there was such indebtedness, a tender which was admittedly made on February 18, 1896, was a timely, and therefore sufficient, tender of that indebtedness. By considering these two propositions, the case may be disposed of.

1. The learned argument which has been addressed to us respecting the definition (common and technical) of the word "indebtedness" does not go to the root of the matter. In our opinion, it invokes a too narrow and constrained view of the subject. No definition of the word "indebtedness," however authoritative and accurate, could be accorded controlling force. The question is as to the actual meaning and intent of the parties, and this is not to be ascertained by defining a single word with scholastic precision. The

nonforfeiture provisions unquestionably became operative upon the failure to pay the premium which fell due on November 11, 1893. The insured was then entitled to "nonparticipating term insurance"; and aside from the second proposition, presently to be discussed, the question upon which the existence of such insurance at the time of the death of the insured depends, is as to whether there was, when the term insurance began, any indebtedness to the company by which the duration of that insurance was limited or curtailed. The table which follows the nonforfeiture provisions, and which may be treated as forming part of them, shows the time for which the term insurance would have continued if there had been no indebtedness upon the policy; but it was expressly provided that, if there should be such indebtedness, the table would have to be modified, unless payment of that indebtedness should be made in cash, in which case the figures in the table would apply. Johnson, as has been mentioned, settled three annual premiums upon each policy. This was done according to the company's 30 per cent. premium loan plan, namely, by paying at the outset 70 per cent. of the premiums in cash, and by signing certificates of loan for the balance, which, in each case, except as to the recited policy number, were as follows:

"Certificate of Loan.

"Newark, N. J., Jan. 15th, 1891.

"Premium Payable Nov. 11th.

"Certificate of Loan on Policy No. 165,039.

"This certifies that the Mutual Benefit Life Insurance Company has loaned on policy No. 165,039 one hundred and seven $\frac{82}{100}$ dollars, being thirty per cent. on the first annual premium, which, with any additional loan, shall be a lien on the policy until paid; legal interest on the same to be paid annually out of the dividend, if any, otherwise to be paid in cash; the amount of the existing loan to be indorsed herein, and also stated on the renewal receipt.

"Frank C. Johnson."

Now, the precise inquiry is: Did the loan thus certified constitute such an indebtedness upon the policy as was contemplated by the nonforfeiture provisions? If it did, then, in the absence of any payment or sufficient tender thereof, the problem now under examination must be solved in favor of the defendant in error. We do not attach importance to the fact that the obligation certified was made a lien on the policy, and that, except by enforcement of that lien, no provision was made, or time fixed, for its payment. The material question is: What did the parties mean? It cannot reasonably be supposed that they intended the word "indebtedness" to have any special or technical significance, and that, in common and ordinary apprehension, a "loan," no matter when or how payable, is understood to be an indebtedness, is indubitable. That, too, in each of these instances, the loan was "on the policy," is, under the express terms of the certificate, unquestionable. It is entitled "Certificate of Loan on Policy," and certifies that the company "has loaned on policy," etc. We cannot believe that this correspondence of the terms of the certificate with those of the nonforfeiture provisions was accidental, but are convinced that the "loan" for

which the former was given was intended to be inclusive of the "indebtedness" to which the latter referred.

The decision of the supreme court in *Insurance Co. v. Dutcher*, 95 U. S. 269, has been earnestly pressed upon our attention by the learned counsel for the plaintiff in error, but it cannot be regarded as ruling the present case. Although the facts which were there involved bear some resemblance to those with which we are called upon to deal, they are really essentially different. The judgment in the Dutcher Case was based, not only upon the provisions of the particular policy, but also upon a certain collateral agreement which had been made by the parties at the time of the delivery of the policy; and the construction which the court placed upon the entire transaction accorded with a long-continued practice of the company, to which, as showing the insurer's interpretation of its own contract, much weight was given. In this case we have neither a collateral agreement to consider, nor any course of business under like policies to aid us in the construction of those directly in question. There is here nothing to be done but to determine, from the language of the nonforfeiture provisions and of the certificates, the true meaning of the former; and, in the decision to which we have referred, we find nothing which conflicts with our understanding of them. In that case, aside from the construction which had been put upon its policies by the company, the question was as to whether certain premiums should be regarded as having been paid "in cash"; and it was held that they should be, notwithstanding the fact that the payments were in part made (as the court viewed the matter) by means supplied by a "permanent loan" of the company to the insured. It was not held that this loan was not itself an indebtedness. Indeed, it appears to have been assumed that it was; but that question—the vital one here—was not there presented, and this difference it is which plainly distinguishes that case from this. In that one the undertaking of the company was to issue a "paid-up policy for as many tenths of the amount originally assured as there had been annual premiums paid in cash"; and the only question being, as we have said, whether certain of the premiums had been so paid, the court held that they had been, and, therefore, that the paid-up policy there claimed was demandable. Had the existence of the asserted right to such a policy depended upon the absence of any indebtedness on the original policy, and had such indebtedness appeared as in this case, there is no reason to doubt that the judgment would have been different.

2. Payment of the indebtedness to which reference has been made was tendered on February 18, 1896; and this tender, if made in due time, would have been effectual to extend the period of term insurance beyond the time of the death of the insured. But we are clearly of opinion that it was too long postponed. The default in settlement of premium under the original policy occurred on November 11, 1893; and the tender was not made until more than two years thereafter, and until within a few days before the expiration of the time to which, irrespective of the tender, the term extended.

The nonforfeiture provisions conceded, it is true, that a right to the longer term might be acquired by payment of the indebtedness; but it would, we think, be most unreasonable to hold that the insured was, under this provision, entitled, without paying his indebtedness, to insurance for the shorter term, and then, when that term was about to expire, to tender his debt, and thereupon insist upon an extension of the subsisting contract. In view of the circumstances of the case, it is not necessary to determine whether the tender should have been made promptly upon default under the original policy, or whether it might have been made during the period of three months allowed to the insured for making written application for a paid-up policy, if desired. In either view of the subject, the tender which was in fact made was too long delayed to be of any avail. The judgment is affirmed.

IRVINE v. ANGUS et al.

(Circuit Court, N. D. California. December 27, 1897.)

No. 4,858.

VOLUNTARY PAYMENT.

One paying assessments on stock which he held pending an appeal taken by him in an action in which he claimed the stock as his own, and in which the decree ordered that he turn the stock to its owner upon payment of an amount found to be due him, cannot recover such assessments from the owner, though the sum ordered by the decree was not paid until the termination of the appeal, as such holding of the stock raised an involuntary trust, and the payment of the assessments was to the use of the trustee, and not the owner.

This was an action by William Irvine against James S. Angus, Thomas G. Crothers, and W. S. Goodfellow, executors, substituted defendants for James G. Fair, deceased, to recover \$15,090.06 paid by Irvine as trustee on assessments levied on stock which he held pending an appeal taken by him to the United States supreme court from a decree of the circuit court establishing a trust with respect to said stock, and ordering it turned over to one S. F. Dunham, whose real name was James G. Fair.

George W. Towle, for plaintiff.

Pierson & Mitchell and Wilson & Wilson, for defendants.

HAWLEY, District Judge. This action was brought by the plaintiff against James G. Fair, now deceased, to recover the amount of money paid by William Irvine in liquidation of assessments regularly levied upon 4,998 $\frac{1}{2}$ shares of stock of the Morgan Mining Company, which shares, at the time of the assessments, stood of record on the books of that corporation in the name of Irvine, but were, in fact, the property of James G. Fair. The assessments, five in number, were paid between the 24th day of December, 1879, and May, 1884. The complaint in this action was filed April 13, 1886. It is alleged in the complaint that the shares of stock upon which the assessments were paid were held in trust by Irvine for Fair, and that in May, 1884, Irvine transferred the stock to Fair, surrendered his trust, and there-

after demanded from Fair the amount paid for assessments by him during the time of his trusteeship, to wit, \$15,090.06. It is admitted that Fair died December 28, 1894, and that defendants, James S. Angus, Thomas G. Crothers, and W. S. Goodfellow, were duly and regularly appointed executors of his estate. The question as to whether Irvine was a trustee or the owner of the shares of stock in the Morgan Mining Company was made the subject of a suit in this court, in which one S. F. Dunham was the plaintiff, and William Irvine the defendant. The trial of that case resulted in a decree being entered in December, 1879, to the effect that Irvine held the shares of stock in trust for Dunham, and he was ordered to turn over the same to Dunham, upon receipt from him of the sum of \$14,221.76, as a condition precedent to the transfer; that sum being found due to Irvine for expenditures made and assessments paid upon the shares of stock during the time he held same in trust. It is admitted, and the records show, that Dunham was simply another name for Fair, and that Fair was the real party in interest. Irvine, being dissatisfied with the decree in that case, took an appeal therefrom to the supreme court, and that court, on April 14, 1884, affirmed the decree of this court. 4 Sup. Ct. 501. The mandate from the supreme court was filed and entered in this court, April 30, 1884. On that day James G. Fair, as the assignee of Dunham, paid to the clerk of this court, who was appointed a commissioner, under the decree, to represent the defendant Irvine, the sum of \$18,555.82,—being the amount of the principal sum of \$14,221.76, with legal interest thereon from December 24, 1879,—and the said commissioner, by virtue of the powers vested in him (default having been made by Irvine), caused to be transferred and assigned the shares of stock, mentioned in the decree, standing on the books of the Morgan Mining Company in the name of Irvine, to James G. Fair. This action is brought to recover the money paid by Irvine upon the assessments on the shares of stock which were levied pending the appeal in that case. No question is made as to the regularity of the assessments, or of the amount of the assessments, paid by Irvine. There was no demand ever made by Dunham, or by Fair, as the assignee of Dunham, for any transfer of the shares of stock standing on the books of the Morgan Mining Company in the name of Irvine, until May 2, 1884, which was after the receipt of the mandate from the supreme court. The statement of facts in *Irvine v. Dunham*, 111 U. S. 327, 4 Sup. Ct. 501, is hereby referred to as showing more clearly the nature and character of the contentions of the parties in that suit. It will be observed that Irvine in that suit denied Dunham's right to the shares of stock, or any part thereof; denied that he held any stock in trust for Dunham; and claimed that he was the owner of all the shares of stock. In the complaint in the present action it is alleged that, during the times when the assessments were levied and paid by Irvine, the said shares of stock were held by Irvine as trustee for defendant Fair. The answer admits "that on the 24th day of December, 1879, and at all times thereafter, until the month of May, 1884, the plaintiff was the holder of 4,998½ shares of the capital stock of the Morgan Mining Company, and that the said shares of stock were at all said times the property of this

defendant. But defendant denies that the plaintiff was at said times, or any of them, the lawful holder of said shares, or any of them, or held the same, or any of them, as trustee of this defendant, or held said shares, or any of them, for or as trustee for this defendant, save in this: that the said shares were at all times the property of this defendant, and that the said plaintiff was wrongfully in possession thereof, and held the same without the consent of this defendant, and was the trustee of this defendant in respect thereof, involuntarily and by operation of law, and not otherwise." The answer further denies, with reference to the payment of the assessments by Irvine, "that the said several sums, or any of them, or any part thereof, paid by plaintiff, were each or all or any of them, * * * in whole or in part, paid to said corporation by plaintiff as trustee of said shares of stock, or for account thereof, or of this defendant," or that the same, or any part thereof, was paid by plaintiff at the instance or request of defendant, or to his sole or other use or benefit. The defendant in his answer further alleges "that, at all the times in the complaint mentioned, the plaintiff was the holder of said shares, and claimed to own and hold the same in his own right, and not in trust for this defendant, and that each and all of said assessments upon the same, so paid by plaintiff, were so paid by him for his own use, and for the protection of his own interests, and not at the instance or request of the defendant, or for his use or benefit; that at all said times this defendant, as the plaintiff well knew, was the owner of said 4,998½ shares, and desired to have the possession thereof, and to have the same transferred to his own name upon the books of said corporation, and to pay all the assessments levied thereon; but that the plaintiff wrongfully, and in disregard of the rights of the defendant, at all times held said shares of stock adversely to this defendant, and claimed the same to be, and treated the same as, his own individual property."

Section 2217 of the Civil Code of this state provides that "an involuntary trust is one which is created by operation of law." See, also, sections 2223, 2224. Section 2275 provides that "an involuntary trustee who becomes such through his own fault, has none of the rights mentioned in this article." At the trial the plaintiff moved for judgment on the pleadings, which motion is hereby denied. The case will be considered upon its merits.

It is contended by the plaintiff that, inasmuch as the decree in *Irvine v. Dunham* established the fact that Irvine held the shares of stock as trustee, it became his duty, during the pendency of the appeal, to protect the property from sale; that the payments of the assessments were never made by Irvine until the last hour of the day of sale, and could not, therefore, be claimed to have been voluntary payments on his part; that Irvine was not required by the decree to transfer the shares of stock to Dunham, or his assignee, until the amount of money therein mentioned was paid over to him, which money was not paid until after the mandate of the supreme court, affirming the decree in that case, was filed in this court, and hence it became his duty, as trustee, to pay the assessments on the stock. In support of his contention, he relies upon the principles announced in

Keener, Quasi Cont. 388, 396. There is no doubt that in a certain line of cases a defendant could be held responsible for money advanced or paid out by another for his benefit, although he had not requested such payment to be made. Especially is this true where the payment, as made, cannot be regarded as having been officiously made. But is this such a case? The decision of the supreme court in *Irvine v. Dunham*, 111 U. S. 327, 334, 4 Sup. Ct. 501, must be accepted as establishing the nature and character of the decree which was entered by this court. The decree established the trust relations hitherto existing between the parties and settled the trust. What was the contention of Irvine in that case? To quote from that opinion:

"The appellant [*Irvine*] next contends that he is entitled, under the terms of the trust, to hold onto the stock, which he received as a consideration for the conveyance of the trust property, until there has been an accounting and the expenses and counsel fees have been paid. But by his answer he denies the trust, he claims to hold the stock for himself alone, he wants no accounting, and does not offer to account, or to hand over any net proceeds of the property after an accounting. In other words, he seeks to hold onto the trust property until it suits him to execute a trust, the existence of which he denies. * * * When, therefore, appellant denied that he held in trust the stock claimed by the appellee, the latter, having established the trust, was entitled to have, if he demanded it, a new trustee appointed, or, if the appointment of a new trustee were not necessary for the preservation of his rights, to have an account taken by the court of the expenses and assessments with which his share of the trust property was chargeable, and upon their payment to have a transfer to himself of his share of the stock. The decree of the circuit court has given him these rights. There has been an accounting, and the sum with which the appellee's interest in the stock is chargeable has been ascertained; and when the sum so found is paid by appellee, and not till then, the decree of the court requires a transfer to him of his share of the stock. The decree of the court simply executes and winds up a trust, the existence of which it finds, but which the trustee denies and refuses to execute. Both parties got their rights under the decree."

When Irvine took his appeal from that decree he took the chances of procuring a reversal. Whatever assessments he paid after that time he paid at his own peril, or, at least, to protect his own interest, not the interest of Fair, whose rights in the premises he continued to deny. His obligation to pay the assessments after he had taken the appeal did not arise from the nature of the relations theretofore existing between the parties. He was not charged by the decree with any other duty than to turn over the shares of stock, which the court declared he had held in trust for Dunham, upon the payment of the amount of money by Dunham or his assignee, as required by the decree. He could not thereafter create any additional charge or indebtedness against the property. He gained no additional rights by taking an appeal from the decree. His payment of the assessments thereafter levied must be treated as having been voluntarily made, and although the payments thereof resulted beneficially to Fair, whose duty it undoubtedly was to have paid the assessments, the plaintiff cannot, by such acts, hold Fair responsible for the money thus voluntarily advanced; this, upon the familiar principle that one person cannot make another his debtor by voluntarily paying his debts.

In *Homestead Co. v. Valley R. R.*, 17 Wall. 163, 166, the court said:

"It seems that the appellants, during this litigation, paid the taxes on a portion of these lands, and claim to be reimbursed for this expenditure in case the title is adjudged to be in the defendants, on the ground that they paid the taxes in good faith and in ignorance of the law. But ignorance of the law is no ground for recovery, and the element of good faith will not sustain an action where the payment has been voluntary, without any request from the true owners of the land, and with a full knowledge of all the facts. It is an elementary proposition, which does not require support from adjudged cases, that one person cannot make another his debtor by paying the debt of the latter without his request or assent. It is true, in accordance with our decision, the taxes on these lands were the debt of the defendants, which they should have paid; but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them, without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well-established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title, have risked too much, it is their misfortune; but they are not, on that account, entitled to have the taxes voluntarily paid by them refunded by the successful party in this suit."

In *Litchfield v. County of Webster*, 101 U. S. 773, 778, the court, in the course of its opinion, referring to the payment of taxes upon land, said:

"If one of the contesting claimants paid them, supposing the lands were his, he could not, if he finally failed to maintain his title, recover from the real owner what he thus advanced. We so held in *Homestead Co. v. Valley R.*, 17 Wall. 153."

The defendants are entitled to judgment for their costs.

MISSOURI SAVINGS & LOAN CO. v. RICE et al.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1897.)

No. 907.

1. ELECTION OF REMEDIES—BREACH OF CONTRACT—FRAUD.

Where a defendant has broken his contract and committed a fraud in the same transaction, the plaintiff has the choice of an action on the contract or an action in tort for the fraud.

2. LIMITATIONS.

The statute of limitations, contained in Gen. St. Kan. 1889, par. 4095, which bars an action for relief on the ground of fraud in such a transaction, does not limit the action for the breach of the contract.

3. SAME—ACTION FOR FRAUD.

The action for fraud which is barred by this statute must be one whose basis is a fraud without which the action could not be maintained.

4. ACTION—WHETHER ON CONTRACT OR FOR TORT—CONSTRUCTION OF PLEADINGS—LIMITATIONS.

A petition by a building association alleged that on their application it granted to the defendants, who were stockholders residing in a certain town, a charter constituting them a local board of directors, by accepting which they promised and agreed to comply with its terms, requiring them in all practical ways to protect the interests of the association, and to recommend as borrowers only responsible persons, and truly appraise the value of real estate offered as security; that, in violation of such agreement, defendants recommended certain persons as borrowers who were wholly insolvent, and appraised their property at many times its value,

in consequence of which the plaintiff suffered loss upon the loans made on their recommendation and appraisal. The petition prayed recovery of the amount of such losses as damages for breach of said contract. *Held*, that the action was not one "for relief on the ground of fraud," within Gen. St. Kan. 1889, par. 4095, fixing the period of limitation for such actions, though the facts alleged might constitute fraud as well as a breach of contract; the plaintiff having the right of election to sue on the contract or in tort.

In Error to the Circuit Court of the United States for the District of Kansas.

W. C. Perry and John H. Crain, for plaintiff in error.

J. D. McCleverty, for defendants in error.

Before BREWER, Circuit Justice, SANBORN, Circuit Judge, and RINER, District Judge.

SANBORN, Circuit Judge. On June 13, 1895, the Missouri Savings & Loan Company, the plaintiff in error, commenced an action in the court below against Oscar Rice, B. Hudson, A. Graff, and A. M. Keene, the defendants in error. The case was heard and decided upon a demurrer to an amended petition or declaration, which states as its only ground that the petition does not state facts sufficient to constitute a cause of action. The circuit court sustained the demurrer, and dismissed the action. This writ of error challenges that decision.

There is nothing in the record to inform us upon what ground the court below based its action, but counsel for the defendants in error cites paragraph 4095, Gen. St. Kan. 1889, which provides that actions for "relief on the ground of fraud" can only be brought within two years after the cause of action accrued; and while he admits that, if this is an action on contract, it was brought in time, he argues that the petition shows that this action was for relief on the ground of fraud, and that the causes of action which it pleads accrued more than two years before the action was commenced. The question presented, then, is whether this is an action *ex contractu* or *ex delicto*, and that question must be answered by the amended petition.

This petition pleads two similar causes of action, which differ merely in the amounts in question, the names of the mortgagors, and the description of the mortgaged property. The material facts stated as the basis of the first cause of action are these: The plaintiff is a corporation of the state of Missouri, engaged in loaning money on real estate security to its stockholders, to be repaid in monthly installments. Its principal place of business is St. Louis. Whenever it loans money in any other city, it requires its stockholders in that city to elect a local board of directors, and requires that board to recommend each applicant for a loan as worthy of credit, and to appraise the real estate which he offers as security. The rules of the plaintiff provided that loans upon real estate security should not exceed 50 per cent. of the cash value of the real estate, and the plaintiff loaned an amount equal to only 50 per cent. of the appraised value of the security, and loaned that only upon a recommendation and appraisal made by its local board. The defend-

ants knew these facts. The plaintiff had several stockholders in the city of Ft. Scott, in the state of Kansas, and, among them, these defendants. On November 21, 1892, the defendants and two other stockholders applied to the plaintiff for a charter for a local board. In this application they requested that the right and authority should be conferred upon them to act as a local board of directors for plaintiff at Ft. Scott, to receive applications from stockholders who desired to borrow of plaintiff, and to appraise the value of real estate which these applicants offered as security. On November 26, 1892, the plaintiff granted such a charter to them, which provided that the defendants and one Ury, who was associated with them as a member of the board of directors, should pass upon all applications for loans before they should be forwarded to the plaintiff, and that they should in all practical ways protect the interests of the plaintiff in the locality of Ft. Scott. The defendants accepted this charter, and thereby agreed to comply with its terms. On December 2, 1892, they, being a majority of the local board, prepared an application to the plaintiff for a loan of \$450 to one William G. Player, upon the security of certain real estate in the city of Ft. Scott. The defendant Rice administered the oath to Player, to the effect that the statement in his application was true, and the other defendants appraised the value of the property offered as security at the sum of \$900. Rice then forwarded the application and appraisement to the plaintiff, whereby each of the defendants represented to the plaintiff that they had performed their agreement, and intended that the plaintiff should accept and act upon the application and appraisement. On December 7, 1892, the plaintiff loaned \$450 to Player, on the representations made by the defendants in the application and appraisal, and in the belief that they had performed their agreement in that respect. At the time that the appraisement was made, the real estate was not worth more than \$100, and Player was then insolvent, and ever since has been. The debt which Player had secured by a mortgage on this real estate was not paid, and the plaintiff foreclosed the mortgage at an expense of \$100, and paid \$23.28 for delinquent taxes upon it. It never has been worth more than \$100 since the mortgage was made. The statement of this cause of action in the petition closes with these words: "That this plaintiff has lost, by reason of making said loan, the sum of four hundred ninety-eight and 28-100 dollars (\$498.28); that said loss has been caused solely by the failure of the defendants, and each of them, to carry out their said contract hereinbefore set forth. And plaintiff, by reason of said breach of contract, has been damaged in the sum of \$498.28." The statement of the second cause of action closes with the same allegations, except that "\$2,694.36" appears in place of "\$498.28." The prayer of the petition is for the recovery of the aggregate amount of these two sums, with interest.

This petition contains no allegation that the defendants intended to deceive or defraud the plaintiff, or to the effect that they conspired with Player or with each other for that purpose. Its legal effect is that, in consideration of the charter which they received from the plaintiff and the powers thereby granted to them, the de-

defendants agreed to recommend to it only those applicants who were worthy of credit, and to appraise the real estate security which they offered at its true value in current money, and that in two instances they appraised the security offered at more than its value, to the damage of the plaintiff in the sum of \$3,192.64. This is not, in our opinion, an "action for relief on the ground of fraud." It may be that the facts pleaded strongly indicate—perhaps they are sufficient to warrant the legal inference—that a fraud was committed. This is very frequently the case when a covenant is broken, but one who breaks his agreement cannot deprive the other party to the contract of his right of action for the breach by committing a breach and a fraud at the same time. In such a case the injured party has a right of action for relief on the ground that the contract is broken, and a right of action for relief on the ground of fraud, and the wrongdoer has not, but the injured party has, the choice of remedies. He may bring his action for damages for the fraud, or he may waive the tort, and sue on the contract. Pom. Code Rem. §§ 567, 571. Conceding, but not deciding, that the facts stated in the complaint are sufficient to establish a fraud as well as a breach of the agreement, the plaintiff has made it perfectly plain in this case, both by the frame of its complaint and especially by the allegations which we have quoted from the close of its statement of its causes of action, that it has elected to waive the fraud, and to recover for the breach of the agreement.

The effect of the Kansas statute of limitations against an action for relief on the ground of fraud is nowhere more tersely and correctly stated than by Judge Garver in *Brown v. Bank*, 2 Kan. App. 352, 354, 42 Pac. 593, where he says:

"This limitation applies in express terms to 'an action for relief on the ground of fraud.' This cannot be held to apply to every case wherein a fraudulent transaction may be, either directly or incidentally, inquired into. It must be a case where the party against whom the statute is urged as a bar is seeking relief to which he claims himself entitled because of the fraud of the opposite party. In other words, the fraud must be a part of the substantive cause of action on which the right to relief is founded, and without which no cause of action exists. *Jackson v. Plyler*, 38 S. C. 496, 17 S. E. 255; *Vanduyne v. Hepner*, 45 Ind. 589; *Detwiler v. Schultheis*, 122 Ind. 155, 23 N. E. 709."

This is not such a case, and the judgment below must be reversed. A careful examination of the petition, however, discloses no cause of action upon the contract against the defendant Rice. The allegations of the petition are that the other defendants appraised the security at much more than its value, and from that appraisal the loss resulted. It contains no allegation that Rice took any part in the appraisal, or that he did any other act in violation of his agreement which resulted in any injury to the plaintiff. The demurrer of Rice should accordingly be sustained, and the case, as against him, should be dismissed, while the demurrers of the other defendants should be overruled, with leave to answer. Let the judgment below be reversed, with costs against the defendants in error Hudson, Graff, and Keene, and let the case be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

LONG v. ROSEDALE CEMETERY.

(Circuit Court, D. New Jersey. December 2, 1897.)

CEMETERY COMPANIES—ACTIONS FOR NEGLIGENCE

Cemetery companies organized under the New Jersey general cemetery act (1 Gen. St. p. 353, par. 18) are not exempt from actions for damages arising from the negligence of their servants, on the ground either of the peculiar use to which the property is devoted, or because a judgment, if one is obtained, cannot be enforced by execution; for paragraph 18 of the statute provides a method of satisfying judgments, by sequestrating in equity the incomes and revenues of the cemetery grounds.

This was an action at law by Ellen Long against the proprietors of the Rosedale Cemetery to recover damages alleged to have been caused by the negligence of the defendant's managers and servants.

Francis J. Swayze, for demurrer.

Frank P. McDermott, opposed.

KIRKPATRICK, District Judge. The declaration in this case avers that the defendant is a corporation organized under the laws of the state of New Jersey, and founds its complaint upon the ground of the negligent conduct of its managers and servants. That corporations are liable for the wrongful acts of their servants, committed while in the discharge of their duties, cannot, as a general proposition, be denied. *Brokaw v. Transportation Co.*, 32 N. J. Law, 328. The defendant company is not distinguishable on the pleadings from any other corporation incorporated under the law of New Jersey, except by its name, and that it is the "proprietor and operator of a certain cemetery." The strongest conclusion favorable to the defendant that can be drawn from this assertion is that the company is incorporated under the general laws of the state relating to cemetery companies, and entitled to the immunities of that act. It nowhere appears that the defendant enjoys special privileges granted under special charter. The general cemetery act (1 Gen. St. p. 353, par. 18), among other things, provides:

"That the rents, issues, profits, incomes and revenues derived from any and all lands lying within the boundary of any cemetery or burying ground belonging to or used by or held in trust by an incorporated cemetery company in this state may be taken and sequestered under and by virtue of the orders and decrees of the court of chancery of the state according to the rules and practice of that court, and applied by said court of chancery to the payment of any judgment recovered in any of the courts of this state against said cemetery company."

The legislature having provided a way by which judgments against cemetery companies may be satisfied, non constat that a judgment against this defendant would be a nullity. It may be that the defendant, like many another, has not the means from which an execution may be satisfied in the manner provided by law, but that inability to respond is not a bar to the recovery of the judgment. In this case the judgment is the necessary foundation of the sequestration proceedings before the chancellor, and without it the plaintiff would not have a standing in court to ascertain whether the defendant was possessed of "rents, issues, profits, income and revenues derived from

lands," etc., which, upon a proper application, the court would place in the hands of a receiver for the purpose of satisfying the plaintiff's judgment. Surely the law is not brought into contempt by permitting judgment to be entered against the defendant, when there is a possible means by which it may be satisfied. The remarks of Lord Cockburn in *Coe v. Wise*, 5 Best & S. 440, applied only to cases where "the judgment cannot possibly be satisfied, either by taking the person or property of the defendant, or by any other means." The cases relied upon by the defendants, and cited in their brief, as showing that certain corporations are not liable for the wrongful acts of their servants, are based upon the principle that their funds and revenues cannot be diverted from the purposes of their incorporation to the payment of damages arising from their servants' negligence. This is no case for the application of that principle, for the legislature has expressly said that certain rents and revenues of cemetery companies may, under certain circumstances, be applied to the "payment of any judgment."

It is insisted that the defendant corporation is a charitable organization, and, as such, relieved from responsibility for the wrongful acts of its servants. "The test which determines whether such an enterprise is charitable or otherwise is its purpose. If its purpose is to make profit, it is not a charitable enterprise." *Railway Co. v. Artist*, 19 U. S. App. 612, 9 C. C. A. 14, 60 Fed. 365. The court has not at hand any means by which this test may be applied, and is therefore unable to dismiss the plaintiff's suit on that ground. Neither can the court deprive the plaintiff of the remedy from "considerations of decency, and pious reverence for the dead." The lands of the defendants, surrounding the lots appropriated for the burial of the dead, are by the law exempt from sale under execution, to indiscriminate purchasers, for purposes foreign and repugnant to the purposes to which the whole plot has been dedicated; but the same law points out the way by which, without doing violence to these natural feelings, certain profits and revenues of cemetery companies may be applied to the payment of any judgment which may be recovered against them. The demurrer must be overruled, with costs.

ARMOUR PACKING CO. v. SNYDER et al.

(Circuit Court, D. Minnesota, Fifth Division. December 18, 1897.)

1. OLEOMARGARINE LAW—STATUTE OF MINNESOTA—VALIDITY.

The oleomargarine law of Minnesota (Laws 1891, c. 11) affects the articles to which it relates only when sold or exposed or kept for sale within the state, and is, therefore, not invalid as interfering with the exclusive power of congress over interstate commerce.

2. SAME—POLICE POWERS OF STATE—REQUIREMENT AS TO COLORING.

It is within the police powers of a state to provide by statute that articles sold therein as a substitute for butter shall be colored pink, to prevent the deception of purchasers and consumers.

3. SAME—CONSTRUCTION OF STATUTE—SEIZURE OF PROPERTY.

Laws Minn. 1891, c. 11, § 1, imposes a penalty on any one who shall sell, expose for sale, or have in his possession with intent to sell, any imi-

tation or substitute for butter, not made from milk or cream, that is of any other color than bright pink; and such penalty, under the decision of the supreme court of the state, is recoverable by a criminal prosecution. Section 3 provides that having in possession any such article shall be prima facie evidence that it is kept in violation of the act, and authorizes the dairy and food commissioner to seize and take possession of such article, and upon the order of any court having jurisdiction under the act to sell the same. *Held*, that said section authorizes a seizure only in connection with a prosecution, and a confiscation and sale of the property seized only upon conviction.

Replevin by the Armour Packing Company against A. Snyder, E. B. Williams, and Berndt Anderson. Tried to the court without a jury.

Draper, Davis & Hollister, for Armour Packing Co.

H. W. Childs & George B. Edgerton, for the State of Minnesota.

LOCHREN, District Judge. This case, in which jury trial was duly waived, is an action of replevin, brought by the plaintiff, a New Jersey corporation, doing business in Missouri, against the defendants, of whom Berndt Anderson is the dairy and food commissioner of the state of Minnesota, and the others, inspectors, acting under him as such official, to recover the possession of a large number of packages of butterine, particularly described in plaintiff's complaint. On the 21st day of December, 1895, at the city of Duluth, Minn., this butterine, then in the possession of plaintiff's agents, and by them being then and there exposed and offered for sale, was seized by the defendants under the direction and authority of said Berndt Anderson, as such official, for the purpose of selling the same under the order of any court having jurisdiction, and for purposes other than to be used for food, on the ground that such offering for sale of said butterine was contrary to the statutes of the state of Minnesota. In this action, upon filing the proper bond by the plaintiff, the property was taken from the defendants by the marshal, and redelivered to the plaintiff. Its value is admitted to be the sum of \$2,182.32. It is also admitted and shown that butterine and oleomargarine are the same article, and that the butterine in question was manufactured by plaintiff at Kansas City, in the state of Kansas, and shipped by plaintiff thence to Wisconsin, and later to Duluth, aforesaid, and that it was there kept, exposed, and offered for sale only in the original packages in which it came from the manufactory; which packages were marked, stamped, and in every way distinguished, as required by the laws of the United States and of the state of Minnesota, except that the butterine itself contained in such packages was not in color a bright pink, but was of the yellow color and tint of the best quality of dairy butter, and was in fact an imitation of the best dairy butter, so close in appearance and taste that few, if any, persons could distinguish it from that article. The evidence further showed that plaintiff has been for many years engaged in the manufacture of similar oleomargarine or butterine at Kansas City, aforesaid, and in shipping the same for sale to all the states and territories of the country, and that many others are engaged in the same business, and that the article enters largely into the commerce of the country. It is made of choice fat from

slaughtered cattle and leaf lard, with a small quantity of refined cotton seed oil mixed with butter, cream, and salt; and, being of a light yellowish white color, is colored to resemble the best quality of butter, and is entirely wholesome. The seizure by the dairy and food commissioner was made under chapter 11, Gen. Laws Minn. 1891, which forbids, under special penalties, the sale, exposure for sale, or having in possession with intent to sell, any article in imitation of butter, not wholly made of milk or cream, and that is of any other color than bright pink; and provides that the dairy and food commissioner may seize such article, and, upon the order of any court having jurisdiction under the act, sell the same for any purpose other than for food.

1. There is nothing in the objection that the act referred to does not, as to its title, conform to the provisions of section 27, art. 4, of the state constitution; and the supreme court of the state has declared it to be valid. *State v. Horgan*, 55 Minn. 183, 56 N. W. 688.

2. It is not invalid as interfering with the exclusive power of congress to regulate commerce among the several states. The act does not interfere with oleomargarine so long as it remains an article of commerce, and is being handled or stored as such. It is only after it has ceased to be an article of commerce, and become a part of the mass of the property of the state, and as such is being sold, or kept and exposed for sale, that it comes under this act; which makes no distinction in favor of the article manufactured in this state, or against that which is brought from other states.

3. The serious question in respect to this act is whether it is a valid exercise of the police power of the state to require that all imitations of butter intended to be substitutes for that article shall be colored bright pink. It is certain, and not denied, that butterine or oleomargarine is a substitute for butter, and so intended. It is equally certain that it is made in imitation of butter, even in color, so that it cannot upon ordinary inspection and use be distinguished from it, and that it is calculated and intended to deceive, not the purchasers in original packages, but the purchasers of small amounts at retail, and the consumers, into the belief that the article is in fact butter, is clear beyond doubt. The state has undoubtedly the power of inspection and of confiscation in respect to articles of food put upon the market which are deleterious and unwholesome. And I think it may go further in respect to articles of food, and take efficient measures to prevent the people from being deceived and imposed upon; not only by requiring the packages containing an imitation article of food to be so marked as to disclose its character, but may also require that the article itself shall in a designated way be so marked for the same purpose. *State v. Horgan*, 55 Minn. 183, 56 N. W. 688; *State v. Marshall*, 64 N. H. 549, 15 Atl. 210; *State v. Myers*, 42 W. Va. 822, 26 S. E. 539; *People v. Arensberg*, 105 N. Y. 123, 11 N. E. 277. It is true that plaintiff's witnesses testify with great positiveness that, while oleomargarine is largely sought and purchased as an article of commerce, yet, if it were colored bright pink, no sale of it could be made as an article of food. And this opinion

is doubtless true. But there is nothing in bright pink, as a color, calculated to excite repugnance or loathing. Shades of color akin to it are sometimes given to jellies, ices, and other articles of food, to make them more attractive, and are natural to some preparations of fruit. And it does not appear that oleomargarine would not be equally unsalable if put on the market without coloring, or with any color not a close imitation of the color of dairy butter. The inference is that its marketable value mainly consists in the facility with which those who buy it cheaper than dairy butter can impose it as that article upon those who eat it in the belief that it is butter, and would refuse it if informed what it is in fact. The state has the power to protect its people from such imposition and fraud. *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154.

But it is objected that the seizure in this case was without due process of law. That the state has the power to provide for the seizure and confiscation of articles exposed and offered for sale contrary to its police regulations and inspection laws is well settled. There must be due process of law, which means in each particular case such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. *Cooley, Const. Lim.* 336. Property cannot be condemned and confiscated for violation of the inspection laws or police regulations of a state except upon a judicial hearing and trial, where the owner or person in charge of the property has notice and opportunity to be heard. The first section of the act under consideration provides that whoever, by himself or agent, shall sell, expose for sale, or have in his possession with intent to sell, any article or compound made in imitation of butter, or as a substitute for butter, and not wholly made from milk or cream, that is of any other color than bright pink, shall be subject to the payment of a penalty of \$50, and for a second and each subsequent offense a penalty of \$100, to be recovered, with costs, in any court of the state of competent jurisdiction. And the state supreme court, in *State v. Horgan*, 55 Minn. 183, 56 N. W. 688, held that this penalty may properly be recovered by a criminal prosecution. The third section enacts a rule of evidence applicable to this prosecution for the penalty; that the having in possession by any person or firm of any articles or substance prohibited by the act shall be considered prima facie evidence that the same is kept by such person or firm in violation of the provisions of the act. This section further provides that the state dairy and food commissioner shall be authorized to seize upon and take possession of such article or substance, and upon the order of any court having jurisdiction under the act he shall sell the same, etc. The language seems to refer to a court having jurisdiction under other provisions of the act, which could only be the court wherein the prosecution is had. When every part of the statute is considered, it seems apparent that seizure of the articles is only contemplated in connection with prosecutions for the penalty, when, in the same court, and same proceeding, the owner or person

in possession being present and on trial, and therefore having the right and opportunity to be heard, if he is convicted, the court may condemn the article seized, and order its sale under the statute. The statute, therefore, though meager in its terms, affords, if strictly followed, due process of law. But it does not provide for, nor seem to contemplate, the seizure of the article, disconnected with any prosecution for the penalty, and provides no other way of bringing the party in interest into court in the confiscation proceeding. Merely having the article in possession is not prohibited, but only the selling of it, or having it in possession with intent to sell; the bare possession being only *prima facie* evidence of the intent. It follows that the article can never be confiscated except when found in the hands of some one who is liable to the penalty, and the matter of confiscation is therefore properly made incident to the result of the trial, and one of the consequences of conviction. The trouble with the defense in this case is that the defendants went beyond the scope of the statute, which cannot be expanded beyond its plain terms to bring about and enforce a summary confiscation of property. The defendants justify the seizure of this property, not in connection with, nor as accessory to, any action or prosecution for the recovery of the penalty for violating the statute, but as having been made disconnected with any proceeding in court, and without warrant of any kind. Such seizure is not authorized nor warranted by the statute, and no procedure for such a case is provided for. There must be a conviction for violation of the statute before confiscation can be adjudged or ordered, and no proceeding purely in rem is contemplated. The plaintiff is entitled to judgment, with costs.

PINTSCH COMPRESSING CO. v. BERGIN.

(Circuit Court, D. Massachusetts. November 19, 1897.)

No. 624.

1. ALIENS—JUDGMENT OF NATURALIZATION—CONCLUSIVENESS.

Proceedings in a court of record under the naturalization laws (Rev. St. §§ 1993, 2165, 2171, 2172) are judicial, and result in a judgment which can be impeached only as other judicial judgments are impeached. Hence, where the proceedings are regular on the face of the record, a judgment admitting a woman to citizenship cannot be reviewed or annulled at a subsequent term, on petition of a private party, alleging that during the larger part of the two years prior to her application she was under the disability of coverture, her husband being an alien, and, therefore could not, in law, have had, during that time, the bona fide intention to become a citizen, which the law requires.

2. SAME.

It seems that no one, unless the United States, or a person proceeding by their authority, can institute proceedings to annul a judgment admitting an alien to citizenship.

This was a petition by the Pintsch Compressing Company against Mary A. Bergin for the purpose of annulling a proceeding under the naturalization laws, whereby the latter was admitted to citizenship.

Heman W. Chaplin and Edward D. Whitford, for petitioner.
Anson M. Lyman, for respondent.

PUTNAM, Circuit Judge. The petitioner represents that the respondent has been admitted by this court to become a citizen of the United States when she should not have been, and it prays that her "certificate of naturalization be returned to this court and canceled." The certificate is a nonessential, but we need not stop at the mere form of prayer of the petition. The only interest the petitioner alleges in the question is that, as a citizen, the respondent has sued the petitioner in this court, and that it is only by force of her apparent citizenship that she is enabled to maintain such a suit. It, however, assumes to prosecute the petition on behalf of all persons interested, but, inasmuch as the United States have not intervened, we regard this allegation of no avail.

The respondent was admitted a citizen in accordance with the provisions of section 2167 of the Revised Statutes. Under those provisions she was required to "prove to the satisfaction of the court that for two years next preceding" her application it had been her bona fide intention to become a citizen of the United States. The petition alleges that during the larger portion of that period of two years she had been under disability as the wife of an alien, who nevertheless resided with her in the United States, so that she could not in law have the required operative intention. This proposition involves, technically, mixed questions of law and fact, which were presumably passed on by the court before it admitted the respondent to citizenship, and all which were merged in its final act. Therefore no question raised by the petitioner appears on the face of the proceedings, and the very form of the petition in this case necessarily concedes that the record is regular in every particular. It follows that the petitioner demands to review the findings of the court, and is not merely bringing to our attention an irregularity or fatal defect apparent on the face of the record. As, moreover, the petition alleges that the naturalization was at a former term, it does not apply for the exercise of that summary power over its own proceedings which the court reserves during the term when they occur, but asks what is, in effect, a judgment on scire facias, annulling the proceedings admitting the respondent to citizenship. The section of the Revised Statutes referred to, both in the Revised Statutes and in its original enactment (Act May 26, 1824, c. 186, § 1; 4 Stat. 69), was incorporated in, and became a part of the system established by Act April 14, 1802, c. 28 (2 Stat. 153), now represented by §§ 1993, 2165, 2171, and 2172 of the revision. Whatever may have been the condition under previous statutes, proceedings in a court of record under this legislation are judicial, and result in a judgment which can be impeached only as other judicial judgments may be. *Spratt v. Spratt*, 4 Pet. 393, 406; *Insurance Co. v. Tisdale*, 91 U. S. 238, 245; *Boyd v. Nebraska*, 143 U. S. 135, 180, 12 Sup. Ct. 375. In strict conformity with this principle, and in illustration and confirmation thereof, the judgments of this court, in cases of admission to citizenship under the circumstances of the admission of

the respondent have been, and still are, in the following form, the blanks being first duly filled:

"United States of America.

"District of Massachusetts, to wit:

"At a circuit court of the United States, begun and holden at said Boston on the fifteenth day of —, in the year of our Lord 189—, to wit, on the — day of —, A. D. 189—, the said —, having produced the evidence required by law, took the aforesaid oath, and was admitted to become a citizen of the United States of America; and the court ordered that record thereof be made accordingly."

The record thus ordered on the application of the respondent evidenced a solemn judicial judgment that she was entitled to receive, and did thereby receive, from the United States, the franchise of citizenship. Is any one entitled to proceed for its rescission unless the United States themselves, or by their authorization? No precedent, no text writer, and no rule of law is cited which justifies us in answering this question affirmatively. The fundamental principle that, in the absence of a statute of authorization, only the United States can proceed judicially to recall or rescind franchises granted by them, has peculiar force with reference to citizenship, as to which so great a variety of interests, political and individual, of high importance, is concerned that the jurisdiction of inquiry should be especially fixed and limited. Even when proceeding diplomatically, and in their relations with foreign powers, the United States reserve to themselves the exclusive right to question the naturalization proceedings of their local tribunals. So far as we can discover, there has been no decision of any court of authority on the precise case before us; but whatever precedents there are favor the views we have expressed. Petition dismissed, with costs for the respondent.

UNITED STATES v. JEWETT.

(Circuit Court, D. Massachusetts. December 4, 1897.)

No. 1,808.

1. NATIONAL BANKS—EMBEZZLEMENT—AGENT IN LIQUIDATION.

Rev. St. § 5209, making embezzlement, abstraction, or willful misapplication of the property of a national banking association by an officer or agent a misdemeanor, applies to an agent in liquidation appointed by the stockholders.

2. SAME—INDICTMENT.

Averments in an indictment that the defendant was appointed agent in liquidation for a national banking association, and accepted that office, are not inconsistent with further averments that he afterwards acted as president, clerk, and director of the association.

3. SAME—CHARGING RECEIPT OF PROPERTY IN DIFFERENT CAPACITIES.

An indictment against a defendant for the embezzlement and abstraction of the property of a national banking association is not demurrable because it charges the receipt of the property by him in different capacities, both as an officer and as an agent of the association.

4. SAME—DUPLICITY.

An averment in an indictment against an officer and agent of a national banking association that the defendant "did steal, abstract, take, and carry away" property of the association, does not charge two offenses.

5. SAME—SUFFICIENCY OF AVERMENTS—DESCRIPTION OF OFFENSE.

An allegation that defendant, an officer and agent of a national banking association, did secretly, in a manner and by particulars to the jurors unknown, willfully, unlawfully, and fraudulently convert to his own use, and misapply, from said association to himself, certain funds, sufficiently charges the offense of "willful misapplication" of property, under Rev. St. § 5209.

William S. Jewett was indicted for embezzlement, abstraction, and willful misapplication of the property of the Lake National Bank of Wolfborough, N. H. This hearing is upon demurrer to the indictment.

William S. B. Hopkins and Hollis R. Bailey, for plaintiff.

Boyd B. Jones, U. S. Atty., and John H. Casey, Asst. U. S. Atty.

BROWN, District Judge. This indictment contains 96 counts under section 5209 of the Revised Statutes of the United States, in which are charged embezzlement, abstraction, and willful misapplication by the defendant of the property of the Lake National Bank of Wolfborough, N. H. In each count it is alleged that, before any of the acts charged to have been committed by the defendant, the stockholders of the Lake National Bank had voted to go into liquidation and had appointed the defendant Jewett agent in liquidation. The defendant contends upon demurrer that section 5209 applies only to going banks, and not to a bank in voluntary liquidation, and that consequently the word "agent," in the section, does not include an agent for liquidation. I am of the opinion, however, that such an agent is within the statute. The vote of the stockholders does not terminate the existence of the association. Though its transactions are restricted, it still exists as a legal person capable of acting by an agent; and the defendant was, upon the allegations of the indictment, the agent of the association, though appointed for a special purpose by the vote of its stockholders. *National Bank v. Insurance Co.*, 104 U. S. 54, 74; *First Nat. Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383; Rev. St. §§ 5221-5224. Moreover, I see no reason to doubt that an agent in liquidation, equally with an agent for ordinary business, is within the spirit of the section, as well as within its express terms. The protection afforded by the statute against embezzlement, abstraction, or willful misapplication of the property of the association should be held, in the absence of reasons to the contrary, to continue as long as the necessity for such protection exists.

It is further urged upon demurrer that the averments that Jewett was appointed agent in liquidation, and accepted that office, are inconsistent with averments that he afterwards acted as president, clerk, or director, and that the counts containing such averments are bad for repugnancy. As the appointment of an agent in liquidation does not terminate the existence of the association, though it restricts its transactions, so it does not terminate the official character of its officers, though it may limit their powers. There is no legal impossibility that an agent in liquidation should be also president, director, and clerk. *U. S. v. Northway*, 120 U. S. 328, 329, 7 Sup. Ct. 580. The limitation of the lawful powers of the officer does not limit the

power of the individual holding the office to commit the offenses punishable under section 5209, nor does the appointment of an agent in liquidation necessarily deprive the official of his special facilities for appropriating the bank's property, or afford a reason for excepting him from the operation of a statute which in terms makes him amenable so long as he holds a certain office. If it is intended to argue that after his appointment as agent the defendant could receive, hold, or apply the funds in no other capacity, and that, therefore, an averment that he also received or held or applied them as president and clerk, is the statement of a legal impossibility, such argument, even if its premises are conceded, does not support the demurrer, but would lead merely to the rejection, as surplusage, of the words alleging the legal impossibility. As the offense is the same, and punishable in the same way, whether one or all of the allegations of his official position are true, and as he is fully apprised that proof may be offered of each, the defendant is not prejudiced in his defense by uniting to a charge of the offense three distinct grounds for holding him amenable under the statute.

The defendant also claims that certain of the counts are bad for duplicity, in that they contain a charge of the common-law crime of larceny, joined with a charge of the statutory crime of abstracting. The allegation is that the defendant "did steal, abstract, take, and carry away." The terms "steal, take, and carry away," however, do not charge an offense other than that denoted by the word "abstract." The word "abstract" covers the offense of larceny, which is but one form of the offense of abstraction. *U. S. v. Northway*, 120 U. S. 327, 7 Sup. Ct. 580. Whether it be held that the word "steal" is used to apprise the defendant of the particular kind of abstraction with which he is charged, or that it is merely an allegation of what is included within the term "abstract," and which can therefore be rejected as surplusage, it cannot be said, in either view, that the counts charge the defendant with two distinct offenses. To certain counts, charging that said Jewett did secretly, in a manner and by particulars and in a mode to the jurors unknown, knowingly, willfully, unlawfully, and fraudulently convert to his own use, and misapply, from said association to himself, certain funds and credits, it is objected that they violate the rule stated in *Batchelor v. U. S.*, 156 U. S. 426, 15 Sup. Ct. 446, that the words "willfully misapply" must be supplemented by further averments, showing how the misapplication was made, and that it was an unlawful one. The concluding paragraph of the opinion in *Batchelor v. U. S.*, *supra*, is as follows:

"Such being the nature and effect of the specific allegations in the indictment as to the manner in which the defendant acted, there are no sums, clearly and sufficiently specified, to which can be referred the concluding averment, 'all of which said sums were misapplied willfully, and in the manner aforesaid, out of the moneys, funds, and credits of said association,' and were converted to the defendant's use, benefit, and advantage, with the intention to injure and defraud the association and its depositors, and other persons and corporations doing business with it."

The implication of this language is that the allegation that the sums were converted to the defendant's own use, etc., with intent to defraud, etc., might meet the requirement of "averments to show

how the misapplication was made, and that it was an unlawful one."

In *Evans v. U. S.*, 153 U. S. 584, 14 Sup. Ct. 934, 939, an indictment was sustained in which the specification of the method of misapplication was in the words, "by surrendering and delivering the note of Evans, without receiving payment therefor for the bank." The indictment was sustained, not because of the allegation of specific facts by themselves necessarily constituting an offense, since the acts alleged were in themselves indifferent, but because misapplication was charged, and the essential ingredients set forth. The court says (page 590, 153 U. S., and page 937, 14 Sup. Ct.):

"Every element of the offense being set forth in the earlier part of the count, there was no necessity of repeating it when the particular credit misapplied is described, nor of negating every possible theory consistent with an innocent delivery of the note to the defendant. * * * The general words of a fraudulent misapplication to the use and benefit of the defendant, and of an intent by so doing to defraud the bank, are of themselves inconsistent with an honest purpose."

The charge was substantially in the language of the statute, with the addition of the necessary ingredient of a conversion with fraudulent intent. *U. S. v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512; *Coffin v. U. S.*, 156 U. S. 432, 448, 15 Sup. Ct. 394.

I find no necessary inconsistency between an allegation that the defendant did misapply and convert to his own use certain property, and an allegation that the grand jury is ignorant of the exact means whereby the misapplication and conversion were effected. Even should a defendant conceal or destroy all evidence of the details of the particular transaction, the general fact that assets of the bank in his possession had been misapplied and converted to his own use, with intent to defraud, might be clearly established. The counts 91, 92, 93, 94, 96, distinctly charge misapplication and conversion of assets of the bank to the use of the defendant, and thus show that the act charged was not maladministration, but the criminal misapplication punishable by section 5209. Upon the authority of *Evans v. U. S.*, 153 U. S. 584, 14 Sup. Ct. 934, 939, I am of the opinion that these counts should be sustained.

Other causes of demurrer do not require special consideration. As was said in *Cochran v. U. S.*, 157 U. S. 286, 290, 15 Sup. Ct. 630:

"Few indictments under the national banking law are so skillfully drawn as to be beyond the hypercriticism of astute counsel,—few which might not be made more definite by additional allegations. But the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

I am of the opinion that, upon applying this test, it will be found that each of the counts in the indictment contains every element of the offense intended to be charged, apprises the defendant what he is to meet, and will fully protect the defendant if pleaded to a subsequent indictment. The demurrers are therefore overruled.

UNITED STATES v. SHOEMAKER.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 1,897.

CUSTOMS DUTIES—PROPRIETARY PREPARATION.

A preparation called "Bovrill Wine," labeled "Nutritious Tonic," composed of port wine, extract of beef, and extract of malt, and containing 17.90 of alcohol, was dutiable under paragraph 74 of the act of 1890, as a proprietary preparation containing alcohol, and not under paragraph 336, providing for still wines, etc.

This was an appeal by the United States from a decision of the board of general appraisers in respect to the classification for duty of certain imported merchandise.

James T. Rensselaer, Asst. U. S. Atty.
Albert Comstock, for defendant.

WHEELER, District Judge. The tariff act of 1890 provides for a duty, by paragraph 74, on all medicinal preparations, including medicinal proprietary preparations of which alcohol is a component part, or in the preparation of which alcohol is used, not specially provided for in this act, 50 cents per pound; and by paragraph 75, on the same "of which alcohol is not a component part, thirty-five per centum ad valorem"; and, by paragraph 336, still wines, including ginger wine or ginger cordial and vermouth, in casks, 50 cents per gallon; in bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart, and more than one pint, or twenty-four bottles or jugs, containing each not more than one pint, \$1.60 per case.

The defendant imported a preparation called "Bovrill Wine," labeled "Nutritious Tonic," composed of port wine, extract of beef, and extract of malt, and containing 17.90 of alcohol, which is about the same proportion of alcohol as is contained in port wine. It has been assessed as a still wine, under paragraph 336. That, with this quantity of alcohol, it may be assessed as an alcoholic compound, is shown by *Mackie v. Erhardt*, 23 C. C. A. 351, 77 Fed. 610. Still wines are provided for with sparkling wines, as beverages, and do not seem to include such special preparations as this, except those mentioned. Therefore this should have been assessed as a proprietary preparation containing alcohol, under paragraph 74. Decision reversed.

SANDOW v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 1,881.

1. CUSTOMS DUTIES—CLASSIFICATION—IMPLEMENTS OF OCCUPATION.

Articles properly classifiable as implements of occupation, which arrived sometime after the owner by a different ship, because the ship in which he came refused to carry them, were not entitled to free entry, under paragraph 686 of the act of 1890, which provides for free admission of implements of occupation "in the actual possession at the time of persons arriving in the United States."

2. SAME—CARRIAGE HORSES.

Family carriage horses used as such abroad were entitled to free entry, under paragraph 516 of the act of 1890, as "household effects."

This was an appeal by Eugene Sandow from a decision of the board of general appraisers as to the classification for duty of certain horses brought to this country by him.

Albert Comstock, for plaintiff.

James T. Van Rensselaer, Asst. U. S. Atty.

WHEELER, District Judge. These are horses conceded, in argument, to have been so trained and used in exhibitions as to be implements of occupation of the plaintiff. The ship in which he came would not bring them, and they arrived otherwise a few days after he did. They were not in his possession as of a person at the time "arriving within the United States," within the requirement of paragraph 686 of the act of 1890, for he was not then arriving, but had arrived some time before. *Rosenfeld v. U. S.*, 13 C. C. A. 450, 66 Fed. 303. The evidence taken in this court shows that they had been used abroad as family carriage horses for three years before being brought to this country. *Arthur v. Morgan*, 112 U. S. 495, 5 Sup. Ct. 241, shows that a family carriage used abroad comes within the words "household effects," of paragraph 516. The reasoning by which this conclusion is arrived at in that case would seem to include the carriage horses necessary for the use of the carriage as well as the carriage itself. This construction has been put by the treasury department on importations of carriage horses since that time. This decision and the course of the department seem to require that these horses should be classified as household effects, under paragraph 516. Decision reversed.

UNITED STATES v. BREWER et al.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 2,313.

CUSTOMS DUTIES—CORRECTING INVOICE—REIMPORTATIONS.

In an invoice of reimported grain bags of American manufacture, a mistake in naming the vessel may be corrected by filing a new invoice, and the duties may then be remitted.

This was an appeal by the United States from a decision of the board of general appraisers allowing the correction of the invoice of certain grain bags made in this country, and reimported, after having been sent abroad.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.

Stephen G. Clarke, for defendant.

WHEELER, District Judge. The protest in this case raised the question as to remission of duties on grain bags exported from this country and returned. The board of general appraisers allowed an error in the name of the vessel in one of the invoices to be corrected,

and the duties to be remitted. This appeal is made by the government against that remission. To allow the correction of an invoice by filing a new one seems to be proper, and the decision of the board of general appraisers is affirmed, for the reasons stated by them. Decision affirmed.

HAULENBECK v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 2,102.

CUSTOMS DUTIES—CLASSIFICATION—OLIVE PITS.

Olive pits ground were not dutiable under section 4 of the act of 1890, but under paragraph 24, which provides, among other things, for nut galls, nuts, seeds, etc., which are not edible, but which have been advanced in value or condition by refining, grinding, etc.

This was an appeal by J. W. Haulenbeck from a decision of the board of general appraisers as to the classification for duty of certain imported goods.

Everit Brown, for plaintiff.

Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. This importation is of olive pits ground. They are not edible. They were assessed under section 4, against a protest that they come under paragraph 24 of the act of 1890, which provides for—

"Drugs, such as barks, beans, berries, balsams, buds, bulbs and bulbous roots and excrescences, such as nut galls, fruits, flowers, dried fibre grains, gums, and gum resins, herbs, leaves, lichens, mosses, nuts, roots and stems, spices, vegetables, seeds (aromatic, not garden seeds), and seeds of morbid growth, weeds, woods used expressly for dyeing, and dried insects, any of the foregoing which are not edible, but which have been advanced in value, or condition, by refining, or grinding, or by other process of manufacture."

It seems to fall within this class, as not edible, but advanced in manufacture by grinding.

Decision reversed.

UNITED STATES v. FENSTERER et al.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 2,400.

CUSTOMS DUTIES—CLASSIFICATION—MANUFACTURES OF GLASS.

Oval glass blanks blown in molds, to be finished by cutting into dishes for table use, were dutiable as "manufactures of glass," under paragraph 102 of the act of 1894, and not as glassware, under paragraph 88.

This was an appeal by the United States from the decision of the board of general appraisers in respect to the classification for duty of certain articles of glass imported by Fensterer & Ruhe.

James T. Van Rensselaer, Asst. U. S. Atty.

Everit Brown, for defendants.

WHEELER, District Judge. Paragraph 88 of the tariff act of 1894 provided for duties on "green and colored, molded, or pressed, and flint and lime glass bottles," and on "all other plain green and colored, molded, or pressed, and flint lime and glassware." In this last clause the last "and" and "flint" are transposed, and concededly it should read, "and flint and lime glassware." And paragraph 102 provides for duties on glass windows, and parts thereof, and mirrors with or without frames or cases, "and all manufactures of glass, or of which glass is the component of chief value, not specially provided for in this act." These articles are oval glass blanks, blown in molds, for finishing by cutting into dishes for table use. They were classified as glassware under paragraph 88, against a protest that they were manufactures of glass under paragraph 102; and the protest has been sustained. The question now is whether they are to be classified with glassware, or with manufactures of glass, under these respective paragraphs. They were of glass, and had been manufactured to some extent, and were, therefore, manufactures of glass. They were not completed for their intended use, and would be sought for by manufacturers of, and not dealers in, glassware; and they seem to be materials for glassware, rather than glassware itself. Decision affirmed.

BREWER et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

CUSTOMS DUTIES—FLOUR BAGS REIMPORTED.

Flour bags, shown by proof according to the treasury regulations to have been made in this country, were entitled to free entry, under paragraph 387 of the act of 1894, though the marks on some of the bags did not correspond to those in the invoices.

This was an appeal by Brewer & Bros. from a decision of the board of general appraisers in respect to the classification for duty of certain flour bags.

Stephen G. Clarke, for plaintiffs.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.

WHEELER, District Judge. This importation was of flour bags exported from this country, and assessed properly, unless they were duty free, as returned to this country under paragraph 387 of the tariff act of 1894. That they were the product of this country, and exported and reimported, in fact, is not questioned. All the affidavits and proceedings were taken by the importer that were required by that paragraph, and the treasury regulations under it. Free entry was refused, and the duty assessed, because the marks on many of the bags did not correspond to those in the invoices. That does not show that the bags were not of American manufacture. It only shows that some mistake, probably, was made about them. They were none the less free, as the product of this country, exported and returned, because they had been wrongly marked. The regulations

having been fully complied with, and they having been returned by the appraiser as the product of this country, they should have been allowed to come in free. Decision reversed.

BECK v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—THOROUGHBRED HORSES.

In order that a horse of pure breed, imported specially for breeding purposes, should be entitled to free entry, under paragraph 482 of the act of 1890, it was requisite that proofs of pedigree and identity, as prescribed by the second proviso to that paragraph, should be furnished to the customs officers; and, if this were not done, it was proper to assess the appropriate duty, and such assessment could not thereafter be disturbed by the court on proofs of pedigree, etc., produced before it.

This was an appeal by Leopold Beck from a decision of the board of general appraisers as to the classification for duty of a horse imported by him.

Walter Large, for plaintiff.

Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. Paragraph 482 of the tariff act of 1890 provides:

"Any animal imported specially for breeding purposes shall be admitted free: provided, that no such animal shall be admitted free unless pure bred of a recognized breed, and duly registered in the book of record established for that breed: and provided further, that certificate of such record and of the pedigree of such animal shall be produced and submitted to the customs officer, duly authenticated by the proper custodian of such book of record, together with the affidavit of the owner, agent or importer, that such animal is the identical animal described in said certificate of record and pedigree."

One horse is claimed to be free under that paragraph. The owner did not, however, at any time when the matter was before the customs officers, produce the proof required by the second provision of that statute. The horse could not be free without that proof. The assessment of duty was, therefore, correct when made. Some proof has since been taken in this court, but that does not show that the assessment was not correct when made. This court, sitting on appeal, is not a customs officer, to whom the evidence must, by the expressed provision of the statute, be submitted; and can only decide whether the proper proof was produced before the customs officers, as the law required. It was not, and the decision of the board was correct. Decision affirmed.

HERMANN et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

1. CUSTOMS DUTIES—CONCLUSIVENESS OF APPRAISEMENT.

While an appraisement is final and not reviewable by the courts, yet the alleged inclusion of something not properly a part of market value, and not dutiable at all, may be challenged by protest, and re-examined by the courts on appeal. *Oberteuffer v. Robertson*, 6 Sup. Ct. 462, 116 U. S. 499, followed.

2. SAME—COMMISSIONS.

Commissions, constituting part of the expense of obtaining goods, cannot be added in ascertaining market value.

This was an appeal by Hermann, Sternbach & Co. from a decision of the board of general appraisers in respect to the assessment of duties on certain merchandise.

Stephen G. Clarke, for plaintiffs.

Max J. Kohler, Asst. U. S. Atty.

WHEELER, District Judge. The plaintiffs protest that commissions have been added to market value, and that duties have been assessed upon them as such. Question is made whether this court has, by appeal, any jurisdiction of this matter. That the appraisement of the goods is final and conclusive, and cannot be re-examined here, seems to be quite plain: but that the claimed inclusion of something not properly a part of market value, and not dutiable at all, may be challenged by a protest and re-examined here on appeal, seems equally conclusive. *Oberteuffer v. Robertson*, 116 U. S. 499, 6 Sup. Ct. 462. That the actual value of the goods themselves in the wholesale markets of the country from whence imported is the dutiable value, without reference to the cost, or expenses of purchasing or obtaining them there, seems also to be well settled by that case.

The question here is whether commissions, as such, as a part of the expense of obtaining the goods, have been added to, or made an element of, that, in arriving at the amount on which the duties have been assessed. Commissions were specified in the invoices. The testimony of those concerned in making the invoices has been somewhat considered, not for the purpose of any reappraisement, but to ascertain whether the commissions were, in fact, omitted. They do not appear to have been entered as a part of the market value of the goods themselves, but as an element in the cost of the purchase. They were omitted by the appraiser, and in part restored by direction of the board on each of two of the invoices to "add to entered value amount improperly deducted as commission, 2½%," and were included by similar directions, or by computations upon them in others.

The opinion of the board, by Wilkinson, general appraiser, says:

"The protest is against the assessment of duty by the collector on the valuation of certain worsted goods as found by a board of general appraisers. The appellants assert that duty was assessed upon 'a portion of the nondutiable commission,' and claim that only the value of the goods, as entered, is subject to duty. The importers appealed from the valuation of the local appraiser

for reappraisement, and then from the decision of the general appraiser to a board of general appraisers. Section 13, Act June 10, 1890, provides that the decision of a board of general appraisers on such an appeal 'shall be final and conclusive as to the dutiable value of such merchandise.' We find, as facts, that the board of general appraisers made a decision upon the dutiable value of the merchandise in question, and that the collector assessed duty upon the valuation thus returned. In the absence of any evidence to impeach the reappraisement proceedings or the decision of the board of general appraisers, we hold that the decision of the board as to the dutiable value is final, and that duty was properly assessed. The protest is overruled accordingly."

This shows that the board, in reviewing the proceedings, considered the appraisal conclusive, without reference to what there might have been drawn into it whether properly a part of the actual market value of the goods or not. They did not find that the actual market value was what the commissions would make the entered value amount to, but only that the appraisal was made. The commissions so appear to have gone into the market value as such, and to have had a duty assessed upon them, which was not properly assessable. The commissions should be rejected in reliquidation. Decision reversed.

WILKENS et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—KITUL.

Kitul, being the fiber of the leaf stocks of the jaggery palm of East India, which has been combed between steel brushes with a little oil to soften it, and also slightly colored, and made straight for bunching by lengths for brushes, was dutiable, under the 20 per cent. clause of section 4 of the act of 1890, as an article "manufactured in whole or in part," and not under the 10 per cent. clause, covering "unmanufactured articles," nor under paragraph 597, as a fibrous vegetable substance not specially provided for, nor under paragraph 653, as "vegetable substances," unmanufactured, not otherwise specially provided for.

This was an appeal by Wilkens & Co. from a decision of the board of general appraisers as to the classification for duty of certain imported merchandise.

W. Wickham Smith, for plaintiffs.

Max J. Kohler, Asst. U. S. Atty.

WHEELER, District Judge. The article in question here is kitul, which is of the fiber of the leaf stalks of the jaggery palm of East India. It is taken to England, and dressed by being combed between steel brushes with a little oil to soften it for taking out kinks and curls, slightly coloring it, and making it straight for bunching by lengths for brushes. The tariff act of 1890, by section 4, provided for a duty on "all raw or unmanufactured articles not enumerated or provided for," of 10 per cent. ad valorem, and on "all articles manufactured in whole or in part," of 20 per cent. ad valorem; and by paragraph 597 made sunn, "and all other textile grasses, or fibrous vegetable substances, unmanufactured, or undressed, not specially provided for," and by paragraph 653, "moss, sea weeds and

vegetable substances, crude or unmanufactured, not otherwise specially provided for," free. A duty of 20 per cent. was exacted under section 4, and protests referring to these paragraphs of the free list and to the 10 per cent. clause of section 4 were overruled. This seems to be a fibrous vegetable substance, and would fall under paragraph 597 but for the process which it has undergone, that does not leave it undressed. The fibrous vegetable substances of this paragraph are more definite than the general vegetable substances of paragraph 653, and take this article, as one otherwise specially provided for, out of that paragraph. Section 4 contrasts the "unmanufactured articles" of the 10 per cent. clause with "articles manufactured in whole or in part," of the 20 per cent. clause, and those of the former must be wholly unmanufactured, in order to give the words of the latter full effect. These bunches of dressed and assorted fibers had been advanced somewhat by manufacture from their raw state, and could not justly be said to be wholly unmanufactured, but were actually in part manufactured. Decision affirmed.

ROSS et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—GLASS VIALS FILLED.

In paragraph 88 of the act of 1894, providing for duties on glass bottles, the words, contained in the first clause, "whether filled or unfilled, and whether their contents be dutiable or free," apply only to the preceding enumerated articles, and not to vials, which are provided for in the following clause. Therefore vials holding from a quarter of a pint to a pint, and imported filled with soda water, were entitled to free entry, along with their contents, under paragraph 555; being the proper and necessary covering thereof.

This was an appeal by Ross & Bro. from a decision of the board of general appraisers in respect to the classification for duty of certain glass vials, imported, filled with soda water.

Edward Hartley, for plaintiffs.

James T. Van Rensselaer, Asst. U. S. Atty.

WHEELER, District Judge. The tariff act of 1894 provided for duties on: "(88) Green and colored, molded, or pressed, and flint and lime glass bottles, holding more than one pint, and demijohns and carboys, covered or uncovered, whether filled or unfilled, and whether their contents be dutiable or free, and other molded, or pressed, green and colored, and flint or lime bottle glassware, not specially provided for in this act, three fourths of one cent per pound; and vials, holding not more than one pint and not less than one quarter of a pint, one and one eighth cents per pound,"—and, by paragraph 555, left mineral waters, and "lemonade, soda water, and all similar waters," free. This importation was of soda water, in oval, glass vessels, holding not more than one pint, and not less than one-quarter of a pint, which would properly be called "vials." The contents were admitted free, but duty was exacted on the bottles, as

such. They are the usual and necessary coverings for the soda, and are therefore not dutiable as unnecessary coverings. The question is whether such vials, filled, are dutiable as such, under paragraph 88. The words "whether filled or unfilled, and whether their contents be dutiable or free," in the first clause of that paragraph, seem to apply only to the preceding articles of that paragraph. That classification is not extended to, and does not relate to, the clause concerning vials. Therefore no duty seems to be exacted, by that paragraph, on filled vials, when they are the necessary and proper coverings or containers of their contents. Decision reversed.

UNITED STATES v. SIMON et al.

(Circuit Court, S. D. New York. December 9, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—INDIA RUBBER TUBING.

India rubber tubing, in meter lengths, colored, chiefly used in making stems of artificial flowers, were dutiable as manufactures of India rubber, under paragraph 460 of the act of 1890, and not as parts of artificial flowers, under paragraph 443, not being any finished part of an artificial flower.

This was an appeal by Simon & Co. from a decision of the board of general appraisers as to the classification for duty of certain imported merchandise.

Stephen G. Clarke, for plaintiffs.

Henry D. Sedgwick, Asst. U. S. Atty.

WHEELER, District Judge. This importation is of small India rubber tubing, in meter lengths, colored, the chief use of which is for the making of the stems of artificial flowers. They have been classified as parts of artificial flowers, under paragraph 443 of the tariff act of 1890, against a protest that they are manufactures of India rubber, under paragraph 460. *Cadwalader v. Wanamaker*, 149 U. S. 532, 13 Sup. Ct. 979, 983, and *Magone v. Wiederer*, 159 U. S. 555, 16 Sup. Ct. 122, are relied upon to support this decision. The former was one of the hat-trimmings cases, and covered materials for hats. The latter was for glasses which had been made for parts of clocks, as to which the case showed "that the pieces had been cut and manufactured to sizes suitable for clocks, and that the edges had been ground and beveled so as to cause the glass to be ready for fitting into the dials and frames of the clocks, for which the glasses had been in advance prepared; in other words, that the glass was a finished product, ready for use in clocks, without any further labor or preparation whatever." The paragraph under which this manufacture was assessed does not provide a duty on materials for artificial flowers, but for parts of artificial flowers, which distinguishes this importation from that in the former case; and this tubing is not any finished part of an artificial flower, but is merely a material from which the stems, as such a part of an artificial flower, can be made. As this tubing is not a part of an artificial flower, the protest should be sustained. Decision reversed.

MAVTNER v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—FURS.

Thibet furs, dressed on the skin, which had been made up into coats, and afterwards separated into parts for use as furs dressed on the skin, and not as coats, for wearing apparel, were dutiable as furs dressed on the skin, but not made up into articles, under paragraph 444 of the act of 1890, and not as manufactures of fur not specially provided for, under paragraph 461.

This was an appeal by the importer from a decision of the board of general appraisers in respect to the classification for duty of certain imported furs.

W. B. Coughtry, for plaintiff.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.

WHEELER, District Judge. The tariff act of 1890 provided a duty on: "(444) Furs, dressed on the skin but not made up into articles, and furs not on the skin, prepared for hatters' use, twenty per centum ad valorem." And on: "(461) Manufactures of leather, fur, * * * not specially provided for in this act, thirty-five per centum ad valorem." The plaintiff imported Thibet furs, dressed on the skin, which had been made up into coats, and afterwards separated into parts for use as furs dressed on the skin, and not as coats, for wearing apparel. They were assessed, under paragraph 461, as manufactures of fur, against which the importer protested that they were now furs dressed on the skin, not made up into articles, under paragraph 444. That they had been made up into articles would not make them dutiable as such articles after they had been separated into the materials from which they had been made, in the foreign country, and before importation. They had become what they were before, to be used, not as articles into which they had once been made, but as furs dressed on the skin; and they would seem to be dutiable only as such under paragraph 444. Decision of general appraisers reversed.

UNITED STATES v. GOODSSELL et al.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 2,616.

CUSTOMS DUTIES—CLASSIFICATION—ORANGE BOXES REIMPORTED.

Boxes containing oranges, lemons, and limes, and the sides, tops, and bottoms of which are of thin wood of American manufacture, exported as shoos, are subject only to half-rate duties, under the proviso to paragraph 216 of the act of 1894, although the specific proofs required by the treasury regulations were not produced to prove the fact of American manufacture.

This was an appeal by Goodsell & Co. from a decision of the board of general appraisers as to the duties payable on orange and lemon boxes, composed in part of thin wood of American manufacture, exported as shoos.

Max J. Kohler, Asst. U. S. Atty.
Albert Comstock, for appellees.

WHEELER, District Judge. Paragraph 216 of the tariff act of 1894 provides for a duty on "oranges, lemons and limes in packages at the rate of eight cents per cubic foot of capacity; in bulk, one dollar and fifty cents per one thousand; and in addition thereto, a duty of thirty per centum ad valorem upon the boxes, or barrels, containing such oranges, lemons, or limes; provided, that the thin wood, so called, comprising the sides, tops and bottoms of orange and lemon boxes of the growth and manufacture of the United States, exported as orange and lemon box shooks, may be reimported in completed form filled with oranges and lemons by the payment of duty at one-half the rate imposed on similar boxes of entirely foreign growth and manufacture." The board of appraisers found, "as a matter of incontroverted fact, that all the boxes returned on the invoices by the local appraiser as being 'thin wood American manufacture' are orange or lemon boxes, with thin wood composing the sides, tops, and bottoms, of the growth and manufacture of the United States, which were exported as orange or lemon box shooks, and were reimported in completed form, filled with either oranges or lemons"; and sustained the protest against duty at full rate on similar boxes of entirely foreign growth and manufacture, and assessed the duty at one-half rate, according to the proviso of that section.

The government claims the full duty, because regulations of the treasury department were not followed to prove the fact of American growth and manufacture; but this duty is fixed expressly by the statute as to all such shooks, without any reference to regulations. This statute could not be changed so as to apply to these shooks, which are particularly provided for, without infringing upon the very statute itself. *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423.

Decision affirmed.

DE LUZE v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 2,297.

CUSTOMS DUTIES—CLASSIFICATION—CHAMPAGNE BOTTLES.

Champagne bottles, containing champagne, dutiable under paragraph 243 of the act of 1894, were not separately dutiable under paragraph 88, but were free of duty.

This was an appeal by De Luze from a decision of the board of general appraisers in respect to the classification of champagne bottles imported filled.

W. Wickham Smith, for plaintiff.
James T. Van Rensselaer, Asst. U. S. Atty.

WHEELER, District Judge. The tariff act of 1894 provided for a duty on—

"243. Champagne, and all other sparkling wines in bottles, containing each not more than one quart, and more than one pint, eight dollars per dozen," etc.

And on—

"88. Green and colored molded or pressed and flint or lime glass bottles, holding more than one pint, and demijohns and carboys, covered or uncovered, whether filled or unfilled, and whether their contents be dutiable or free, and other molded or pressed green and colored and flint or lime bottle glassware not specially provided for in this act, three-fourths of one cent per pound," etc.

The plaintiff imported champagne in bottles, which is stipulated to have been correctly assessed under paragraph 243, and that the bottles have been correctly assessed under paragraph 88, unless they were free, as protested. The tariff act of 1870 provided a duty of three cents for each bottle in which wines, brandy, and other spirituous liquors were imported. *De Bary v. Arthur*, 93 U. S. 420. That provision was continued in the tariff act of 1883, and dropped from the tariff act of 1890 without any new provision in its place. Laying a duty on champagne in bottles by the dozen would seem to preclude the application of any general duty on the champagne bottles, and the dropping of that specific provision for a duty on bottles seems to imply that thereafter no duty on champagne bottles was to be assessed. Decision of general appraisers reversed.

SEHLBACH et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—ALIZARINE BLUE.

Alizarine blue, of a new form, not known at the time of the passage of the act of 1890, was nevertheless dutiable as such, under paragraph 478, and not as a coal-tar color, under paragraph 18.

This was an appeal by Sehlbach & Co. from a decision of the board of general appraisers as to the classification for duty of certain imported merchandise.

Edward Hartley, for plaintiffs.

James T. Van Renselaer, Asst. U. S. Atty.

WHEELER, District Judge. This is an alizarine blue. It was assessed as a coal-tar color, under paragraph 18 of the tariff act of 1890, against a protest that it should be assessed under paragraph 478, which provides specially for "alizarine blue." The proof shows that this particular form of alizarine blue was not known in commerce at the time of the passage of that tariff act, but it is of the same class of colors, although made in a different way. It well falls within the same description. *Pickhardt v. Merritt*, 132 U. S. 252, 10 Sup. Ct. 80. Decision reversed.

SMITH et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 2,357.

CUSTOMS DUTIES—CLASSIFICATION—CROCUS.

Crocus, which is a color, but is most largely used as a polishing powder, was dutiable as a color, under paragraph 61 of the act of 1890, under the words, "all other paints and colors, whether dry or mixed," and not under paragraph 133 and section 5, as dross residuum from burnt pyrites, or as a nonenumerated article under section 4.

This was an appeal by Smith & Co. from a decision of the board of general appraisers as to the classification for duty of certain imported merchandise. The importation was described by the board of general appraisers as follows:

"The merchandise is crocus. It was assessed for duty as a color at 25 per cent., under paragraph 61, Act Oct. 1890, and is claimed to be dutiable either at 75 cents per ton, under paragraph 133 and section 5, as dross or residuum from burnt pyrites, or at 20 per cent., as a nonenumerated article, under section 4. It appears from the testimony that the residuum from burnt pyrites is valued at about 6 or 7 to 16 shillings a ton. By the application of labor, and at an expense of 20 or 30 shillings a ton, this residuum is converted into crocus, a new article, having a distinctive name, character, and use. It also appears from the evidence introduced by the importer that crocus is used to the extent of about 80 per cent. as a polishing powder and 20 per cent. as a color."

The board further said:

"Both claims are made under the clauses for nonenumerated articles. If it were necessary to apply the similitude clause, it would seem that crocus should be classified as a color, rather than as the residuum of burnt pyrites. But, as it is suitable for use, and is largely used, as a color, there is no necessity to apply the similitude clause. We find: (1) The article is a polishing product; (2) it is a color. As colors are enumerated, we overrule the claim that the merchandise is dutiable under section 4 or section 5."

Everit Brown, for appellants.

Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. This article—crocus—is found to be, and in fact is, a color, although it is much more largely used as a polishing powder. Paragraph 61 of the act of 1890, which comes after several paragraphs as to colors, lays a duty on "all other paints and colors, whether dry or mixed," etc., without reference to being any otherwise provided for; and this article is not by name otherwise provided for. This duty is therefore directly applied to this article, without regard to its other uses. Decision affirmed.

FLEMING CEMENT & BRICK CO. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 2,320.

CUSTOMS DUTIES—CLASSIFICATION—BRICK.

Magnesic brick, which are not fire brick, were dutiable as brick, under paragraph 76 of the act of 1894, and not as "magnesic fire brick," under paragraph 77.

This was an appeal by the Fleming Cement & Brick Company from a decision of the board of general appraisers in regard to the classification for duty of certain brick imported by them.

Stephen G. Clarke, for appellant.

Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. The tariff act of 1894 provides for a duty on "(77) magnesian fire brick." These are magnesian brick, but are not fire brick, and so are not magnesian fire brick, and are not assessable according to the protest under this paragraph. Decision affirmed.

PARK et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 2,595.

CUSTOMS DUTIES—CLASSIFICATION—FRUIT JUICE.

Strawberry and raspberry fruit juice, containing no alcohol, was dutiable, under paragraph 247 of the act of 1894, as "other fruit juices, not specially provided for," containing 18 per cent. or less of alcohol.

This was an appeal by Park & Tilford from a decision of the board of general appraisers in respect to the classification for duty of certain merchandise imported by them.

Edward Hartley, for appellants.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.

WHEELER, District Judge. This is strawberry and raspberry fruit juice, containing no alcohol. It was assessed, under paragraph 247 of the act of 1894, which provides for—

"Cherry juice and prune juice, or prune wine, and other fruit juices not specially provided for in this act, containing eighteen per centum, or less, of alcohol, fifty cents per gallon."

This is claimed not to come under this description, because it contains no alcohol, but that it is a nonenumerated manufactured article. No alcohol at all is less than 18 per centum of alcohol, and makes this article come within the division provided for in that paragraph. It is a fruit juice. It contains less than 18 per centum of alcohol. Decision affirmed.

JACOT et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 2,476.

CUSTOMS DUTIES—RELIQUIDATION.

Certain goods were imported in 1893, and the duties were liquidated and paid. One case of goods of the same invoice went to a bonded warehouse, and was withdrawn for consumption, under the act of 1894, and the duties on that case were reassessed at a reduced rate, under the latter act. The

duties of the whole invoice were then added anew, without other changes, and the entry was stamped as reliquidated at that date. *Held*, that this action was not subject to protest, as a new assessment and reliquidation.

This was an appeal by Jacot & Son from a decision of the board of general appraisers in respect to a protest against an alleged reassessment and reliquidation as to certain merchandise imported by that firm.

Everit Brown, for appellants.

Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. These goods were imported in 1893, and the duties were liquidated and paid. One case of the goods of the same invoice went to a bonded warehouse, and was withdrawn for consumption, under the act of 1894, and the duties on that case were reassessed at a reduced rate, according to the provisions of that act. The duties of the whole invoice were then added anew, but no change was made in any but those upon that case, and the entry was stamped as reliquidated at that date. The importers protest against that as a new assessment and reliquidation of the whole invoice. But nothing whatever was done about the rate or classification of the goods in question, or any but those withdrawn from the bonded warehouse. Neither the adding up of these duties to obtain new totals, nor stamping the invoice as reliquidated, affected them in any way, and there was nothing then in regard to them to protest against. Decision affirmed.

UNITED STATES v. WATSON et al.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 1,232.

CUSTOMS DUTIES—CLASSIFICATION—PEARL HARDENING.

Pearl hardening, an artificial sulphate of lime, obtained by precipitated carbonate of lime with dilute sulphuric acid, was dutiable, under the act of 1890 as a nonenumerated manufactured article, and not under paragraph 97 as "plaster of Paris, or gypsum ground."

This was an appeal by the United States from a decision of the board of general appraisers in respect to the classification for duty of certain merchandise imported by Watson & Co.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.

Stephen G. Clarke, for appellees.

WHEELER, District Judge. This importation is pearl hardening. The report of the assistant appraisers shows:

"It is an artificial sulphate of lime obtained by precipitated carbonate of lime with dilute sulphuric acid. The carbonate of lime, from which this article is manufactured, is a by-product obtained in the manufacture of soda ash."

It has been classified under paragraph 97 of the tariff act of 1890 as "plaster of Paris, or gypsum ground." It is not plaster of Paris, or gypsum ground, but a nonenumerated manufactured article, as claimed by the collector. Decision reversed.

UNITED STATES v. WAGNER.

(Circuit Court, S. D. New York. December 9, 1897.)

No. 2,351.

CUSTOMS DUTIES—CLASSIFICATION—LITHOGRAPHIC CIGAR LABELS.

Lithographic cigar labels, printed in various colors, including bronze, were dutiable at 20 cents per pound, under paragraph 308 of the act of 1894, if, reckoning the bronze as two colors, the labels would have less than ten colors, the bronze not being of chief value, nor predominant.

This was an appeal by the United States from a decision of the board of general appraisers in respect to the classification for duty of certain lithographic cigar labels imported by Louis C. Wagner.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.
Edward Hartley, for defendant.

WHEELER, District Judge. Paragraph 308 of the tariff act of 1894 provides for a duty on—

"Lithographic cigar labels and bands, * * * if printed in less than ten colors, but not including bronze or metal leaf printing, twenty cents per pound; if printed in ten or more colors or in bronze printing, but not including metal leaf printing, thirty cents per pound; if printed, wholly or part, in metal leaf, forty cents per pound."

The evidence shows that in the trade bronze printing is taken as two colors; that in the styles of cigar labels imported, one (2514) was printed in red, blue, and gold bronze; 2,515 in red, black, and gold bronze; 2532C was printed in red, green, and gold bronze; and 2513C in red, blue, and gold bronze; and, reckoning the bronze as two colors, none of them would have ten colors. The bronze does not appear to have been of chief value, nor predominant. Therefore it appears to have been properly assessed at 20 cents per pound. Decision affirmed.

ST. LOUIS CORSET CO. v. WILLIAMSON CORSET & BRACE CO. et al.

(Circuit Court, E. D. Missouri, E. D. December 4, 1897.)

No. 3,902.

PATENTS—CONSTRUCTION OF CLAIMS—INFRINGEMENT—CORSETS.

The McCabe patent, No. 254,992, for an improvement in corsets, consisting of a hip section composed of a stayed body, and a corded overlay extending from the top of the hip section to about the waist line, and then cut away over the hips so as to expose a portion of the section, is old as to both these elements, and, if valid at all, is limited to the special combination employed therein. *Held*, therefore, that the patent was not infringed by a corset which lacks the element of the hip section composed of a stayed body substantially as described in the patent.

This was a suit in equity by the St. Louis Corset Company against the Williamson Corset & Brace Company and others for alleged infringement of a patent for improvements in corsets.

W. C. & J. C. Jones, for complainant.
Geo. H. Knight, for defendants.

ADAMS, District Judge. This is a suit to enjoin the alleged infringement of letters patent No. 254,992, issued to William McCabe, for an improvement in corsets. The defenses are anticipation and noninfringement. The claim of the patent is for a combination of two elements: (1) A hip section composed of a stayed body; (2) a corded overlay extending from the top of the hip section to about the waist line, and then so cut away over the hip as to expose a portion of the section. This hip section is undeniably an old element. It is described in the patent as "cut in the usual manner, from doubled fabric, so as to form pockets for the vertical stays, a, a, these pockets being formed in the usual manner by lines of stitching securing the two parts together, and to leave a space between the lines of stitches for the insertion of the stays." From this description, as well as from the evidence, it is clear that the first element consists of the well-known side or hip section of a corset made up in the usual way, with provision for vertical stays. The corded overlay constituting the second element, according to the description of the patent, is composed of two thicknesses of fabric, with series of cords, or their equivalents, laid close to each other, and stitched between the cords in the usual manner for making corded work. This is intended to give firmness and strength to the side section over which it is placed, and the two elements as combined are said to produce a new and beneficial result.

It is familiar doctrine that the claims and specifications of a patent must be construed in the light of the state of the art as it existed at the date of the patent. The McCabe patent, now under consideration, was issued March 14, 1882, on an application filed November 16, 1881. Prior to the last-mentioned date it appears that numerous patents had been granted to divers persons for alleged improvements in corsets. Of these, attention is called to the Adler patents, of dates February 1, 1881, and November 19, 1881, respectively, and the Allen patents, of dates November 16, 1880, and July 20, 1880, respectively. These Adler patents concern the hip sections of the corset, and clearly contemplate vertical stays therein. These stays are not exactly the same as in the McCabe patent, but are referred to only for the purpose of disclosing the state of the art in question at the time. The Allen patents relate also to the hip or side section of a corset, and clearly contemplate the use of an overlying stiffening substance to serve the same general purpose as that claimed to be subserved by the McCabe overlying device, called in the claim a "corded overlay."

The proof fairly shows that the hip section, the vertical stays therein, and the overlying stiffening piece, had each and all been well known to the art, and had been used to perform the same general function which is claimed for the complainant's device, prior to the date of McCabe's application for the patent in suit. The best that complainant can claim for the McCabe patent is that these old elements, in the particular combination therein employed, perform some new and useful function, and thereby create the novelty necessary to support the patent. It is very doubtful if this claim can be sustained. The Allen patents, already referred to, seem to embody

practically all the elements of the McCabe combination. The general design and purpose contemplated in both seem to be the same, and it is very doubtful if any materially new or useful result is achieved by the McCabe device. But the decision of the case does not depend upon a finding that the McCabe patent is void for want of novelty; in other words, that the invention of the patent was anticipated by Allen, as claimed by the defendants. The patent in suit, being a combination of old elements, is not infringed by any device in which there is an absence of any essential element of the patent. *P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co.*, 76 Fed. 965. The specification and description of the McCabe patent, to which the claim specifically refers, show, as already seen, that the element of the side or hip section (upon which the other element of an overlay is placed) is old. It is cut in the usual manner from doubled fabric. It is formed into pockets for the insertion of vertical stays in the usual manner, by lines of stitches securing the two parts together. This is plain language, and clearly contemplates both the doubled fabric and the pockets for stays. According to the proof, this in itself would make a complete and merchantable corset.

The defendants' corset, claimed to infringe the complainant's patent, does not contain this element, or any equivalent of it. There is but one thickness of fabric under defendants' overlay, and no stitches at all to make pockets therein. The underlying fabric of defendants' corset seems to be employed only for the purpose of a framework on which to support the corded overlay. The corded overlay practically constitutes all there is of the side section. I have not overlooked the qualification or limitation found in a subsequent part of the specification of complainant's patent, namely, "The vertical stays, a. a, need only extend from the bottom upward to meet the curved edge of the overlay"; but this qualification does not dispense with the double fabric throughout the entire dimensions of the underlying section, and does not dispense with the requirement of stitching the same throughout, as first specified. Again, the defendants' corset contains no vertical stays, and, in my opinion, no equivalent thereof, either throughout the dimensions of the underlying section, or from the bottom of the section up to the corded edge of the overlay. The claim of the patent, taken in connection with the specifications found in the description, to which reference is made in the claim, and the drawings therein also referred to, considered in the light of the art as it was then understood and practiced, satisfactorily establish that the words "stayed body," as used in the claim, must be construed to mean a body (or hip section) supported and strengthened by steel, bone, or some other attenuated, elastic substance, inserted in the pockets, as shown and described in the patent, and running vertically from the bottom up the section, at least to the curved edge of the overlay, throughout the part fitting over the hip. It is contended that the thin piece of cloth constituting an interlining between the two pieces that form the part fitting over the hip, as employed by the defendants, is the equivalent of complainant's vertical stays. This is satisfactorily an-

swered by the proof that this interlining serves no beneficial purpose, other or different from what would be served by a corresponding increase in the thickness of the two outside pieces. If this unimportant piece of cloth is the equivalent of complainant's vertical stays, the invention suggested by the vertical stays would not reach the dignity or importance of a patentable invention. The defendants' employment, therefore, of the thin interlining, under the circumstances, cannot be held to be an equivalent of the vertical stays of the patent.

It may be conceded that the defendants employ the corded overlay in substantially the same way, and for substantially the same purpose, as contemplated in complainant's patent; but inasmuch as defendants do not make use of the other element of complainant's patent, namely, the hip section composed of a stayed body, substantially as described in complainant's patent, there is, under the authority already cited, no infringement of complainant's patent. The bill must be dismissed.

CONSOLIDATED FASTENER CO. v. LITTAUER et al.

(Circuit Court of Appeals, Second Circuit. December 1, 1897.)

No. 63.

1. PATENTS—PRELIMINARY INJUNCTION—PRIOR DECISION—APPEAL.

On appeal from an order granting a preliminary injunction on the strength of a prior decision by the circuit court against another party, such prior decision will be given the same weight which it should have before the circuit court, in the absence of some controlling reason for disregarding it. *American Paper Pail & Box Co. v. National Folding-Box & Paper Co.*, 2 C. C. A. 165, 51 Fed. 229, followed.

2. SAME—IMPROVEMENT IN BUTTONS.

The Raymond patent, No. 405,179, for an improvement in buttons, covering a spring stud consisting of a depressed dome forming an annular riveting surface, an exterior engaging spring, and a fastening eyelet adapted to enter from beneath the fabric, and be riveted over by contact with the depressed dome, construed, and held infringed. 79 Fed. 795, affirmed.

This is an appeal from an order of the circuit court, Northern district of New York, granting an injunction pendente lite against infringement of complainant's patent.

The patent in suit, No. 405,179, was granted to Pierre A. Raymond, June 11, 1889, for an improvement in buttons. Claims 1 and 3, only, are involved in this litigation. Suit was heretofore brought upon the same patent by this complainant against the Columbian Fastener Company, of which the present defendant, Littauer, was president; and at final hearing on pleadings and proofs the patent was sustained, claims 1 and 3 were construed, and held to be valid, and the device of the Columbian Company was found to infringe. The opinion, which contains a full and careful discussion of the patent and of the evidence introduced, will be found reported in 79 Fed. 795. No appeal from the decision in the suit against the Columbian Company appears to have been taken. Subsequently the defendants in the suit at bar began to use buttons of a different model from that which was found to infringe in the former suit, by attaching them to gloves which defendants' firm made and sold. Believing this new model button to be also an infringement, complainant brought suit, and moved, before the same judge who had construed the patent in the Columbian Company Case, for an order granting injunction

pendente lite. In opposition there were presented affidavits of the defendant Littauer, and some others, several prior patents, and the file wrapper and contents. It is manifest from the opinion above cited that much of this evidence was before the court in the Columbian Company Case. What new evidence, if any, is now presented, does not appear. Having once discussed the patent and the prior art in a comprehensive opinion, the judge who sat at circuit granted an injunction against the new-model button, without writing anything further, and defendants have appealed.

Wm. A. Jenner, for appellants.

John R. Bennett, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). This court pointed out the distinction between "appeals from orders" and "appeals from final decrees" in *American Paper Pail & Box Co. v. National Folding-Box & Paper Co.*, 2 C. C. A. 165, 51 Fed. 229:

"The adjudication upon which the motion for preliminary injunction was based, not being the subject of the appeal, is to have the same weight which it should have before the circuit court, * * * in the absence of some controlling reason for disregarding it."

No such controlling reason is suggested here. No prior patent, or prior use or prior publication, having an important bearing upon the validity or construction of the patent, and which was not before the court in the Columbian Company Case, is now presented, no new authority on patent law is now first cited, there is nothing to show an improvident exercise of legal discretion by the circuit judge, and apparently this is an effort to review the decision in the Columbian Case at final hearing upon a partial presentation of the evidence then considered, and without the cross-examination. There is no warrant for such practice, which was expressly condemned in *American Paper Pail & Box Co. v. National Folding-Box & Paper Co.*, supra. The only question, therefore, to be considered on this appeal, is whether the new-model button infringes the first and third claims of the patent, as construed in the Columbian Company Case.

The button is of the kind which may be more appropriately called a "spring stud," and is used for fastening gloves; being adapted to engage with a socket corresponding to the old-fashioned buttonhole. The flaps of the glove being brought together, the socket is pressed perpendicularly down upon the stud, and the spring cap of the latter yields sufficiently to allow the stud to enter the socket, whereupon its resiliency causes it to engage with the interior of the socket (such interior being a little larger in diameter than is the aperture leading into the socket) sufficiently to hold it in place, as against the ordinary horizontal pull. In his specification the patentee states that in two former patents (349,453, of September 21, 1886, and 369,882, of September 13, 1887) he had described and claimed a fastening device for gloves, consisting of a socket and spring stud, and proceeds:

"In the said patents the spring stud was formed by a semicylindrical spring cap, which was made from a blank, having a series of radial spring fingers, bent down and united to a common base. Within this spring cap was a dome-shaped piece, having a horizontal flange at its lower edge, which formed the base, to which the spring fingers were united by a clamping ring. The clamp-

ing ring also inclosed the upper flange of an eyelet, which was adapted to be put down through the fabric, and riveted over from the underside so as to hold the spring stud in place on the fabric."

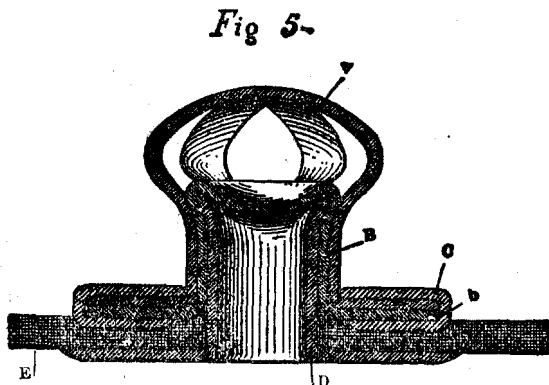
There seem to have been objections to this mode of inserting the eyelet, and "to avoid these objections" the construction of the patent was devised—

"In which construction the dome forms a fundamental supporting part, so rigid as to admit of an eyelet being riveted over against it, and affording a seat for the external spring, by which the stud is made to engage with the * * * socket. Instead of employing the eyelet with its upper flange held in the clamping ring, I make use of an eyelet having a smaller shank and a larger flange, which is inserted from beneath the fabric, and, extending up into the dome piece above described, is met by a depending lug in the top of the said dome piece, against which it is forced, and its upper edge thereby riveted over so that it cannot be withdrawn, the spring cap being thus held firmly in position upon the fabric."

Describing the drawings, patentee proceeds:

"C is a clamping ring holding the spring fingers against flange, b. This clamping ring and the base of the dome form a flange extending beyond the spring, by which the stud may be held while the eyelet is being forced into position. The upper end of dome, B, instead of being rounded up, as in my previous patents mentioned above, is depressed so as to form a re-entrant cavity on its upper side, and a depending convexity on its lower side. This makes a sort of annular riveting depression in the upper part of the dome or support. D is an eyelet having a broad flange at its base, and adapted to pass through the fabric, E; and entering the dome, B, and meeting the depression at its upper end, it is thereby riveted over at its upper end so that it cannot be withdrawn, thus holding the spring stud firmly in its place on the fabric."

Fig. 5, which shows all these parts, is here reproduced:



The circuit court, in the *Columbian Company Case*, held that:

"The valuable feature of this stud is passing the eyelet through the underside of the fabric into the compressed dome, where it is upset and securely riveted; the fabric being held firmly between the flanges of the eyelet and dome. * * * That it is simple, durable, strong, inexpensive, and popular, is abundantly proved by the record."

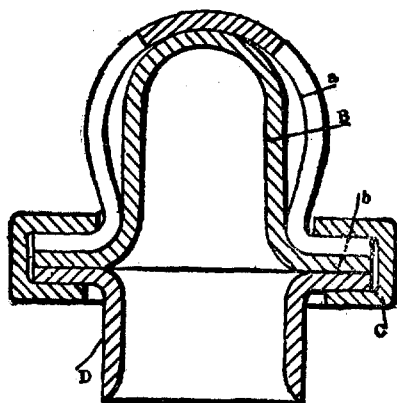
The claims in controversy are:

"(1) The combination, with an embracing button attached to one part of a fabric, of a spring stud attached to the opposite part, and adapted to engage

the said button; the stud being composed of a depressed dome or support forming an annular riveting surface, and an exterior engaging spring, and being fastened to the fabric by an eyelet adapted to enter the back of the dome or support, and be riveted over by contact with such depression." "(3) A spring stud for engagement with a receiving button or socket consisting of a depressed dome or support forming an annular riveting surface, and an exterior engaging spring, combined with a fastening eyelet; the eyelet being adapted to enter from behind, and be riveted over by contact with the said depression, and the dome having a flange extending beyond the spring, by which it is held while the eyelet is forced into position."

Exactly what is the "improvement" of the patent in suit over the earlier patents to Raymond will be apparent from inspection of the following sketch:

DOME OF
PRIOR RAYMOND PATENT.



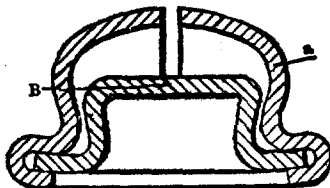
a is the spring cap; B, the dome; b, the flange of the dome; C, the clamping ring which holds the flange of the spring pressed down upon the flange of the dome; D is the eyelet, one flange of which is held by the clamping ring. After the shank of D is thrust through the fabric, it is bent over outwards so as to form another flange, holding the entire button to the fabric. It is apparent that it would be impossible to insert the eyelet into the dome of this prior Raymond patent, and fasten it there, since there is no recess into which any part of it could be driven. If the shank of the eyelet was long enough, and was pushed in far enough, its end would be turned over inwards by the dome, and the two parts would not interlock. In the present patent, however, the depression of the dome has produced an annular recess of greater diameter than the interior of the walls of the dome at or above the flange. When the eyelet shank is forced in, its end will be turned over outwards into the annular recess, thus interlocking the two parts together. Of this feature of the patent the circuit court, in the *Columbian Company Case*, said:

"Raymond's combination was new, because he introduced into his stud parts which combined to attach the stud to the fabric in a novel way, and in a better way than anything which preceded it. * * * The new mode of fastening above described is the essence and gist of the invention. It is perfectly

obvious that this is what Raymond intended to cover by the claims in question. No one can be deceived or misled upon this point."

It is argued here that, because the description and claims refer to the dome as a supporting part, the claims should be so construed as to cover only structures in which the dome affords lateral support to the spring cap. It is unnecessary to discuss this argument. It was urged before the circuit court upon a record which, so far as appears, contained all there is here, with the addition that the witnesses were subject to cross-examination; and that court held that the patentee used the word "support" in the sense of a foundation, rather than a buttress,—the spring cap being seated on the flange of the dome, and no element of lateral support being included in the claims. The decision of the circuit court in the Columbian Company Case was accepted by the judge who granted the preliminary injunction in the case at bar, and, there being no "controlling reason for disregarding it," it should have the same weight here upon appeal from the injunction order.

The following sketch shows the defendants' form of dome (the eyelet is not shown):



The spring cap, *a*, is "a vertically split head, projecting from a base plate, the split communicating with slits in the base plate, which intersects transverse slits in the base plate. The head is thus divided into two parts, and a spring action is given thereto, which causes the head to return to normal position after the pressure is removed, or cause a locking action with a socket. The base plate of the head is turned over so as to embrace and clamp the flange of the hat-shaped piece [the dome]. The eyelet enters from below, and the top of the eyelet contracts with the underside of the top of the hat, which causes the sides of the eyelet to crinkle and press outwardly against the sides of the hat; and, the interior diameter of the hat being somewhat greater at the top than at its opening, the withdrawal of the eyelet is thereby prevented."

This quotation is from appellants' brief. When it is read in connection with the device of the patent, infringement seems to be reasonably plain. No serious attempt is made to distinguish the split spring head from the "semicylindrical spring cap" of the patent. Defendants' contention is that their device has no "depressed dome or support forming an annular riveting surface." In support of this contention it is urged: First, that defendants' dome does not afford lateral support to the spring head; second, that it has no "annular riveting surface"; third, that the eyelet is not riveted over by contact with a depression. The first of these arguments has been already disposed of, and inspection of the device or the drawing discloses the weakness of the other two. If a cylinder be conceived as rising perpendicularly from the inner circumference of the foundation walls of the dome of the patent in suit, it will be found that, by rea-

son of the depression of the dome from its original position in the prior Raymond patents, there is formed outside of the walls of the cylinder thus conceived, and inside of the dome itself, an open space, which entirely surrounds such cylinder, and is therefore annular. Being itself annular, the outer wall which surrounds it is also annular. This annular space will receive such portions of the metal of the eyelet shank as may be driven into it, allowing this metal thus to enter until it engages with the solid wall of the inside of the dome, and thus holds the eyelet against withdrawal. The wall is therefore a riveting surface. To contend that the defendants' device has not such "annular riveting surface" is preposterous. Inspection of the drawing, and a perusal of the description above quoted from appellants' brief, conclusively prove the converse. It is urged, however, that defendants' device contains no eyelet "adapted * * * to be riveted over by contact with said depression" (i. e. the depressed dome). Defendants' contention is that since the top of its dome is horizontal, or possibly a little vaulted, it cannot be the equivalent of the depressed dome of the claims. This calls for an extremely narrow construction of the words "depressed" and "depression," as used in the patent. It will be remembered that Raymond had in mind an improvement on his earlier patents, in which his high-vaulted dome left no annular space for the eyelet to turn over into, and presented no riveting surface, against which it might be turned, and thus held against withdrawal. His "improvement" was the providing for such a method of fastening the eyelet, and he secured it by lowering or depressing his old high-vaulted dome. No particular amount of depression was needed, nor is any specified in the claims, except that it must be sufficient to produce the result, viz. to furnish the annular riveting surface. The drawing of the patent shows a dome, not only depressed, but actually reversed. It is manifest, however, that reversal is not necessary; that the same result would be accomplished by depressing the old dome to a horizontal, or even to such an extent that, although still architecturally a dome, the act of depression would cause the surplus metal to swell out so as to form the annular space and annular surface necessary for riveting. The dome is depressed in either case, and, when the end of the eyelet shank contacts with it, it may fairly be said to contact with a depression, within the meaning of the claim, which uses the words "depression" and "depressed dome" as synonymous. The only support to the defendants' claim is found in the language of the specification, where the patentee, describing the drawings, says:

"The upper end of dome, B, instead of being rounded up, as in my previous patents mentioned above, is depressed so as to form a re-entrant cavity on its upper side, and a depending convexity on its lower side. This makes a sort of annular riveting depression in the upper part of the dome or support."

From the whole patent, however, it is quite plain what the improvement was which he had in mind, which he fully describes, and which he sets forth in the claim, correctly, as:

"A depressed dome or support forming an annular riveting surface, [and,] by contact with [which depressed dome] an eyelet entering the back of the dome, * * * [can] be riveted over."

We know of no principle of patent construction which, in such a case (the improvement being novel), would require the court to read into the claim the particular concrete form of improvement shown in the drawings and in the descriptions of such drawings. The order of the circuit court is affirmed, with costs.

FRANK et al. v. HESS et al.

(Circuit Court, E. D. Pennsylvania. December 13, 1897.)

No. 11.

1. PATENTS FOR DESIGNS.

Design patents cannot be enlarged by the specification, but are limited to the particular design shown in the drawings filed.

2. SAME—DESIGN FOR CAP.

Design patent No. 26,533, issued to Jacob Frank for a design for a cap, consisting of a succession of diamond-shaped figures encircling the rim of the cap, and a single rosette, is not infringed by a cap having a different style of rosette, and, on the rim, rhombus-shaped figures, which, when the cap is held in a sloping position, appear to be diamond-shaped; the general effect of the design being dissimilar.

This was a suit in equity by John Frank and Jacob Frank, co-partners trading as John Frank & Son, against S. Wildman Hess and Rolando Silver, co-partners trading as Hess & Silver, for an alleged infringement of design patent No. 26,533, issued to Jacob Frank for a design for a cap.

Jerome Carty, for complainants.

J. M. Moyer, for respondents.

DALLAS, Circuit Judge. This is a suit upon a patent dated January 12, 1897 (No. 26,533), issued to Jacob Frank, for "design for a cap." The specification expressly refers to the accompanying drawings as "forming a part thereof." It also states that the leading feature of the patentee's design for a cap is the "rim of the same, with ornamentations thereon." It is further specified (referring to the drawings) that "on the rim are geometrically-shaped figures, D, and the rosette, E." Fig. 1 of the accompanying drawings shows a succession of diamond-shaped figures encircling the rim of the cap, together with a single, circular rosette attached to the rim at a point between two of the diamond-shaped figures before mentioned. What is claimed is the "design for a cap, substantially as described and shown." The position taken by the complainant's counsel, that this patent should be so construed as to cover any and every kind of geometrically-shaped figure, when applied, for the purpose of ornamentation, to the rim of a child's cap is clearly untenable. The monopoly must be confined to the particular design described and shown, and, being so confined, the design of the defendant cannot be held to conflict with it. The two designs not only are not identical, but they do not present the same impression to the eye; nor can I believe that an ordinary purchaser, giving any attention to the subject of design, would be misled into supposing that that of the defendant is that of

the complainant. It is true that the defendant uses a succession of devices, which, when the cap is held in a sloping position, appear to be, severally, of a diamond shape; but, when both caps are held upon a horizontal plane, the effect of the one is wholly different from that produced by the other. For the diamond upon the plaintiff's cap there is substituted a rhombus upon the defendant's, and the space between each of these respective figures is about twice as great in the defendant's design as in that of the complainant. To these differences in detail, separately considered, I would not attach importance; but because, as a whole, they result in producing quite distinct pictures, they are controlling. The respective rosettes are so absolutely unlike as to render any comparison of them unnecessary. The bill is dismissed, with costs.

DEERE & CO. V. ROCK ISLAND PLOW CO.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1898.)

No. 356.

1. PATENTS—COMBINATIONS—NEW RESULTS.

The new result which a combination is required to attain is a result which is new and distinguishable as compared with results produced by the elements in their separate state, or as assembled in a mere aggregation, without functional relations to each other. A combination is not unpatentable merely because its results may also have been produced by other combinations.

2. SAME—CORN PLANTERS.

The Waterman patent, No. 480,304, for improvements in corn planters, does not cover, in its first claim, a mere aggregation, but a patentable combination, in which the force generated by the friction between the outer edges of the disks (which cover the corn, and at the same time support and carry the seed box) and the ground works the mechanism in the seed box to drop the corn in fixed quantities; the disks being at the same time, by reason of their variable angular adjustment to the line of travel of the machine, functional in determining the distance between the charges of grain as deposited in the furrow.

Woods, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern Division of the Northern District of Illinois.

This was a suit in equity by Deere & Co., a corporation, against the Rock Island Plow Company, for alleged infringement of a patent for improvements in corn planters. The circuit court dismissed the bill for want of novelty in the patent, and the complainant has appealed.

L. L. Bond, A. H. Adams, C. E. Pickard, and J. L. Jackson, for appellant.

John G. Manahan and Edward Rector, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge. Appellant, a corporation, exhibited its bill in the circuit court, alleging infringement by appellee, which is also a corporation, of the first claim of letters patent of the United States numbered 480,304. This patent was issued August 9, 1892. Complainant owns the same, as assignee of the inventor, Lewis E. Wa-

terman. The invention of this patent "relates to improvements in corn planters." Fifteen claims were conceded in the patent office. The first, being the one in controversy in this suit, reads:

"In a corn planter, the combination, substantially as hereinbefore described, of a seed box, mechanism for measuring and delivering seed from the box, co-operating disks on either side of the box, which disks carry or support the seed-box and the measuring and delivering mechanism, and which actuate the latter, and means for adjusting the disks so as to vary their covering capacity."

As applicable to this claim, the specification and diagrams of the patent show a horizontal frame, approximately round, with an extension or tongue from one side inclining slightly downward, and cut out vertically at its outward extremity into two arms, which arms pass on either side of, and are pivoted to, a central forward portion of the rigid frame whereby the subsoiler is held to a double-moldboard lister plow. This circular frame is, by means of the pivot whereby it is attached in the rear of the plow, movable vertically out of its horizontal position. Transversely across and underneath the broadest portion of this frame, and at right angles to the direction of the plow, extends an axle, on either end of which ground wheels, not spoked, but made in the form of disks, are fixed. On this frame, itself supported by the axle and ground wheels, is supported vertically a cylindrical seed box, containing in its bottom a seed measuring and delivering mechanism, and a spout leading from the bottom downward through said frame to a tube or conductor fixed vertically behind the subsoiler, and in the frame which carries the subsoiler. Through this spout and tube, as the plow parts its furrow, and the subsoiler the secondary furrow, the seeds are dropped into the latter furrow in fixed quantities or charges, and at fixed intervals. On the axle, which turns with the disks or ground wheels, and by the friction between the outward edges of the latter and the ground as the structure is drawn in the wake of the subsoiler, is a vertical, beveled cog wheel, which engages with cogs on the underside of a horizontal annular plate in the bottom of the seed box, and thereby actuates the seed measuring and delivering mechanism. This vertical, beveled wheel is between the center of the axle and the disk fixed on the end thereof. So far as now described, the structure contains all the factors of the claim quoted, except the last, namely, "means for adjusting the disks so as to vary their covering capacity." These factors, not being in combination with the last, would themselves combine to the one result of dropping the grain in fixed quantities, and at fixed intervals, into the secondary furrow behind the advancing subsoiler. In such hypothetical combination, however, the disks would have merely the function of wheels. As disks, they would be functionless. But the patentee, by the operation of his device in dropping the corn, undertakes also to cover the same as and when dropped into the furrow. For this purpose the axle between the disks is made in halves. These are joined together under the central portion of the seed box by a coupling operative as a universal joint. By this means each ground wheel or disk may be set so that its plane of revolution, being a vertical plane, is at a greater or less angle with that vertical plane which would pass through the central longitudinal line of the furrow, or direction of the

plow. The planes of revolution in the disks, if extended, meet in a vertical line through the center of the furrow in the rear of the advancing seed box, as attached to the plow in operation. In order to move the loosened soil more effectively, the disks or ground wheels are "preferably" made concavo-convex, with sharpened peripheries, and placed on the axle with the concaved surfaces towards each other. Each half of the divided axle is journaled in a bracket which is attached by bolts to the horizontal frame which carries the seed box. The openings in the frame for these bolts are slots concentric with the annular plate in the bottom of the seed box which moves the seed measuring and delivering mechanism. By loosening the nuts on these bolts, a different angular adjustment of the axle and disks may be made. The nuts are then tightened so that the new position of the disks is maintained. By varying the angular adjustment, the disks move more or less earth,—in other words, increase or decrease the depth at which the corn is covered.

The patent No. 418,526, issued December 31, 1889, to T. P. Lynch, shows, in a lister plow or corn planter, the combination "of a seed box, mechanism for measuring and delivering seed from the box, co-operating" wheels "on either side of the box, which" wheels "carry or support the seed box and the measuring and delivering mechanism, and which actuate the latter." In the device of the Lynch patent, the ground wheels, which are not disks, but spoked wheels, are fixed vertically on the ends, respectively, of the axle, so that their planes of revolution are parallel to each other, and to a vertical plane through the longitudinal central line of the furrow. In this patent the axle is not divided, or in halves; the means for covering the grain being two curved shovels adjusted to follow in the rear of the advancing seed box. In the patent in suit the divided axle, the central coupling forming a universal joint, the angular adjustment of the disks, and the frame whereby the axle and disks are held in position, and attached to and made to follow the plow, constitute the mechanism described in the specification, whereby earth is thrown over the corn to cover it. The central coupling between the two meeting ends of the divided axle forming the universal joint, the tube or bearing in which each half of the axle is journaled, the brackets on the tube, with the bolts and slots through the frame, whereby the axle is held to the frame which supports the seed box, constitute the last element specified in the claim, namely, the "means for adjusting the disks so as to vary their covering capacity," as described in the specification. The construction of the Lynch device, above referred to, has the one distinct result, namely, it drops the grain in fixed quantities, and at fixed intervals, in the furrow. If we suppose the divided axle of the patent in suit to be set and secured so that the two halves are in a straight line, the disks will then have only the function of the wheels in the Lynch device. On this hypothesis, if the words, "means for adjusting the disks so as to vary their covering capacity," be omitted from the claim in suit, the remaining elements, as expressed in the claim, would attain the result of the Lynch combination. But disks, as disks, would not be a factor towards such result. Again, disks attached to a lister plow, following the subsoiler, set, as in the patent in suit, angularly to the direc-

tion of the plow, by an angular adjustment, which may be changed, and which cover the grain dropped behind the subsoiler from a seed box in fixed quantities, and at fixed intervals, are found in the patent to Loughry, dated March 4, 1890, and numbered 422,603. But in the Loughry patent each disk is upon a spindle projecting from the lower end of an adjustable upright rod. There is no axle connecting these disks. They are not functional in carrying the seed box, in actuating the seed distributing and delivering mechanism, or in fixing the intervals or distances between the charges of corn as dropped into the furrow behind the subsoiler. In the patent in suit, and in the claim in question, the "co-operating disks" are on "either side of the box." These disks are distant from each other about 10 or 12 inches. The box is between them, and not on one side, in order that the corn may be dropped into the furrow straddled by the disks. Again, the box is between the disks, and not on one side or above them, in order that, in the work required of them, they may retain the upright position, and not topple over.

Counsel for appellee has put in evidence a very large number of prior patents. To about 12 of these he makes reference in his argument. The patent 305,430, to E. A. Daniel, in 1884, is seemingly dwelt on with most confidence. Counsel says:

"The patent to Daniel, of 1884, shows each of the parts named in said first claim. In the Daniel structure there are three disks on each side of the center of the machine; constituting two groups, which throw in towards each other, as in the patent in suit. Every function set out in the claim sued on is performed in the Daniel structure by the same agency respectively named in said claim. Inasmuch as a change of location of an element in a combination, without change of function, does not affect the identity of the combination (Dane v. Manufacturing Co., 3 Biss. 374, Fed. Cas. No. 3,558), the Daniel structure, if subsequent, would be an infringement on the claim sued on, were the latter valid; but 'what would infringe a patent, if later, will defeat a patent, if earlier.' (Knapp v. Morss, 150 U. S. 229, 14 Sup. Ct. 81.)"

The device of this Daniel patent belongs to the harrow or broadcast-seeder family. The three disks constituting the gang on one side of this device are on a single axle. The two axles are set, by means of a frame above the disks, at an angle to each other, so that by the mutual opposition of the two gangs of disks the machine may be drawn over the prepared field in a direct line of travel. There is over each gang a separate seed box, set at a considerable elevation above the disks. If one of the gangs with its seed box should be detached from the other, and fastened to the rear of a plow, or should itself, as a single implement, be drawn over ground already prepared, its course would be zigzag, or at least uncertain. Its disks would not co-operate to keep it in the line of travel. If, on the other hand, the disks be set so that their planes of revolution are in the line of travel, then they would have no covering capacity. Moreover, if the distance between the exterior disks should be fixed at 10 or 12 inches, the machine would topple over. In this Daniel machine the adjacent disks—one on the inner end of one axle, and the other on the inner end of the other—are in the same position, relatively to each other and to the line of travel, as the disks of the patent in suit. Moreover, their angular adjustment may be varied. Still further, in front of

these two disks are firmly secured to the tongue of the machine two other disks, with the opposite angularity, intended to open, in a prepared soil, shallow, parallel, and closely-adjacent furrows. By a spout extending from the left-hand seed box obliquely towards the right-hand inner-end disk, a stream of seed is thrown, apparently, against said last-named disk, to be thereby scattered in the wake of the two forward disks attached to the tongue. The seed so scattered is thereupon covered, but whether by the action of one or both of the inner-end disks of the gangs, does not clearly appear. At all events, the right-hand inner-end disk has no connection with the box from which the seed flows as last mentioned. The two inner-end disks do not co-operate upon any mechanism in said seed-box. They are not "co-operating disks on either side of the box." In the machine of the patent in suit, assuming the plane of revolution in the disks to be in line with the direction of the plow, one full turn of the disks will measure a uniform interval or distance in the furrow. By the revolution of the plate in the bottom of the seed box, the charges of seed are carried successively to the opening of the spout, through which they fall into the furrow at distances apart corresponding to that portion of the circumference of the disks which rolls over the ground while the seed plate, after one charge drops, brings another to the spout. Further, though this may be a feature of no special importance apart from accuracy of description, these predetermined intervals between the charges of grain as dropped into the furrow are made in a degree greater or less by change in the angular adjustment of the disks. In other words, the disks, with their variable angular adjustment, are functional, in the machine of the patent, in fixing the intervals at which the charges of seed are dropped into the furrow; and the disks themselves, apart from the matter of angular adjustment (their friction with the ground being aided by the weight of the seed box and its contents), are functional in operating mechanism whereby one charge is separated from the mass of grain, and separately carried to the upper opening of the spout, and there dropped into the furrow. Disks having functions as disclosed in the claim in suit are not found in the device of Daniel, or in any of the numerous machines shown in the record, of that class to which the machine of Daniel belongs. In many of these machines a stirring implement of some sort, actuated through connecting appliances by the revolution of the disks, operates on the mass of seed in the box, and continuous streams from the mass of seed find outlets by gravity through holes in the bottom of the box, sometimes connected with downward spouts or conductors.

The argument most persistently urged by the learned counsel for appellee goes to the proposition that the elements assembled in the claim in controversy are really a mere aggregation, and not a patentable combination. The seed box of the patent, for instance, considered as a hollow receptacle for holding seed, is identical with itself in other situations. But here the seed box, besides holding the mass of corn in appropriate relation to the seed measuring and delivering mechanism, is functional as an instrumentality whereby said seed measuring and delivering mechanism is held in position to receive, as its means of operation in dropping corn, a force generated by the im-

pact or friction between the rims of the disks and the ground, which disks, with their angular adjustment, are at the same time functional in determining the intervals of distance between the charges of corn, and in covering the same as dropped. Counsel for appellee says that the elements of the claim in controversy "were not original with the complainant's assignor, and produce no new result in their present situation, wherefore a patentable combination does not obtain." The new result of a patentable combination is a result which is new and distinguishable as compared with results produced by the elements in their separated state, or as assembled in a mere aggregation, without functional relations to each other. A combination is not unpatentable merely because its results may also have been produced by other combinations. A footnote to section 156, Rob. Pat., reads:

"It is frequently stated in the decisions of the courts that no new combination can be produced unless its result or effect be also new. This is to be understood as referring to the effect of the combination as compared with the effect of its elements in their separate or aggregated state, not as compared with the effect of other combinations of the same or different elements. It is true that no combination can have been invented unless it is capable of producing effects beyond those resulting from the use of any or all the elements in their separated state. But it is not true that the same elements cannot be grouped into different combinations, governed by different co-operative laws, although their practical effect as arts or instruments may be the same. The decisions are to be read with this distinction in mind."

In *Reckendorfer v. Faber*, 92 U. S. 357, as showing the distinction between a mere aggregation and a patentable combination, it is said:

"Another illustration may be found in the frame in a sawmill which advances the log regularly to meet the saw, and the saw which saws the log; the two co-operate and are simultaneous in their joint action of sawing through the whole log,—or in the sewing-machine, where one part advances the cloth, and another part forms the stitches; the action being simultaneous in carrying on a continuous sewing. A stem-winding watch key is another instance. The office of the stem is to hold the watch, or hang the chain to the watch. The office of the key is to wind it. When the stem is made the key, the joint duty of holding the chain and winding the watch is performed by the same instrument. A double effect is produced, or a double duty performed, by the combined result. In these and numerous like cases the parts co-operate in producing the final effect,—sometimes simultaneously, sometimes successively. The result comes from the combined effect of the several parts, not simply from the separate action of each, and is therefore patentable."

As before pointed out in this opinion, if the disks be made functionless otherwise than as wheels,—in other words, if disks be taken out and wheels put in,—then all the elements of the claim, barring the last, may combine to the one result of dropping corn in fixed charges, and at fixed intervals. But such a supposed combination is not itself a factor in this claim. The last element, namely, "means for adjusting the disks so as to vary their covering capacity," by which we must necessarily understand, as described in the specification, disks which have the angular adjustment, as well as disks whose angular adjustment may be changed, might, when separated from the seed box and contained mechanism, or when these latter parts are functionless by the absence of seed from the box, cover charges of corn previously dropped by some other machine, or by hand. But in the combination of the claim the force generated by the friction or impact between the

outer edges of the disks and the ground as the machine follows the plow works the mechanism in the seed box to drop in fixed quantities the corn covered by the disks themselves while generating said force; the disks being at the same time functional in determining the intervals of distance between charges of grain as deposited in the furrow. The claim in controversy is not the aggregation of two distinct combinations. The last element may perhaps be called, in itself, a "subcombination," but the remainder of the claim, as set down, does not constitute another subcombination. This is not a case where two subcombinations are assembled. The criterion here is not whether the result of the union is anything more than the aggregate of two results, one attributable to one subcombination, and the other to the other. This is not a case of two machines brought together with no effect beyond adding the result of one to that of the other. A combination consisting of all the elements specified in this claim, except the last, is not itself a factor in this claim. The elements of the claim, barring the last, are not here combined otherwise than in an organism which includes the last. The claim is not accurately thought of as containing but two elements; the result of one being the dropping corn in fixed quantities, and at fixed intervals of distance, and of the other the covering the corn so dropped. Corn planting results from the co-operation of all the elements as adjusted for the time being to meet the conditions of the soil in which the work is carried on. This court does not concur with the learned counsel for appellee in his proposition that the claim in controversy is a mere aggregation, nor in his further proposition that "there was no invention in simply transferring to the Lynch and other organizations the well-known driving and covering functions of the disks of former organizations." As already pointed out in this opinion, the disks of the claim in suit have functions not found "in the disks of former organizations"; nor were these functions simply transferred to the Lynch, or to any other, organization.

Assuming the validity of the claim, we do not understand the infringement to be contested. Mr. Waterman, the inventor, was formerly an employé of the appellant corporation. In 1894 he entered the service of appellee, and has since remained in that service. While employed by appellee, and on May 21, 1895, there was issued to said Waterman, "assignor to the Rock Island Plow Company," appellee, letters patent No. 539,495. Appellant makes plows under the Waterman patent of 1892, being that in suit; appellee, under the Waterman patent of 1895. Plows made by appellee pursuant to the specification of the last-named patent contain, unmistakably, the combination of the claim in suit. Appellant's expert so testified. No witness has expressed any opinion to the contrary; nor, as said above, does the learned counsel even contend that the infringement is not clear if the claim be valid. There is no question here as to the utility of a machine made within the terms of the claim in comparison with the machines of Lynch or Loughry. Utility to the patentable degree is not disputed. The decree is reversed, and the cause remanded, with the direction to the circuit court to enter a decree for an injunction and an accounting.

WOODS, Circuit Judge (dissenting). I am unable to see that the Waterman combination embodies a new conception. Its exact counterpart, it is true, has not been found in the prior art; but the elements are all old in fact, as well as in theory, and, in plows, cultivators, harrows, and seed drills, have all been in familiar use, in the same relations to each other, and performing the same functions in the manner shown in the patent in suit. It is pointed out, and emphasized by repetition, that the disks of this patent have functions which do not all belong to the disks alone, or wheels alone, of any prior device; and in this fact, as I understand the opinion, is recognized the novelty which made the combination patentable. "These predetermined intervals between the charges of grain as dropped into the furrow," it is said, "are made in a degree greater or less by change in the angular adjustment of the disks. In other words, the disks, with their variable angular adjustment, are functional in the machine of the patent, in fixing the intervals at which the charges of seed are dropped into the furrow; and the disks themselves, apart from the matter of angular adjustment, their friction with the ground being aided by the weight of the seed box and its contents, are functional in operating mechanism whereby one charge is separated from the mass of grain, and separately carried to the upper opening of the spouts, and there dropped into the furrow." The first of these functions, the varying of the predetermined intervals between the charges of the grain dropped by changing the adjustment of the disks, I do not find to have been pointed out in the specification, or suggested either by experts or by counsel for the appellant. The discovery, therefore, would seem to be original with the court. But that it is genuine must be conceded, since it is manifestly true, theoretically, that a revolving disk will advance further by a single revolution on a line coincident with its own plane than if drawn forward on a line at an angle with its plane, and the greater the angle the shorter will be the forward movement, the total variation possible being the difference between the circumference of the disk and its diameter. Practically, the variation, I think, will be very much less, and probably without appreciable effect; but, whether great or small, I do not perceive that it can be a beneficial feature of the device. The contrary seems probable. The question, however, is an immaterial one. That part of the prior art which is disclosed in the opinion alone would compel me to a different conclusion on the question of patentability from that declared by the court. It is shown in the opinion that, without the means for adjusting the disks, the elements or factors of the claim in suit "would themselves combine to the one result of dropping the corn in fixed quantities and at fixed intervals," but that "the disks would have merely the function of wheels"; and on this hypothesis it is conceded that the Lynch patent, which shows, in a lister plow, the combination "of a seed box, mechanism for measuring and delivering seed from the box, [wheels instead of] disks on either side of the box which carry or support the seed box and the measuring and delivering mechanism, and which actuate the latter," is not different in combination or result. It is also conceded that in the Loughry patent are "disks attached to a lister plow, following the subsoiler,

set, as in the patent in suit, angularly to the direction of the plow, by an angular adjustment, which may be changed, and which cover the grain dropped behind the subsoiler from a seed box in fixed quantities, and at fixed intervals"; but those disks, it is explained, "are not functional in carrying the seed box, in actuating the seed distributing and delivering mechanism, or in fixing the intervals or distances between the charges of corn as dropped into the furrow." It is further conceded that in the Daniel machine, which is a broadcast seeder with three disks on an axle on either side of the center, "the two axles are set, by means of a frame above the disks, at an angle to each other, so that by the mutual opposition of the two gangs of disks the machine may be drawn over the prepared field in a direct line of travel"; that there "is over each gang a separate seed box"; that "the adjacent disks (one on the inner end of one axle, and the other on the inner end of the other) are in the same position, relatively to each other and to the line of travel, as the disks of the patent in suit"; that "their angular adjustment may be varied"; that "in front of these two inner-end disks are firmly secured to the tongue of the machine two other disks, with the opposite angularity, intended to open, in a prepared soil, shallow, parallel and closely-adjacent furrows"; that, "by a spout extending from the left-hand seed box obliquely towards the right-hand inner-end disk a stream of seed is thrown, apparently, against said last-named disk, to be thereby scattered in the wake of the two forward disks attached to the tongue," and there "covered, but whether by the action of one or both the inner-end disks of the gangs does not clearly appear"; that, "at all events, the right-hand inner-end disk has no connection with the box from which the seed flows as last mentioned"; that "the two inner-end disks do not co-operate upon any mechanism in said seed box"; that "they are not 'co-operating disks on either side of the box.'" My view may be as well explained by starting at this point. It is conceded that the Daniel machine embodies a lister plow, the wheels on the tongue cutting the furrow, and the inner-end wheels being in a position to cover the corn as dropped or poured into the furrow. It needed no invention to cut away the other two disks of each gang, and instead of two seed boxes, one over each gang, to substitute one box located above and between the wheels, changing the feeding mechanism only to the extent necessary to fit it into the new box, and operating it as before by connections with one or both disks. If with both, then they would be "co-operating disks on either side of the box." Thus changed, the machine, it is true, would not have dropped the seed at regular intervals; but, again, it required no invention to produce that result. It was only necessary to take the seed box and dropping mechanism already in use in the Lynch device, and place it above and between, and connect it with, the inner-end disks of Daniel, instead of the wheels of Lynch, and, the disks being already adjustable, the result would have been an anticipation of the Waterman combination. To put it in another way, equally simple and void of possible invention: It was only necessary to take the two inner and adjustable disks of Daniel or Loughry, and put them in the place of the wheels of the Lynch plow, and, whether the covering plates of

that plow remained or were removed, the result would have been the combination in question; and, though it be conceded that in the combination so made the disk would be required to perform the function of a wheel, and also the function of turning the soil, and incidentally of varying the distance between the charges dropped, that is not important, because the fact that a disk is a wheel is obvious, and to make it serve the uses of a wheel in addition to any other known function cannot be invention. The Loughry patent is not less significant. If its disks do not carry the seed box, and are not functional otherwise like those of the patent in suit, it needed only to transfer to it the seed box of Lynch, with its mechanism for measuring and dropping the grain, and to connect the mechanism with the disks, instead of the spoked wheels.

DETROIT MOTOR CO. v. JENNEY ELECTRIC MOTOR CO.

(Circuit Court, D. Indiana. December 17, 1897.)

No. 9,176.

PATENTS—INVENTION—ELECTRIC SWITCHES.

The Blades patent, No. 418,678, for an improvement in electric switches to be used with shunt-wound electric motors, is void, for want of patentable invention, as to claims 1 and 4, since the only new element not found in the prior art is a spring attached to the switch for returning it to its initial position when the magnet is de-energized; and there is no invention, in view of the prior art, in the use of a spring for this purpose.

This was a suit in equity by the Detroit Motor Company against the Jenney Electric Motor Company for alleged infringement of a patent relating to electric switches.

George H. Lothrop, for complainant.

Chester Bradford, for defendant.

BAKER, District Judge. This is a suit for infringement of patent No. 418,678, granted to the complainant, as assignee of Harry H. Blades, dated January 7, 1890, for an improvement in electric switches to be used with shunt-wound electric motors. The answer denies patentable novelty in the alleged invention, in view of the prior state of the art, and also denies infringement. The specification states that:

"It is the object of the invention to provide a switch for electric motors on constant potential circuits, such that, when there is a cessation of the current, it will automatically break the armature circuit, and assume its initial position, ready at will to gradually turn the current on the armature in starting. In starting shunt motors on constant potential circuits, the field circuit is first made, and then the current is thrown gradually on the armature. This leaves the switch lever for starting the armature in its final position. In stopping, the operator first breaks the main circuit, including the field circuit, and then, after the motor stops, turns the switch lever for starting the armature from its final position back to its initial. Very often, however, the operator forgets to turn this armature lever back, and, when the time comes to start, the motor turns on the main switch, and then throws the full current into the armature before it has time to generate its counter electro-motive force, and thus reduce the current flowing through it. The result of this is that either the armature is burned out or the fusible plugs put in for its protection are blown; also, the

circuit is sometimes broken for a short time by the stopping of the dynamo, a short circuit at the central station, or for some other cause. In this event the ordinary armature lever would, of course, stay in its final position, and, when the current is re-established, either the armature or the plugs would burn out."

It is further stated that:

"The object of the invention is to obviate these difficulties by a device such that when the circuit is broken, whether intentionally or not, the armature will be thrown out of circuit."

The invention described in the specification consists in the combination with a shunt-wound electric motor of a magnet in the field circuit of the motor, a hand switch in the armature circuit adapted to be held in its closed position by the magnet, and means for opening the hand switch automatically when released by the magnet.

There are four claims in the patent. The first and fourth are alone involved in this suit. These are as follows:

"(1) In a shunt-wound electric motor, the combination, with the field circuit, of a magnet in the said circuit, a hand switch adapted to open and close the armature circuit, said switch arranged to be held in its closed position by the magnetism of the said magnet, and means for automatically retracting the said switch to its initial position when the magnet is de-energized by the cessation of the current through the field circuit, substantially as described."

"(4) In a shunt-wound electric motor, the combination, with the field circuit, of a magnet in said circuit, a hand switch adapted to open and close the armature circuit, said switch arranged to be held in its closed position by the magnetism of the said magnet, and a spring for automatically retracting the said switch to its initial position when the magnet is de-energized by the cessation of the current through the field circuit, substantially as described."

The prior state of the art, as shown by the patents in evidence,—consisting of the patents of Frank L. Pope, No. 126,486; Edward Weston, No. 264,983; Wightman and Lemp, No. 367,082; Henry E. Walter, No. 373,034; George D. Sheperdson, No. 389,254; and George H. Whittingham, No. 396,791,—tends strongly to show that no patentable novelty is disclosed in the combination of either claim alleged to be infringed. In the Walter patent, granted in 1887, is found every element of the first and fourth claims of the patent in suit, except the spring for returning the switch to its initial position when the same is released by the demagnetization of the electro magnet upon the cessation of the passage of the electric current through the magnet caused by the opening or breaking of the circuit. The complainant's expert says that the Walter patent is upon an automatic starting device, consisting essentially in an automatic adjustable resistance in the armature circuit operated by an electro magnet in the field circuit of the motor, to automatically cut out the resistance in the armature circuit of the motor. In his cross-examination, speaking of the Walter patent, he admits that the motor there illustrated is a shunt-wound electric motor; that there is a magnet in the field circuit; that there is a switch adapted to open and close the armature circuit; that the operation of the magnet is to draw the switch towards itself over the contacts of the resistance; that such effect ceases when the current ceases; and that, if a spring or other equivalent device were provided, the switch would be returned thereby to its initial position when the magnet was de-energized by the opening or breaking of the circuit.

The only new element not found in the prior art is the spring attached to the switch for returning it to its initial position when the magnet is de-energized. Does the device of the patent in suit, in view of the prior state of the art, attain to the dignity of invention? It seems to me that it does not. The court is of opinion that, to a mechanic skilled in the art, the use of a spring or its equivalent for returning the switch to its initial position would have occurred as soon as the advantage of such automatic return was suggested. Some of the patents in evidence show the use of a spring for accomplishing substantially the same purpose as that to which the spring is applied in the patent in suit. The many familiar uses of a kindred character to which springs are applied deprive the device in the claims in suit of patentable novelty. It results that the bill must be dismissed for want of equity, at complainant's costs.

SOEHNER v. FAVORITE STOVE & RANGE CO.¹

(Circuit Court of Appeals, Sixth Circuit. December 7, 1897.)

No. 486.

1. PATENTS—COMBINATION CLAIMS—PRACTICABILITY.

Where the claims are somewhat obscure, and it is objected that the combination is not a practicable one, the court will apply the rule that the claims are to be construed in the light of the specifications; and if, looking at both, the court is able to understand the meaning of the patentee in the language of his claims, and as so understood the combination is practicable, it will give effect to them according to the apparent purpose.

2. SAME—ANTICIPATION.

The existence and prior public use of an article embodying the combination of a patent, in almost exactly the same form, will defeat the patent, whether the advantages of it were known to the manufacturers and users or not.

3. SAME—INVENTION—COOKING STOVES.

The use of curved or swelling side plates along the side grooves of a cooking stove being known, the employment of the same construction at the rear end of the side plates, alongside the vertical grooves, is merely an extended application of the same idea, or a duplication of the former construction to perform a like service, and is not patentable.

4. SAME.

The Boal reissue, No. 11,462, for improvements in cooking stoves, consisting in the use of inwardly curved side plates joined to the flue plates, construed, and held to be void, in view of the prior state of the art, for want of patentable invention.

5. DESIGN PATENTS—SCROLL WORK ON STOVES.

In view of the ancient and common use of scroll work for the ornamentation of exposed surfaces, one cannot now claim broadly, under a design patent, the use of scroll work in general upon the margins of the sides and other prominent features of a stove. To be patentable, there must be something peculiar in the formation of the scrolls themselves, or in their relative arrangement, so as to produce a distinct effect, affording a special utility beyond any ordinary work of the kind.

6. SAME.

The Boal patent, No. 23,780, for a design for stoves, construed, and held not infringed.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

¹ Rehearing denied February 8, 1898.

Nelson Davenport and Robert Ramsey, for appellant.
E. E. Wood and Edward Boyd, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge. This is a suit in equity upon a bill filed in the court below by the Favorite Stove & Range Company, setting up the ownership by complainant of two letters patent issued to Stanhope Boal, one of which is reissue No. 11,462, of date January 8, 1895, for an improvement in stoves; the other being design patent No. 23,780, for the ornamentation of stoves, and bearing date November 6, 1894,—both of which patents, it is alleged, were assigned to the complainant. The bill charges that the defendant (the appellant here) has infringed both of said patents, in the sale of a stove called in this record the "Western Stewart," and it prays for an injunction, and an accounting in respect of the profits and damages. The defendant answered, denying the validity of the patents, upon the ground that the inventions lacked patentability; alleging that they had been in prior public use, and that they were anticipated by the prior art; and also denying infringement; but as no question arises in respect to the pleadings, and the case has been contested on the merits, it is unnecessary to go into further detail of the pleadings. The case was brought to a hearing on the pleadings and proofs, and the court, being of opinion that both the patents sued on were valid, and were infringed by the defendant, decreed in favor of the complainant. The defendant has brought this decree here for review by appeal.

Reissued patent No. 11,462 relates to the construction of cook stoves having three flues at the rear and bottom of such stoves; that is to say, two flues extending down the back of the oven, and at the outer end of the flue space there, and thence along under the oven next the outside of the stove, until these side flues open into a central return flue, which passes back under the oven, and up the rear thereof, between the side flues above mentioned. Such stoves had long been in use, and the patent is for an improvement upon the old construction. The patentee states the object of his invention thus:

"The object of my invention is to provide a cooking stove with a curved or swelling form of side plates, to which the oven doors are hinged, so as to increase the capacity of the flues, and also to increase the capacity of the oven, and at the same time adding a beautiful appearance to the stove, without increasing the cost."

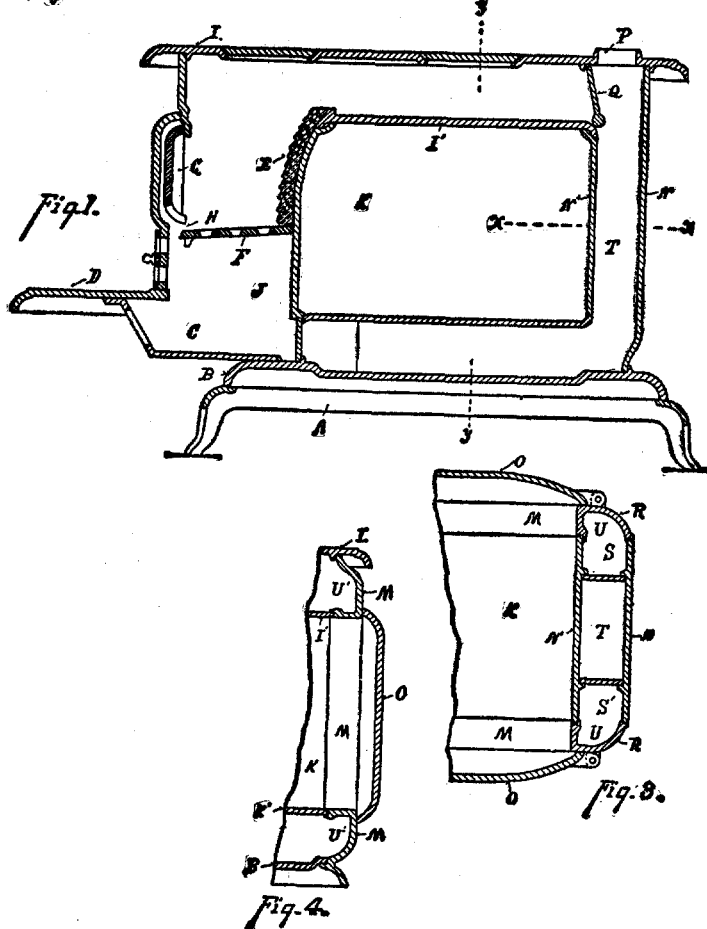
The essential feature of the construction devised by him consisted of an enlargement of the rear and bottom side flues, by swelling out that portion of the side plates of the stove which forms the side wall of the flues, in a circular form, turning inward towards the edges of the plates, and hanging the oven doors considerably back of the side openings of the oven, and upon the curve of the side plates towards the rear. It is claimed that thereby the area of the flues and of the oven is increased, and the appearance of the stove improved, without increased cost in the manufacture. The claims, as shown by the patent, are as follows:

"(1) The combination with a cook stove having the usual draft flues and oven, and provided with two plates forming a flue at the rear of the oven, of a curved side plate, M, joined to the aforesaid flue plates, and forming an extension of the rear flue, substantially as specified. (2) The combination with a cook stove having an oven, and draft flues extending about said oven, and down at the rear thereof at each side, of curved plates, M, forming extensions of the said rear flues, substantially as specified. (3) The combination of a cook stove having an oven, and draft flues extending about said oven, and downward at the rear thereof, and at each side, of the curved plates, M, forming extensions, U', at the top and bottom of the oven, substantially as specified. (4) The combination with a cook stove having an oven, and draft flues extending about said oven, of the curved side plates, M, R, forming extensions at the sides and rear thereof, substantially as specified."

Fig. 1. is a central vertical longitudinal section

Fig. 3. is a section on line 2, 2, Fig. 1.

Fig. 4. is a section on line 4, 4, Fig. 1.



R is a prolongation of the side plate, M, at the rear end of the stove, curving inward, and resting upon the rear plate. Inasmuch as a cook stove "having the usual draft flues and oven," which is made one element of the combination in the first claim, is the same stove as is made the corresponding element of the second claim, the claims are in effect for the same thing. The claims in the patent were not prepared with technical precision, and are somewhat obscure. Objection is made to them by counsel for the appellant, that they do not describe a practicable combination. In terms, they describe a complete cook stove as one element of the combination, and the side plate, M, could not be put together with the stove already completed. But, on looking at the specifications, we see that the patentee did not mean, in his claims, to use as one part of his combination the whole cook stove, but the stove minus the outer plates, which were to be supplied by the other element of the combination. If, therefore, we apply the benignant rule of construction,—as we are required to do,—that the claims should be construed by the specifications, and that if, looking at both, the court is able to understand the meaning of the patentee in the language of his claims, and, as so understood, the combination is a practicable one, it will give effect to them according to the apparent purpose. *Ryan v. Goodwin*, 3 Sumn. 514, Fed. Cas. No. 12,186; *Blanchard v. Sprague*, 3 Sumn. 534, Fed. Cas. No. 1,518; *Turrill v. Railroad*, 1 Wall. 491; *Klein v. Russell*, 19 Wall. 433, 466; *Haworth v. Hardcastle*, *Webst. Pat. Cas.* 480; *Blandy v. Griffith*, 3 Fish. Pat. Cas. 609, Fed. Cas. No. 1,529; *Roller-Mill Co. v. Coombs*, 39 Fed. 25. These are a few of the great number of cases in which the foregoing rule has been approved and applied. Of course, if the language of a claim, in the light of the specifications, does not show that the patentee has described a practicable combination, there is an end of it, and the claim is nugatory. It is claimed for this patent that it provides more space for the flues and oven, without increasing the cost of the stove. Whether this is so with respect to the flues seems to be, upon the evidence, dubious. The reasons advanced for believing it are not very satisfactory. If the oven is enlarged, the curving in of the side plates at their edges must necessarily involve the use of more material in the side plates than if the plates were vertical throughout. But it is not necessary for us to decide how the fact is. With regard to the increase of the oven space by the proposed construction, it seems clear that, if the bottom plate is contracted to diminish the material, it must be at the expense of the flues. It is true that the bringing of the oven doors back upon the rear projection of the side plates might, from the size given to the doors, induce purchasers to believe that the oven is larger than it really is. But that would be a species of deception which could hardly be said to be an improvement in a useful art, which the patent laws are designed to encourage. In the complainant's stoves built under this patent, the oven door is shown to be swelled out in its central part, and in this way the oven space is widened. But the form of the oven door is not involved in the patent. The door constitutes no part of the combination. The transfer of a portion of the width of the oven plates

to, and casting it as an inward projection of, the side plates, does not lessen the material employed, or result in any advantage that we can see, or that is suggested by the patentee. The substance of his patent and of his invention, as before stated, consists in the curving of the side plates.

We come now to the consideration of the prior art in the construction of the flues. It is shown by the evidence in the record that as early as 1877, and for several years thereafter, Gordon G. Wolfe, of Troy, N. Y., made and sold a large number of stoves having a similar curvature and expansion of the side plate along the side of the flue extending under the bottom of the oven. This device of Wolfe, after some modifications, was patented to one Gobbelle, of Cleveland. In this patent the back flue, it is said, was extended by curving the wall of the flues adjoining the sides. This construction of the Wolfe stove is testified to by the witness Keep, who was engaged in the stove business at Troy at the time; and he is corroborated by Wolfe himself, who was produced as a witness, and also by the witness Hagan, a mechanical expert and solicitor of patents, who examined one of Wolfe's stoves in 1879, while a suit was pending concerning the validity of a patent involved in its construction. Keep also testifies that at about the same time, as we understand him, one George Graves made a stove at Troy called the "Senora," which had the front plate of both bottom and rear flues curved and turned in at the edges. How extensively the Graves stove went into use does not appear. What the object of this peculiarity in the form of the side plates was, we are not informed; and we cannot say whether it was done to enlarge the flue, or to improve the looks of the stove. It is probable, however, that the latter was the main purpose, for it is not made to appear that the flues of the old construction were defective in their capacity. But it is not material. The existence and prior public use of side plates in stoves making up the same combination as that shown by the patent in suit, of an almost, if not exactly, similar formation, would defeat the patent, whether the advantages of it were known to the manufacturers and users of the older stove or not. Much stress is laid upon the advantage gained by the widening of the oven produced by giving the swelling form to the side plates. Undoubtedly the oven is widened, relatively to the bottom plate of the stove, by curving in the lower edge of the side plate, and so relatively to the top and back plates, by the like curving of the edges of the side plate where the plates meet. And this result was obvious to the most common observer of the earlier stoves. It is difficult to find invention in discovering so plain an inference as this. And so of the flues. If there had never been any previous construction of the kind, it would be hard to find any sufficient grounds on which to support this patent. No new function of the stove is developed. The results of operating it are the same. The parts remain in substance as before. The form of one of them is changed. The result of that is that the top, bottom, and rear plates can be made smaller. If the saving thereby made was worth the while, it involved no invention to draw in the edges of the side plates to accomplish it. If the swelling form was new, and the beauty of the stove was there-

by increased, it might give ground for a design patent, but that feature alone would not support a patent for the structure itself. Moreover, it is within common knowledge—and therefore the court should take judicial notice of the fact—that, a good while before the invention claimed by Boal, box stoves were in general use, the side and back plates of which, as well as the door, were swelled out in their central parts, and turned inwards toward the edges. This formation widened the stove in the same locality as that of the oven in the cook stove, and suggested all the advantages of form and appearance to be gained by such expansion of the center in a cook stove. But the use of the curved formation of the side plates along the side flue under the oven in the Wolfe stove is sufficiently proven. The evidence that this formation was employed at the rear end of the side plates alongside the vertical flues is not so clear. But, if we were to negative this, the case would still stand exposed to the rule stated in *Smith v. Nichols*, 21 Wall. 112, 119:

“A mere carrying forward, or new or more extended application, of the original thought; a change only in the form, proportions, or degree; the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means, with better results,—is not such invention as will sustain a patent.”

This rule has been since so many times restated and applied that it has become familiar doctrine. *Fox v. Perkins*, 3 C. C. A. 32, 52 Fed. 205. It has been most frequently quoted in cases of the simple development of the original thing. But the transferring by Mr. Boal of the same construction from the lower edge of the side plates along the bottom flues to the rear edge along the rear flues, if in fact that was new with him, would furnish an apt illustration of a new application of the original thought, such as is spoken of in the case just quoted. Indeed, it would come near to a mere duplication of the former construction to perform the like service in a connecting flue, such as was found in *L. Schreiber & Sons Co. v. Grimm*, 19 C. C. A. 67, 72 Fed. 671, and *Clark v. Deere & Mansur Co.*, 25 C. C. A. 619, 80 Fed. 534. The curving of the side plates at the edges may not be identically the same in the Wolfe stove and that of the stoves manufactured by the complainant under the Boal patent, but a mere change of form, not substantial, and not producing results distinct in their nature, is not invention. But Boal does not define the degree of curvature, and any appreciable degree would fulfill the requirements of his patent. Having this fact in view, and having no doubt that the Wolfe stoves had this formation with respect to the sides of the bottom flues, at least, and that those stoves had been disseminated widely and in public use many years before Boal's alleged invention, we think there was error in sustaining his patent.

There is much evidence in the record in regard to the Garland stoves, which the appellee produces, as anticipating the patent in suit. It was proven by the appellee, clearly enough, that the Garland stove, which also possesses the same circular formation near the edges of the side plates, was manufactured and on sale prior to the date of Boal's application for his original patent, and that Boal must have known this. But, after this proof was in, the complain-

ant offered evidence to show that Boal's invention was prior to his application, and antedated the production of the Garland stove by a short period of time. It may be true. We do not decide that question. The circumstances are such that we should feel impelled to look into it more critically if we were not satisfied that Boal had been anticipated in another quarter. It seems altogether likely that both the Boal and Garland stoves are simply the adoption and expansion of old constructions.

Patent No. 23,780 relates to a design employed in the form and ornamentation of the complainant's stove. The form is stated to embody round corners on the front frame plate, the edges of which are flush with the edges of the curved door. The ornamentation consists of scroll work on the outside borders of the larger side members of the stove, and upon the body of the smaller members which lack room for the advantageous representation of such work upon their margins. Another feature of his design consists of an ornamental central portion of the oven door, in imitation of an alligator skin, inclosed in which is the nameplate or panel of the door. The specifications and drawings describe the formation and ornamentation of several parts of the stove, and thereto are appended eight claims, the first of which is for the design of the whole stove. The rest are for the distinct parts referred to in the specifications. The first claim is the only one involved in the controversy. It is not urged that any of the others are infringed. The art of ornamentation with scroll work is ancient. The classical sculpture and architecture of the old civilization employed it in various styles, and in a variety of their productions; and its use has been continued and enlarged, not only in the old departments of the arts, but in new and familiar productions in domestic life. Not only the columns, capitals, walls, and ceilings of buildings, and tapestries, old and new, illustrate it, but the counterpanes of beds, the covers of tables, and the borders of the pages and covers of books and magazines are some of many other things seen in almost universal use. Again, it is well known, and matter of common observation, that when the object to be decorated is large enough, and exposes its whole surface, it is regarded as in good taste and effective to dispose such decoration upon its margins, though it would not be so practicable upon smaller surfaces. All these things being so, the field for invention in decorating the plates and legs of stoves with scroll work, if it was open at all, must necessarily be limited. It could not consist, broadly, in displaying scroll work in general upon the margins of the sides and other prominent features of the stove. There must be something peculiar in the formation of the scrolls themselves, or in their relative arrangement, so as to produce a distinct effect, affording a special utility beyond any ordinary work of the kind. It was not possible for Boal to establish a monopoly in the ornamentation of stoves with scroll work displayed in a way which was not distinguishable to the general observation from ordinary work of the kind exposed in appropriate places upon such an article. That was a privilege, an advantage, accruing to everybody from the progress of art. It is not necessary to decide whether his

design meets the requirements that were imposed upon him when he proposed to make a design of this sort patentable; for, if that be admitted, it is plainly obvious that the defendant's stove does not infringe his patent, when limited to the specific characteristics of his scrolls, or the peculiar arrangement of them. The complainant does not, as we understand, contend that there is a close similitude between the design of his stove and that of the defendant, when considered in detail. It would be vain to contend for that; for while it must be admitted (and this is the contention most pressed by the complainant) that to the casual observer, or to one who regards their general appearance only, there is a sameness of appearance, yet it is only the sameness which results from the use by the defendant of the resources which were of right open to each,—that is, in this case, the privilege of using an old kind of ornament, in its common style of application, to the improvement of the appearance of his stoves. Another quite noticeable difference in the design of the complainant's stove consists in the imitation of the skin of an alligator upon the oven door, in the space surrounding the panel for the nameplate, which is not found in the defendant's. But it is not necessary to dwell upon this and other differences. The detail of the ornamentation varies in most particulars, and the arrangement, in their relation to each other, of the details, varies also. To declare the defendant's stove an infringement would be to concede to the Boal patent pretensions broad enough to cover the whole field of ornamenting stoves with scroll work applied according to the generally approved style and methods of the art. As this concession must be denied, it follows that the alleged infringement must also be denied. The decree of the court below will be reversed, and the cause remanded, with directions to the court below to dismiss the bill.

PATENT BUTTON CO. v. CONSOLIDATED FASTENER CO.

(Circuit Court, D. Maine. November 6, 1897.)

No. 501.

1. PATENTS—INFRINGEMENT SUITS—DEMURRER FOR WANT OF INVENTION.

A patent will not be declared void, on demurrer to the bill for want of invention, except in an unusual case, and under circumstances enabling the court to clearly see that under no state of proofs which could possibly be suggested could patentability be shown.

2. SAME—JUDICIAL NOTICE.

On a bill for infringement of the Platt patent, No. 520,999, for a device for driving and clinching tacks, *held*, that the court would not presume to have such judicial knowledge of the state of the art eight or ten years earlier (when the invention was made), in reference to so special a matter, as would enable it to declare the patent void on demurrer for want of invention.

This was a suit in equity by the Patent Button Company against the Consolidated Fastener Company for alleged infringement of letters patent No. 520,999, to Irving G. Platt, for a device for driving and clinching tacks. The cause was heard on demurrer to the bill for want of patentable invention.

George Cook and Richard Webb, for complainant.
Wm. B. H. Dowse, for defendant.

PUTNAM, Circuit Judge. This bill was brought for relief against alleged infringements of a patent for an invention. The respondent demurred to the bill; assigning that the patent is invalid on its face, for lack of patentability. The patent relates to a device for driving and clinching tacks. The device consists of a tack holder, with a slot or recess suited to hold the head of the tack, and a die adapted, by its peculiar form, to curl or clinch the point of the tack. The cloth and the button, or whatever is to be secured by the tack, interpose, of course, between the die and the tack holder. The patent in suit issued June 5, 1894; but the application was filed June 7, 1889. Of course, the invention may have gone back at least two years earlier than that, or to June, 1887; being fully 10 years prior to the filing of the demurrer. The specification describes the alleged invention as an advance on a prior device of the complainant for attaching buttons to fabrics, covered by an earlier patent than that in suit, and it describes in detail the improvements which it claims have been made. It may be that the earlier patent was such a departure from the state of the art as to involve ingenuity, and it may be that ingenuity was involved in returning back from the earlier patent to anything so near the state of the art as the patent in suit. In considering the case at bar, however, we have no occasion to travel those two roads; but we may look at the device now in suit, and compare it directly with the state of the art. Doing this, it must be admitted that it is difficult to perceive that the complainant can produce evidence which would satisfy a court that he brings it anything patentable. But the issue which we have to try, as the case now comes to us, is not one of fact, but of law, in the technical sense of the expression. We are not able to see that it differs in any respect from the issue which would be made if this suit had been one at common law, followed by a demurrer. Can this patent be adjudged invalid on an issue so raised? We had occasion to make some remarks on this topic in *Industries Co. v. Grace*, 52 Fed. 124; the opinion having been passed down in the Massachusetts district on July 28, 1892. We there said as follows:

"I am not aware that in this circuit the practice of demurring on the ground of the want of invention has obtained a footing. The mischief of permitting it unnecessarily is well pointed out by the reference of Judge Blodgett to the crop of demurrers which one of his decisions occasioned in the Northern district of Illinois. *Manufacturing Co. v. Adkins*, 36 Fed. 554. I am not able to ascertain that the practice of this character which exists in some of the districts has ever had the direct approval of the supreme court. The expressions in *Brown v. Piper*, 91 U. S. 37, frequently referred to, do not seem to go to that extent, as in that case there were a bill, answer, and proofs, so that the complainant had had full opportunity, and all possible facts were before the court. On such a record the court might with safety say that there was nothing on the face of the patent itself which could require its attention. In *New York Belting & Packing Co. v. New Jersey Car-Spring & Rubber Co.*, 137 U. S. 445, 11 Sup. Ct. 193, where the subject-matter was that of a design, the court overruled the demurrer on the merits, without either expressly condemning or approving the practice on this point. It is true, nevertheless, that in several districts this practice is sustained; and it is also

approved by Rob. Pat. § 1110, and by Mr. Gould's notes to Story, Eq. Pl. (10th Ed.) § 452. In *Blessing v. Copper Works*, 34 Fed. 753, Judge Shipman uses the following language: "To decide, in advance of an opportunity to give evidence, that no evidence can possibly be given upon the question of invention which would permit the case to be submitted to the jury, seems to me to be ill advised, except in an unusual case." This would seem especially so if the questions, not only of value and usefulness, but of novelty, are to be in any degree determined by what transpires subsequent to the issue of the patent, as was suggested in *Magowan v. Packing Co.*, 141 U. S. 332, 343, 12 Sup. Ct. 71, and the *Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450, even with such qualifications as appear in *McClain v. Ortmayer*, 141 U. S. 419, 12 Sup. Ct. 76, and *Adams v. Stamping Co.*, 141 U. S. 539, 12 Sup. Ct. 66."

It is apparent that we did not in this case undertake to settle positively the precise question whether, having reference to the state of the art, an alleged invention could be held not patentable, for want of invention, on a demurrer to a bill framed in the usual form of a bill alleging infringement. Since that opinion was passed down, we have had, from the supreme court, *Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, and *Richards v. Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, and 159 U. S. 477, 16 Sup. Ct. 53. Although in the earlier of these two cases the demurrer had been overruled in the court below, and the case came up to the supreme court, bringing, not only the demurrer, but also an answer and proofs, and although in the later of the two cases there was apparently sufficient on the face of the specification to enable the court to perceive, as a matter of law, that the alleged inventor had obtained a patent for a mere aggregation, yet we must accept the result of those cases as holding that the question of invention, although it may come in the form of a pure issue of fact, may, under some circumstances, be disposed of on demurrer. We are not, however, required to depart from the suggestion which we made in *Industries Co. v. Grace*, that, even if such an issue can be made on a demurrer, it can be only in an unusual case, and under such circumstances that the court could see clearly that under no state of proofs which could possibly be suggested could patentability be shown. Certainly no hypothesis is admissible which substitutes for a knowledge of the law, by which technical issues of law must be determined, a knowledge of the arts. "Judicial notice" is an expression used with some variation of meaning, according to the standpoint of each particular case. Its true significance is not infrequently confused, by reason of the fact that the courts do not always carefully distinguish in the respect to which we refer. When the court is disposing of an issue of fact, which at the common law is for a jury, it may properly extend judicial notice so as to embrace all those matters which a jury is entitled to take cognizance of without particular proofs, by reason of its representing the common knowledge of the community at large. It is undoubtedly in this sense that Lord Esher, in *Attorney General v. Wright* [1897] 2 Q. B. 318, 321, used the following language, having reference to the case then before the court of appeal, which brought in review the findings of a jury with reference to the right of mooring vessels on a particular foreshore. He there said as follows:

"It seems to me that it is the duty of judges to bring into force the knowledge that they have in common with all who are engaged in a particular busi-

ness, and that they should not shut their eyes, and affect not to know what everybody conversant with the particular business with which they have to deal knows."

When, however, we look at the same expression with regard to technical issues of law, it refers only to matters of fact of such kind that, according to common experience, it is absurd to dispute them, or, to use the language of the text-books, of such character that, with reference to them, all corroborating evidence is dispensed with, and all opposing evidence is forbidden. Such facts raise conclusive or absolute presumptions, and the presumptions are so absolute that although, accurately speaking, they are presumptions of fact, they conclude the court as effectually as though they were presumptions of law, and are usually described as such. 1 Greenl. Ev. §§ 14, 15. We cannot bring our minds to dispose of an issue of this kind adversely to a patent on loose notions of the rules of judicial notice, or through any conclusions short of that raised by a state of facts of the decided character which we have explained. We cannot presume to have such judicial knowledge of the state of the art ten years, or even eight years, prior to the filing of this demurrer, with reference to so special a matter as that to which this patent relates, as to enable us to foresee that no possible state of proofs can sustain it. The bill alleges invention, and this raises primarily only a question of fact. There is nothing in it, or on the face of any part of the patent, which modifies the character of this issue. For example, there is nothing in the recitals of the specification to show that the patent issued for a mere aggregation. The issue raised is purely one of invention or noninvention, and this with reference to such special and limited subject-matters that ordinarily they do not come within the range of universal experience or judicial knowledge. *Packard v. Lacing-Stud Co.*, 16 C. C. A. 639, 70 Fed. 66, 67; *Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co.*, 25 C. C. A. 420, 80 Fed. 287, 290; *American Street-Car Advertising Co. v. Newton St. Ry. Co.* (decided by the circuit court for the district of Massachusetts Aug. 6, 1897) 82 Fed. 732. Demurrer overruled. Respondent will answer on or before December rules, next. Costs to abide the result of the suit.

DICKERSON v. TINLING.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1897.)

No. 935.

1. PATENTS—INFRINGEMENT—SALE OF PATENTED ARTICLES PURCHASED ABROAD.

One purchasing in a foreign country an article protected by a United States patent, from persons other than the owner of the United States patent or his vendees, cannot import and sell the same in this country without infringing the United States patent.

2. SAME.

One purchasing in a foreign country, from the owners of a United States patent, patented goods having marked upon them a condition that they should not be imported into the United States, cannot import and sell them here without being guilty of infringement.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a suit by Edward N. Dickerson against Hugh L. Tinling for alleged infringement of a patent. The court below denied a motion for preliminary injunction, and the plaintiff thereupon appealed to this court.

Edward N. Dickerson (Anthony Gref and James H. Brown, on the brief), in pro. per.

Sam B. Berry, for appellee.

Before SANBORN and THAYER, Circuit Judges, and RINER, District Judge.

SANBORN, Circuit Judge. This is an appeal from an order denying a motion for a preliminary injunction to restrain the defendant from infringing letters patent No. 400,086, issued March 26, 1889, to the Farbenfabriken, vormals Friedr. Bayer & Co., a corporation of Germany, hereafter called Bayer & Co., as assignee of Oskar Hinsberg. The letters patent secure to Bayer & Co. the monopoly of the manufacture and sale of phenacetine or paracet-phenetidine in the United States. The appellant, Edward N. Dickerson, alleged in his bill that these letters patent had been issued and assigned to him, and that the appellee was infringing upon his rights by vending in the United States the improvement described in the patent. The appellee answered that Bayer & Co. was the sole owner and manufacturer of phenacetine, which he averred was the same substance which was manufactured by others in Germany and elsewhere as paracet-phenetidine; that Bayer & Co. was the real owner of the patent in suit, and the appellant was its agent, and held the assignment of all rights under the patent for its benefit; that the appellee had been informed and believed that about March 26, 1889, Bayer & Co., or Hinsberg for them, "obtained a patent on, or registered, in the German empire, this same 'phenacetine,'" and that the German patent or registration had expired, or been rendered void by the authorities of the German empire, and "that he, in common with many citizens of the United States has bought small quantities of said 'phenacetine' from persons outside of the United States, who had perfect and legal right to deal in the same, being the legal purchasers and sellers thereof, and that he has brought the same into the United States, and that he has resold a small quantity thereof in the United States for a legitimate profit." The answer contains some other allegations, but none that are material to the issue, and it contains no other denial of infringement. To this answer the appellant filed the usual replication, and upon these pleadings and certain affidavits, from which it appears that no patent had ever been issued in Germany, as alleged in the answer, and that every package of phenacetine that had ever been sold by Bayer & Co. in a foreign country had a prohibition against its importation into and sale within the United States printed upon it, and was sold subject to that prohibition, the motion for the temporary injunction was heard and denied.

If it were conceded that Bayer & Co. is the real owner of the let-

ters patent in suit, as alleged in the answer, it would be difficult, upon the facts disclosed by this record, to justify a sale of phenacetine in the United States by this appellee. Section 4884 of the Revised Statutes provides that "every patent shall contain * * * a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use and vend the invention or discovery throughout the United States, and the territories thereof." The answer avers that the appellee bought the phenacetine he is selling in a foreign country, either from Bayer & Co., or from others who had a legal right to sell it in that country. He must have bought it, therefore, of Bayer & Co., or their vendees, or of others. If he bought it of others than Bayer & Co. or their vendees, he bought with it no right to sell it in the United States, because no one but Bayer & Co. and their vendees had that right in this country. The right to sell the patented article in the United States is not governed by the laws of Germany or of England, but by the laws of this nation; and under those laws and the patent before us Bayer & Co. has the "exclusive right to make, use and vend" phenacetine in the United States. Thus, in *Boesch v. Graff*, 133 U. S. 697, 703, 10 Sup. Ct. 378, a case in which the defendant had purchased in Germany, from one Hecht, who had the legal right to sell them there, certain burners, which had been patented in both Germany and the United States, Chief Justice Fuller said:

"The right which Hecht had to make and sell the burners in Germany was allowed him under the laws of that country, and purchasers from him could not be thereby authorized to sell the articles in the United States, in defiance of the rights of the patentees under a United States patent."

The cases of *Adams v. Burke*, 17 Wall. 453, 456; *Hobbie v. Jennison*, 149 U. S. 355, 362, 13 Sup. Ct. 879, and *Keeler v. Folding-Bed Co.*, 157 U. S. 659, 664, 15 Sup. Ct. 738, in which it was held that one who purchases patented articles of a territorial assignee within the district of the United States assigned to him, may sell them again in the territory owned by another, do not rule the case in hand. They rest upon the principle that one who buys the patented article of a party who is legally empowered to sell it under the patent has once paid tribute to the monopoly, and has thereby acquired the right to use and sell the article he buys elsewhere within the United States. But one who purchases in a foreign country, of others than the owners of the United States patent or their vendees, pays nothing, either directly or indirectly, to the owners of the patent, and therefore he acquires no right to make, use, or vend the article which he buys within the territorial limits of their monopoly. It follows that, if the appellee bought the phenacetine he is selling of others than Bayer & Co., or its vendees, he is infringing upon the exclusive right of this patentee, and an injunction should issue.

On the other hand, if the appellee bought the phenacetine he is selling in a foreign country from Bayer & Co., or from its vendees, subject to the express condition that it should not be imported into the United States, or sold within their limits, the exclusive right to sell the patented article within the United States which was granted to Bayer & Co. by the patent was not abridged by that purchase.

Conceding—but not deciding—that one who buys a patented article without restriction in a foreign country from the owner of the United States patent has the right to use and vend it in this country upon the general principle that a patented article purchased from the patentee passes without the limit of the monopoly (*Holiday v. Mattheson*, 24 Fed. 185; *Dickerson v. Matheson*, 6 C. C. A. 466, 57 Fed. 524, 527), there can be no doubt that a patentee has the same right and power to sell the patented article upon conditions or with restrictions that he has to sell it at all. Bayer & Co. had the right to sell its phenacetine in Germany without restriction. It had an equal right to sell it subject to the limitation that it should not be sold or used in any way that would curtail or affect the exclusive right which that corporation held under this patent to make, use, and vend the phenacetine in the United States. If the corporation sold the patented article subject to such a restriction, the purchasers, with notice of this limitation, whether immediate or remote, could acquire no better right than strangers to infringe upon the monopoly secured by the patent. That monopoly would still remain intact, and purchasers of the phenacetine which had been sold under the restriction must be liable for its use and sale in the United States to the same extent as those who made it or bought it of strangers within their limits. *Dickerson v. Matheson*, 6 C. C. A. 466, 57 Fed. 524, 526, 528; *Id.*, 50 Fed. 73, 77; *Id.*, 47 Fed. 319. The record is that every package of this article sold by Bayer & Co. in a foreign country was sold on the express condition that it should not be imported into or sold within the United States, and that this prohibition was plainly printed upon every package. The necessary result is that, whether the appellee bought in a foreign country the phenacetine which he is now selling in the state of Colorado from Bayer & Co., or its vendees, subject to this restriction, or from others without restriction, he is alike an infringer upon the exclusive right to make, use, and vend the phenacetine within the United States, which was granted to this corporation by the letters patent. The order denying the motion for a temporary injunction must accordingly be reversed, and the case must be remanded to the court below, with directions to issue the injunction, and it is so ordered.

SALOMON et al. v. GARVIN MACH. CO.

(Circuit Court, S. D. New York. December 27, 1897.)

1. PATENTS—NOVELTY AND INFRINGEMENT—FRICTION CLUTCHES.

The Salomon patent, No. 354,242, for improvements in friction clutches, consisting in the combination, with the shaft and pulley, of the hub mounted on the shaft, a double expansion ring connected with the hub, and means for expanding the ring against the interior of the pulley, shows patentable novelty as to the first claim, the novel feature of which is the double expansion ring; and the claim is infringed by a device cast in one piece, with curved arms in place of the interior ring, and which perform all the functions thereof, and are a mechanical equivalent.

2. SAME—CONSTRUCTION OF CLAIM.

Patents should not be defeated on the construction of a single immaterial and inartistic word used in the claim, and hence the use of the word

"ring" will not confine the claim to that precise device when other words, such as "curved arms," or "annular support," might have been used with equal propriety to describe the actual invention.

This was a suit in equity by Etienne Salomon and George Schrade against the Garvin Machine Company for alleged infringement of a patent for improvements in friction clutches.

A. Bell Malcomson, for complainants.

C. Godfrey Patterson, for defendant.

COXE, District Judge. This is an equity suit for the infringement of letters patent, No. 354,242, granted to Etienne Salomon, December 14, 1886, for improvements in friction clutches. The object of the invention was to produce a friction clutch which is simple, cheap, durable and certain in operation. It consists of a cast double expansion ring and hub screwed on the power shaft by set screws. Openings are cut in the outer ring to allow of its expansion by means of levers set loosely in one opening and operated by forks formed on a sliding sleeve. By tightening these levers the inner ring becomes a spring and brings the outside rim of the clutch in contact with the pulley at all points.

The first claim is the only one involved.

"(1) In a friction clutch, the combination, with a sliding shaft and pulley, of a hub mounted on said shaft, a double expansion ring connected with said hub, and means for expanding said ring against the interior of the pulley, substantially as and for the purposes set forth."

The defenses are lack of novelty and invention and noninfringement.

The elements of the claim are first, a shaft and pulley; second, a hub mounted on the shaft; third, a double expansion ring connected with the hub, and, fourth, means for expanding said ring against the interior of the pulley. Of these the novel feature will be found to reside in the third element of the combination, namely, the double expansion ring connected with the hub. This element was new with Salomon. None of the references offered in evidence shows such a construction, or anything which can be deemed an equivalent. A number of patents were introduced in evidence, but they failed to anticipate or limit the patent in this essential particular. The complainants' position in this regard cannot be better stated than by quoting the language of their expert, Mr. Henry Connett, who has added to the perspicuity of his statement the unusual and doubly welcome charm of brevity. He says:

"There is no suggestion in any of these prior patents of the invention of Salomon set forth in patent 354,242. The invention of Salomon as set forth in complainants' patent was a new departure from the old styles of friction clutch, which consisted in splitting a single tire or ring in one or more places and expanding or contracting it. Salomon's device added an inner ring, to act as a compensating element, and equally distribute the expansion of the outer or friction ring around its circumference. This element does not appear in any one of the patents referred to in the question and this element is specifically claimed in the first claim of complainants' patent."

The defendant's device is cast in one piece with curved arms in place of the interior ring of the patent. These arms are not con-

centric with the outer ring, but the proof is persuasive that they accomplish all the functions attributed to the complainants' ring. It is undisputed that the patentee, who was employed by the defendant company, exhibited his patent to the president of the company in the hope that the company would manufacture under it; that the patent remained in the possession of the president for some time and that it was after this occurrence that the clutch now complained of by the complainants made its appearance upon the market. In the catalogue issued by the defendant in July, 1893, this device is described as follows:

"The friction ring has no direct connection with the hub, this connection being by two curved arms extending as far as possible to the opposite side of the hub, allowing the ring to fill in all directions."

Thus it will be seen that before this action was commenced the defendant company attributed to the new device the same advantages and mode of operation which are found in the complainants' clutch due to the essential and novel feature of the combination in question. It is true that the curved arms of the defendant's clutch are not, strictly speaking, a ring, but that they are the equivalent of a ring and perform the same office as the ring of the patent, cannot be doubted. The language of the specification leaves no question as to the meaning the patentee intended to convey. Although patents are sometimes defeated upon the construction of a single immaterial and inartistic word, they ought not to be. There was nothing in the prior art requiring the patentee to limit his interior device to the precise form of a ring. He might have used the words "curved arms," or "annular support" with equal propriety. The defendant, if it uses the combination, cannot avoid infringement on the narrow pretext that the essential element is not in the precise form shown in the specification. It is hardly disputed that the defendant's arms have the qualities of a spring, but it is argued that its spring operates only as a buffer and not to diffuse expansion to all parts of the outer ring. It is thought that this contention, assuming it to be material, is not supported by the proof. It is at variance with the defendant's own declaration. The defendant's device, though differing in appearance and in some minor details, embodies all the elements of the patented combination or exact equivalents therefor and is an infringement of the claim in question. The complainant is entitled to the usual decree.

WILLIAMS v. AMERICAN STRING WRAPPER CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1898.)

No. 433.

PATENTS—INVENTION—STRING WRAPPERS.

The Williams patent, No. 558,244, for an improvement in string wrappers, consisting in cutting into the wrapper on both sides of the end of the string, to facilitate getting hold of the string, so that the wrapper may be easily opened without tearing or injuring the newspaper or other article wrapped therein, is void for want of invention. 81 Fed. 200, affirmed.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This was a suit in equity by Benajah Williams against the American String Wrapper Company and Arthur L. Curry for alleged infringement of a patent. The circuit court dismissed the bill for want of equity (81 Fed. 200), and the complainant has appealed.

Frank T. Brown, for appellant.

C. Clarence Poole and Taylor E. Brown, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. In this case the circuit court found that letters patent of the United States, 558,244, issued on April 14, 1896, to Benajah Williams, were invalid for want of novelty, and accordingly dismissed the bill, which was brought to obtain an injunction against infringement. *Williams v. Wrapper Co.*, 81 Fed. 200. The first claim of the patent reads in this wise:

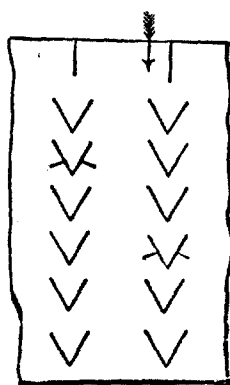
"A wrapper for newspapers, periodicals, and the like, comprising a body portion having a thread or cord attached thereto, said thread or cord arranged in proximity to and parallel with the end of said body portion, and extending transversely across the same, and terminating flush with the edge thereof; said body portion provided with slits in the edge thereof adjacent to the ends of the thread or cord, forming a partially detached portion, which partially detached portion remains attached to the thread or cord, as and for the purpose set forth."

The other claims differ from this only in minor particulars, the second describing "the inner ends of said slits" as "converging towards each other and the thread or cord," and the third, besides the inclined slits, calling for a wrapper "comprising a rectangular body." The specification, in part, says:

"The object of this invention is to provide a wrapper that can be easily opened without tearing or injuring the newspaper, periodical, or other article wrapped therein. * * * Adjacent to the gummed end of wrapper, A, and extending entirely across the wrapper, parallel with the end thereof, is a small flexible thread or string, C, which may be secured to the wrapper by first applying to the thread or string an adhesive substance, and then, before the adhesive substance becomes dry, applying said thread or string directly to the material out of which the wrapper is made, and permitting the adhesive material to be dried in any suitable manner. The string or thread is of a length such that its ends are flush with the edges of the wrapper, as shown. On each side of the string, at the ends thereof, I provide a short notch or slit, D, in the edge of the wrapper, as shown, for a purpose to be presently described. The two slits at each end may be inclined towards each other from the outer edge of the wrapper. The string or thread, C, is applied to the same side of the wrapper as the adhesive substance, B; so that when the wrapper is wrapped around a newspaper, periodical, or other article, as indicated at E, Fig. 2, the string or thread will be on the inner surface of the wrappers, as shown. The wrapping of the article is begun at the end of the wrapper opposite the end to which the adhesive substance and the thread or string are applied, and the said string or thread is located adjacent to the gummed end of the wrapper, so that, when the wrapper is applied to the article, only one thickness of the wrapper is necessary to be ruptured to open the package or bundle. The provision of the slits, D, enables a person to easily grasp the end of the string or thread to effect a rupture of the wrapper across its entire width. If desired, slits, D, may be provided only in one edge of the body portion. The portion of the wrapper included between the two slits at the end of the string is prevented from becoming detached by its adhesion to the

string, and also by reason of the fact that the slits, D, do not join each other at the inner extremities thereof. It will be obvious that the flexibility of the thread or string will not interfere with the folding or rolling of the wrappers when handled in bulk. Wrappers constructed in accordance with my invention may be made of any desired size and shape, and of any suitable material. If desired, the gumming of the edge of the wrapper may be omitted, and the wrapper may be secured, when wrapped around an article, by any suitable or well-known method, as will be readily understood."

Numerous patents were produced in proof of the prior art, but, by stipulation of counsel, copies of all were omitted from the record except the British patent 340, issued in 1866 to Earnest Petito, and letters patent of the United States 180,773, issued August 8, 1876, to H. B. Magruder and R. M. Walsh; 271,006, issued on January 23, 1883, to J. A. Whitney; 459,461, issued on September 15, 1891, to W. J. Puckett; 486,523, issued on November 22, 1892, to J. Zimmerman; and 519,185, issued May 1, 1894, to P. J. Ogle. Prior use also was alleged, predicated upon wrappers made at Toledo, Ohio, between 1889 and 1896, according to designs of Henry T. Marshall, as illustrated in his applications for patents filed February 10 and March 22, 1888, drawings of which are in the record by agreement. The Petito patent shows a thread in the fold of an envelope for a letter with perforations near the end of the fold. The patent to Magruder and Walsh also has reference to envelopes for letters, and shows a string or cord, covered within the folded end, and not extending beyond the sides, with a series of perforations in a corner of the envelope near one end of the string. The Whitney design is for an envelope or covering for cigars, and need not be more particularly described. The Puckett patent shows a cord in the bottom fold of an envelope, the corners of which are made to project and cover the knotted ends of the string. The Zimmerman patent is for improvements in key-opening sheet-metal cans, and shows a detached strip terminating in a free tongue at one edge of the blank sheet of which the can is made. The Ogle design, of which an illustration is given



in the margin, is a wrapper or envelope for periodicals and the like, provided with two lines of slits forming a tearing strip, the slits of each line being disposed at such angles that the line of fracture is prevented from deviating from its proper course. The Marshall designs were also for wrappers for periodicals or newspapers, and show a thread extending across the body near the gummed edge of the wrapper, the ends of the thread in one form of construction projecting beyond the side lines of the wrapper, and in the other form terminating flush with those lines in a circular notch cut out of the paper, whereby the ends of the string are left uncovered.

In view of what had been done before, Williams, it is clear, cannot be credited with a patentable contribution to the art. His conception may have been original with him, but it was not essentially new. The use of the string or cord was familiar, and if a cut or slit in the

edges of a wrapper, already provided with a string, for the purpose of making easy the grasping of the ends of the string, was not otherwise an obvious expedient, it was plainly suggested by the patent of Ogle. It was only necessary to place the string upon the tearing strip of that patent to produce the exact design in question. The decree below must be affirmed.

LAWRENCE et al. v. FLATBOAT.

(District Court, S. D. Alabama, December 27, 1897.)

1. MARITIME LIENS—ADMIRALTY JURISDICTION.

A flatboat, with a pile driver and its engine erected thereon, which is mainly used in constructing bulkheads for the erection of channel lights, and which is also employed in transporting materials used in the work (being towed by a tug for this purpose), is to be classed as a "vessel," within the maritime jurisdiction, and subject to maritime liens.

2. SAME—SEAMEN'S WAGES.

Persons employed upon such a boat, who assist in moving her about, and who also work the pile driver and are engaged in constructing the bulkhead, are to be regarded as rendering maritime services, so as to give them a lien on the vessel for their wages.

This was a libel in rem by Millard T. Lawrence and others against an unnamed flatboat or pile driver, of which the Southern Log-Cart & Supply Company are claimants.

Sheldon & Burgett and W. D. McKinstry, for libelants.
Gregory L. & Harry T. Smith, for claimant.

TOULMIN, District Judge. The libel is to recover a balance of wages due libelants for services on the said flatboat. The boat had erected on her a pile driver, which was used in driving piling in the construction of bulkheads on which to erect channel lights along the channel of Mobile Bay for the guidance of vessels navigating the bay. She was also provided with an engine aboard, with which to operate the pile driver. The business of the boat was to transport the material used in constructing the bulkheads from the city of Mobile to the several points in the bay along the channel where such material was to be used,—some 25 miles distant from said city,—but mainly to drive the piling in the construction of the said bulkheads. The boat was without rudder, sails, or other means of propulsion, and was towed from the city of Mobile to the bay, and from the bay to the city, when going with and returning for said material; but when moving about the bay from one place to another, where the work was being done, she was propelled by a rude sail and rudder, improvised for the purpose, and sometimes by the use of anchors, windlass, and rope, using the engine on board for the purpose of operating the windlass. The libelant Maynard was the engineer of the boat, and his services were rendered in operating the engine for navigation, when necessary, and in operating it when employed in driving piling. The services of the other libelants were rendered in the special business of the boat,—loading her with the material transported by her, assisting in moving her from place to place about the bay, so far as mov-

ing was necessary, but mainly in driving the piling and constructing the bulkheads referred to.

The learned judge who decided the case of *The Alabama*, reported in 22 Fed. 449, in speaking of the case of the floating elevator (*The Hezekiah Baldwin*, 8 Ben. 556, Fed. Cas. No. 6,449), said:

"The elevator was capable of being, and its business required it to be, navigated from one place to another. When in place and in operation, it lifted grain and placed it aboard another water craft to be transported. Exactly the same may be said of the dredgeboat *Alabama*, except that it lifted mud instead of grain. Each aided commerce,—the one by loading grain in transit, the other by removing obstructions in the way of commerce by water."

So it was held that the dredgeboat and scows used in connection therewith were within the admiralty jurisdiction, and subject to a lien for towage. It seems to me that the flatboat in this case should likewise be classed as a vessel, rendering service in aid of commerce. She was capable of being navigated, and her business required her to be navigated, from one place to another. When at work she drove piling and constructed bulkheads for the erection of lights to mark the channel of the bay, in aid of navigation and commerce. Dredges and scows, though never used in the transfer of passengers or freight, and furnished with no motive power of their own, are vessels, and subject, as such, to maritime liens for service rendered. *The Alabama*, 19 Fed. 544. A dredge is subject to libel in admiralty for wages. *The Atlantic*, 53 Fed. 607, *The Starbuck*, 61 Fed. 502. In the case of *The Atlantic* it was held that an engineer on a steam dredge, chartered for work on a government contract, is entitled to a lien for wages. The dredge was engaged in dredging water ways near Charleston, S. C. In the case of *The Minna*, 11 Fed. 759, Judge Brown says "that all hands employed upon a vessel, except the master, are entitled to a lien if their services are in furtherance of the main object of the enterprise in which she is engaged." It is also held that the lien is not limited to acts done for the benefit of the ship, or in the actual performance of seamen's duties. *Ringgold v. Crocker*, Abb. Adm. 344, Fed. Cas. No. 11,843; *Reed v. Canfield*, 1 Sumn. 195, Fed. Cas. No. 11,641. Any service is maritime if substantially to be performed on water within the ebb and flow of the tide. *The D. C. Salisbury*, Olcott, 71, Fed. Cas. No. 3,694. See, also, Rev. St. U. S. § 4612. In *Saylor v. Tavlör*, 23 C. C. A. 343, 77 Fed. 476, it is held that if the craft comes within the maritime jurisdiction the persons employed aboard of her come also under that jurisdiction. In the case of *The Destroyer*, 56 Fed. 310, it is said that, "to entitle one to a lien for wages against a vessel, it is not necessary that the services be rendered in navigation alone; that where the services are rendered in the special business of the vessel, in moving her about, so far as moving was desired, but mainly in operating her machinery for throwing projectiles, which was her sole business, the men who rendered the services are entitled to a lien upon the vessel for wages." According to the decided weight of authority, a craft used as the flatboat, with pile driver, in this case was used, should be classed as a vessel, and subject to a maritime lien for seamen's wages. The proctor for claimant practically concedes this proposi-

tion, but his contention is that the libelants were not seamen, and performed no, or but little, maritime service on the boat. He claims that the primary object of libelants' employment was the erection of bulkheads upon which the channel lights were placed; that the moving of the boat from place to place was only incidental to the work of erecting the bulkheads; and that such work was not maritime in its character, and created no lien upon the vessel. While it is true that the navigation of the boat from place to place in the bay was only incidental to the work of erecting the bulkheads, which was the main object of her employment, and of the employment of the hands upon her, I cannot agree with the able proctor in the conclusion that the work done and the services rendered were not maritime in their character and created no lien upon the vessel. The work done by the vessel related to and was an aid to navigation and commerce, and the services rendered by the libelants were rendered in the special business of the vessel and in furtherance of the work in which she was engaged. In the case of *The Minna*, supra, Judge Brown says that "the earlier cases indicate that mere landsmen have no lien unless their labors contribute to the preservation or navigation of the ship, or to the sustenance or health of the crew"; but he considers the better rule to be, and he holds, "that all hands employed upon a vessel, except the master, are entitled to a lien if their services are in furtherance of the main object of the enterprise in which she is engaged." My opinion is that the libelants have a lien for their wages which is enforceable in admiralty. A decree will accordingly be entered in favor of libelants.

SERVISS v. FERGUSON et al.

(Circuit Court of Appeals, Second Circuit. December 14, 1897.)

No. 16.

1. SALVAGE—DERELICTS—OBLIGATION OF SALVORS.

Salvors rescuing a derelict property are under a legal obligation to care for the preservation thereof while they retain possession.

2. SAME.

Salvors of a derelict barge, who placed her in a slip, where she afterwards sunk, and was then run upon and crushed by a vessel moving about in the slip, held liable in damages to her owners for the amount of their loss less a reasonable salvage award, on account of their negligence in not taking other precautions to indicate the positions of the sunken boat than merely notifying persons about the wharf of the place where she was sunk, and then going away, and leaving no one in charge.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by William H. Serviss against William E. Ferguson and others, owners of the tug Governor, to recover damages for the loss of a scow. The circuit court entered a decree for the libellant, and the respondents have appealed.

The district court in rendering its decision delivered the following opinion (BROWN, District Judge):

"The defendant, about midnight on February 8, 1895, picked up the libellant's scow, which was adrift with no one on board, in the ice of the East river, and

towed her into the slip between Seventeenth and Eighteenth streets, and moored her outside of another scow there made fast to the dock. Within a few hours afterwards, and while the defendant's tug was temporarily absent, the scow sank at her moorings, without any fault, as I find, of the defendant, and probably through previous injury of the ice. On the return of the salvor a few hours after, it was perceived that the scow had sunk; one mooring line was still taut running down into the water, and some fenders were afloat above her. The slip was occupied by a dredge and several scows belonging to a dredging company, a dumping boat, and several city dirt scows. These were moved around in the slip as occasion required, sometimes by tugs, sometimes by hand. Early in the forenoon one of the boats, being moved by hand, was run upon the sunken scow, but got off with the rising tide. There were contacts by other boats. Some days afterwards, when the scow was raised, it was found to be so crushed as to be worthless. I have no doubt that what was left of her was practically destroyed by the collision with the first boat.

"The libellant contends that the defendant as salvor is answerable for this loss, both for placing the libellant's boat in an unsafe place, and in taking no means for her preservation from injury after she sank. I think the place to which she was taken was well enough, if suitable care had been given to her afterwards; but in this latter respect the libellant's contention must, I think, be sustained.

"A liberal compensation is awarded by the court for salvage services, especially in the rescue of derelict vessels. A corresponding legal obligation rests upon the salvor to take reasonable care for the preservation of the property while he retains possession. Story, Bailm. (9th Ed.) § 623; The Sumner, 1 Brown's Adm. 52, Fed. Cas. No. 13,608.

"The only hesitation I have had in this case has arisen from the circumstances that at least two of the men who were at work about the slip noticed the taut line running beneath the water and the fenders afloat; and that from these circumstances they inferred that there was some sunken craft beneath. The defendant's captain, who had brought the boat in, also testified that he gave verbal notice to a number of persons about the wharf before going away in the morning as to the place where the boat was sunk. No pains, however, seem to have been taken to make this notice general, nor was any special buoy or other mark made of the wreck beneath the water, other than the line and fenders above spoken of.

"The rule of diligence obligatory on salvors is that of ordinary care, such as persons of reasonable prudence would naturally be expected to exercise for the preservation of their own property from loss or injury under like circumstances. Applying this rule, I am constrained to find that the line and the fenders were not sufficient as a reasonable protection to the scow, or a reasonable notice of the sunken wreck, considering the kind of work going on in the slip, and the persons in charge of it. I cannot conceive that a man of reasonable prudence would have left his own boat in that manner, liable to be destroyed by the boats moving back and forth in the slip, with no one in attendance to give warning as to the wreck, or any more plain and recognizable buoys. I must, therefore, allow a decree for the libellant, which will be for the value of the scow at the time she sank in the slip, less one-third thereof, deducted as an allowance for the salvage service.

"If it seems a hardship to require the defendant to pay for a boat they have rescued, possibly from complete destruction, it must be remembered that the compensation which the court awards for salvage services includes the recompense for all the necessary care of the salvaged property; and that the seeming hardship is no other or different than that in which any other negligent loss involves every ordinary bailee for hire."

James J. Macklin, for appellants.

J. A. Hyland, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decree of district court affirmed, with costs, on opinion of district judge.

THE JOB T. WILSON.**THE HOWARD.**

(District Court, D. Maryland. November 23, 1897.)

1. COLLISION—INJURY TO TOW—LIABILITY FOR DAMAGES.

Damages caused to a tow by the mutual fault of her tug and the other colliding vessel are chargeable, primarily, one-half against each offending vessel; but, if one of the latter cannot respond for its part, the other must pay the whole.

2. SAME.

In a case of mutual fault, where one of the colliding vessels was rendered practically worthless, so that a decree for half damages was entered against the other, *held*, that where the latter was also compelled to pay the entire claim of an innocent sufferer by the collision, who was entitled to hold both of the colliding vessels, her owners might recoup one-half the latter sum out of the half damages decreed to the other vessel.

3. SAME—LOSS OF EFFECTS BY CREW.

Members of the crew of a tug who lose personal effects by reason of a collision resulting from the mutual fault of the tug's officers and the other colliding vessel, being engaged in a common employment with their officers, cannot recover against the tug for their loss. Hence their only remedy is against the other colliding vessel for half their damages.

4. SAME—DAMAGES FOR DEATH OF SEAMAN.

Under a statute authorizing recovery for a wrongful death only in cases where deceased would have had a right of action for his injuries if death had not ensued, there is no right of action against a tug for death of members of the crew caused by a collision resulting in part from the negligence of the tug's officers, and in part from the fault of the other colliding vessel, and hence the only remedy is against the latter vessel for half damages.

These were libels to recover damages resulting from a collision between the steamtug Job T. Wilson and the steamship Howard. The court heretofore, on July 28, 1897, found both the colliding vessels in fault, made a decree for divided damages, and referred the cause to a master to ascertain the amount.

J. Southgate Lemmon, for Warwick Park Transp. Co.

C. Baker Clotworthy, for intervening petitioners and seamen on tug.

Pollard & Bagby, for representatives of persons who lost their lives in collision.

Wm. Pinkney Whyte and Daniel H. Hayne, for the Howard.

MORRIS, District Judge. In the matter of the proper decree to be passed apportioning the damages resulting from a collision. The court, by its interlocutory decree of July 28, 1897, found both the colliding vessels in fault, and decreed that the damages should be divided, and referred the case to a master to ascertain the amounts. The original libel was filed by the Warwick Transportation Company, the owner of the tug Job T. Wilson, against the steamship Howard, in rem. There was afterwards filed an intervening petition by the Virginia Dredging Company for the damages to a scow belonging to it which was being towed by the tug; also petitions by the crew of the tug for loss of their personal effects. There was also filed a libel in personam against the owners of the steamship Howard by the

widow and children of James F. Childress for the pecuniary loss to them by the death of Childress, who was an engineer on the tug, and who was drowned by the overturning of the tug in the collision; and also a similar libel by Samuel J. Chappel, who was the master of the tug, for pecuniary loss by the death of his son, 17 years old, who was cook on the tug and was also drowned. These libels to recover for the death of Childress and young Chappel are in personam against the Merchants' & Miners' Transportation Company, the owner of the steamship Howard; the right of action arising under the Maryland law, the place of collision being in the Patapsco river, within the limits of Maryland.

The Maryland Code of Public General Laws (volume 2, art. 67) provides that wherever the death of a person shall be caused by such a wrongful act, neglect, or default as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for the benefit of the wife, husband, parent, or child of the person whose death was wrongfully caused. Before the interlocutory decree was passed, the owner of the steamship filed a petition on May 28, 1897, in proper form, under the fifty-ninth admiralty rule, making the owner of the tug a party to the cause, and charging that the sole cause of the collision was the faulty navigation of the tug. On motion of the owner of the steamship, an order was passed July 27, 1897, by which the original libel, together with all the petitions filed therein, and the libels of the widow and children of Childress, and the libel of Chappel, and the libel of the owner of the steamship instituted under the fifty-ninth rule, were consolidated. On June 22, 1897, the owner of the tug filed his petition to limit liability under sections 4283-4285 of the Revised Statutes, and by an order passed July 23, 1897, it was allowed to surrender the tug and her pending freight to the marshal, who was directed to sell the tug and bring the proceeds into court. The tug was sold for a very inconsiderable sum, which yielded nothing after deducting expenses; so that, if the liability of the owner of the tug be limited to the proceeds of the tug, its liability is extinguished. The exceptions to the sums found as damage by the master's report having been overruled, the questions now to be considered have relation to the proper decree to be passed apportioning the damages.

First, as to the claim of the Virginia Dredging Company for damage, demurrage, and expenses on account of injury to its scow which was being towed by the tug. No fault is attributable to the scow, and its owner is an innocent sufferer, entitled to full compensation; and, while each wrongdoer is primarily chargeable with half the damage, if the innocent sufferer is unable to obtain the one-half charged against either he can compel the other to pay the whole. The full amount of this claim is \$3,050.

Second, the claim of the Warwick Park Transportation Company for injury to the tug, including all expenses, is \$4,200, of which it is entitled to recover one-half, amounting to \$2,100. The Howard was not injured, and the tug was injured to the extent that in her dam-

aged condition she proved to be practically worthless, so that the only fund from which any of the parties entitled to recover can be paid is the stipulation given by the owner of the Howard or the responsibility of the owner in personam. The Howard and her owner are, however, only liable for half the damages. Therefore it seems to me that if, by payments to innocent sufferers, the Howard is made to pay in excess of half to make good damages for which the tug is liable, she should be allowed to retain the excess out of the money in the hands of the steamship owner payable to the owner of the tug. One of the benefits of the power of the admiralty court to bring in all the parties charged with fault in a collision case, and to consolidate all the libels into one case, is that by one decree the court can settle the rights of all the parties and do substantial justice. *The North Star*, 106 U. S. 17, 27, 1 Sup. Ct. 41.

It is urged on behalf of the Warwick Park Transportation Company, the owner of the tug, that it should receive from the stipulators for the steamship its full one-half of its damages without deduction, because, having surrendered the tug, its liability is limited to her proceeds, and that to allow damages to the innocent sufferers to be deducted from its recovery against the steamship is to defeat that limitation; and, further, that the law does not permit the owner of the steamship to recoup any damages it may have to pay, because the law does not permit a claim for contribution by one wrongdoer against another. The answer is, I think, that the admiralty rule of apportioning the damages resulting from a collision, when both vessels are wrongdoers, is a rule peculiar to the admiralty, and is in direct conflict with the common-law rule. For special reasons of maritime policy, instead of refusing, as the common law does, to allow either of the wrongdoers to recover against the other, the admiralty provides a special proceeding to bring into one case all the parties charged with fault for the very purpose of compelling each to bear its share of the whole damage; and the decree in favor of innocent parties who are free from fault is not against the guilty in solido for the whole amount, but against each for its share, with the provision that, if the innocent party is unable to obtain satisfaction from either of those decreed against, he may proceed against the other, because he is entitled to be paid in full. *The Alabama*, 92 U. S. 695; *The Atlas*, 93 U. S. 302; *The Juniata*, Id. 337; *The Virginia Ehrman*, 97 U. S. 309; *The Sterling*, 106 U. S. 647, 1 Sup. Ct. 89. In *The Juniata* only one of the offending vessels was sued. There was a decree against that vessel for one-half the damages of *Pursglove*, the owner of the other vessel, and for the whole damage suffered by the United States, the innocent owner of cargo, and the court said (93 U. S. 340):

"The decree must therefore be changed so as to require full payment to be made to the United States by the claimants of the *Juniata*. Whatever their rights may be against *Pursglove* by reason of such payment of more than one-half must be settled in another proceeding. It cannot be done in this litigation."

Subsequently, and after the case of *The North Star*, 106 U. S. 17, 1 Sup. Ct. 41, the supreme court promulgated rule 59 in admiralty (112 U. S. 743), giving the right to the owners of the vessel proceeded

against to bring any other vessel contributing to the collision into the same suit, so that the court might render such decree "as to law and justice shall appertain." In *The North Star* the supreme court refused to allow the statute of limited liability to be applied so as to work the injustice of permitting the owners of one vessel to receive their full moiety of the loss, and then defeat the owners of the other vessel by interposing the limitation of liability. It seems to me a similar injustice would be worked by permitting the owners of a vessel which is primarily liable for only one-half of the damage of an innocent sufferer to be compelled to pay the other half charged against the other vessel, and yet refusing to allow the owners of the vessel which has paid the whole to obtain the excess out of the money in their hands payable to the owners of the other vessel for damages arising from the same collision. The whole object, as it seems to me, of the practice in admiralty, which enables the court to deal with all the questions arising from a collision as one transaction, is to prevent such inequitable results. *The City of New York*, 25 Fed. 149; *The Canima*, 17 Fed. 271; *The Hercules*, 20 Fed. 205.

There was also on board the tug a passenger, John G. Trent, who lost his personal effects to the value of \$70, and who, as an innocent sufferer, is entitled to full compensation. He is to be paid by the stipulators of the Howard, with the right to recoup one-half from the sum awarded to the tug.

The report also finds the amounts of the losses of the personal effects of the master and the crew of the tug. These claimants, being all of them members of the crew of the tug and engaged in her navigation, were, in my judgment, in a common employment, and could not recover against the tug. As to the master and mate, it was their own personal neglect and want of care which contributed to bring about the collision, and as to the others, so far as the navigation of the tug was concerned, I hold that they were engaged in a common employment. As to the mate, who had charge of the wheel and failed to avoid the Howard, and as to the master, who negligently performed the duties of a lookout, the case seems clear; and as to the others of the crew it does not seem to me that the owner owed to them the duty of seeing that the master and mate made no mistakes of navigation. After the owner had provided a proper tug and competent officers and crew, they all took the risk, as it appears to me, of the negligence of any of the ship's company in the ordinary work of the tug, and cannot recover against the tug for damages suffered by reason of a disaster to which no fault of the owner has in any way contributed. *The Queen*, 40 Fed. 694; *The Bristol*, 29 Fed. 867. These claimants are therefore entitled to a decree against the stipulators for the Howard for one-half of the respective losses.

With regard to the amounts awarded to the widow and children of the engineer, and to the master, who was the father of the young man 17 years of age who was drowned, it seems to me that they are only entitled to recover one-half of the amounts awarded. Under the Maryland statute they can only recover if the deceased would have had a right of action for his injuries if death had not ensued. If I am right in holding that none of the tug's officers and crew could

have sued the owner of the tug, because the owner of the tug had not violated any duty which as owner it owed to them, then the statute gives no right of action against the tug. It seems impossible to suppose that, if the engineer had negligently caused the boiler to explode, the master or mate could have had a right of action against the owner; and it seems equally unreasonable that the engineer could have a right of action against the owner because the mate made a mistake as to how near he was to the edge of the channel, and the master was negligent in performing the self-assumed duty of a lookout. They were all engaged in the common employment of navigating the tug. *Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *Railway Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983. It follows that, having no right of action against the tug, these suitors must lose the half of the damages for which the tug would be responsible, and can only recover from the Howard the remaining half. I am aware that in *Transfer No. 4*, 9 C. C. A. 521, 61 Fed. 364, this rule was not approved, but it seems to me the weight of authority and of reason sustains it.

Taking the master's report of the amounts of the damages, the decree should be as follows:

Against the stipulators for the steamship Howard in favor of the Virginia Dredging Company for one-half of the full amount of \$3,050, viz. \$1,525; with the right, also, to said dredging company to be paid any part of the remaining \$1,525 which shall not be paid by the owners of the tug.

Samuel J. Chappel (master), $\frac{1}{2}$ personal effects, $\frac{1}{2}$ of \$62.....	\$	31	00
Samuel J. Chappel (master), $\frac{1}{2}$ personal effects of son, $\frac{1}{2}$ of \$55.....		27	50
John G. Trent (passenger), his personal effects, his whole loss, viz....		70	00
—with the right when paid to deduct $\frac{1}{2}$ from the owners of tug.			
Zero Walker (mate), $\frac{1}{2}$ personal effects, $\frac{1}{2}$ of \$100.....		50	00
Lawrence W. Smith (fireman), $\frac{1}{2}$ personal effects, $\frac{1}{2}$ of \$57.70.....		28	85
Charles Kersey (fireman), $\frac{1}{2}$ personal effects, $\frac{1}{2}$ of \$52.....		26	00
Sarah E. Childress and children, for loss of life of James F. Childress, $\frac{1}{2}$ of \$3,000.....		1,500	00
Samuel J. Chappel (master), for loss of life of his son Charles, $\frac{1}{2}$ of \$700		350	00
The Warwick Park Transportation Company, $\frac{1}{2}$ of \$4,200..	\$2,100	00	
Less $\frac{1}{2}$ of \$3,050, the whole damage paid to the			
Virginia Dredging Company, if paid by the			
stipulators for the Howard.....			
	\$1,525	00	
Less $\frac{1}{2}$ of \$70, the whole damage paid to John			
G. Trent, a passenger on the tug.....			
	35	00	
		1,560	00
		540	00

I understood at the argument that there were some items of expenditure after the collision made by the owners of the tug included in the award of \$4,200, which it was conceded should be paid in full. As these items are not separated in the master's report, I have not been able to deal with them, but counsel can bring them to my attention. Upon the question of interest and the costs I will also hear counsel. It may be more convenient that the stipulators for the Howard be required to pay the sums decreed against them into the registry of the court for distribution.

KING v. LAWSON et al.

(Circuit Court, D. South Dakota, S. D. December 15, 1897.)

FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

A bill to protect a homestead entry man in making the improvements required by the law, by enjoining interference by defendants, who, as is alleged, claimed a portion of the land under the town-site act, but whose claims were rejected by the secretary of the interior, does not present any question arising under the laws of the United States.

Suit in equity by Henry J. King against William Lawson and others. Heard on motion for temporary injunction.

King & Greene, for complainant.

John D. Rivers, for defendants.

CARLAND, District Judge. The complainant made a homestead entry of lots 3 and 4, and S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, section 10, and lot 1 of section 15, township 104, range — W. of 5th P. M., Brule county, S. D., under section 2290, Rev. St. U. S., on September 30, 1897. He had made a settlement upon said land before the date of said entry, and from the time of settlement until the present has been in the possession of the same, except as that possession has been disturbed by the defendants, who have resided upon the land for some years, and claim to reside upon the same as town-site claimants; being in the actual occupancy of a portion of said land, to the extent of two acres each. Before complainant was allowed to make a homestead entry of the land by the local land office, a hearing was ordered, and had, to determine whether complainant should be allowed to make a homestead entry of the same, or the mayor of the city of Chamberlain, S. D., a town-site entry thereof in trust for the defendants and others. Such proceedings were had on said hearing that on the 15th day of June, 1897, the honorable secretary of the interior decided that complainant should be allowed to make a homestead entry of the land, and that the defendants had no rights thereto as town-site claimants. The defendants refused to abandon the land, and are insisting upon their right to remain thereon, and, as complainant avers, refuse to allow him to make his improvements and otherwise comply with the homestead laws of the United States, and have destroyed certain improvements, in the way of fencing, made by complainant. Complainant avers that he is in possession under and by virtue of the homestead laws of the United States, and that the rights involved, and claimed by him, are based upon the federal statutes and laws in relation to homestead claims. All the parties to this action are citizens of South Dakota. On November 12, 1897, complainant filed his bill in this court, alleging the foregoing facts, among others, and praying for a mandatory and prohibitory injunction, removing the defendants from the possession of said land, and restraining them from in any wise interfering with complainant in the making of the necessary improvements required of him as a homestead entry man. Complainant also moved, on the bill, upon due

notice, for a temporary injunction. A hearing on said motion was had December 7, 1897.

Defendants opposed the granting of the temporary injunction upon several grounds, the first among which is want of jurisdiction, arising from the fact that the bill does not show that any federal question is involved in this controversy. The fact that a holding that a federal question exists in the case stated would bring under the jurisdiction of this court numerous cases where title to land is being acquired under the land laws of the United States has caused a somewhat careful consideration of this point. Whether the case is one which presents a federal question must be ascertained from the bill itself. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192; *St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co.*, 15 C. C. A. 167, 68 Fed. 9. A case is said to arise under the constitution and laws of the United States whenever its correct decision depends upon the construction of either, or whenever the constitution, laws, or treaties of the United States create or confer the right, privilege, claim, or title on which the plaintiff relies, in whole or in part, for a recovery. A case is one of federal cognizance whenever it becomes necessary to construe the constitution, laws, or treaties of the United States, or to decide as to the existence of some right, title, privilege, claim, or immunity asserted thereunder. *Cohens v. Virginia*, 6 Wheat. 264; *Osborn v. Bank*, 9 Wheat. 738; *Starin v. City of New York*, 115 U. S. 248, 6 Sup. Ct. 28; *Mayor v. Cooper*, 6 Wall. 247; *Tennessee v. Davis*, 100 U. S. 257; *Railroad Co. v. Mississippi*, 102 U. S. 135; *Metcalf v. Watertown*, 128 U. S. 586, 588, 9 Sup. Ct. 173; *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030; *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635, 5 Sup. Ct. 1104; *Water Co. v. Keyes*, 96 U. S. 199; *Romie v. Casanova*, 91 U. S. 379.

In the case of *St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co.*, 15 C. C. A. 179, 68 Fed. 9, the court of appeals for this circuit stated the doctrine about as broadly as can be found in any of the cases. The court said:

"Nor is it at all material, so far as the question of jurisdiction is concerned, that the court may not be compelled to construe the acts of congress in the respect stated, or in any other; for, as we have already shown, its jurisdiction does not depend upon the nature of the question that is ultimately decisive of the plaintiff's right to recover. If a case is commenced originally in the circuit court, and, by a fair construction of the complaint, it appears that the plaintiff predicates his right to relief on the meaning or effect of a law of the United States, and the claim is made in good faith, so that there is a real, instead of a merely colorable, controversy, then jurisdiction over the case exists, even though it may appear that the right to the same relief is asserted on another ground, that does not involve the consideration of a federal question. In concluding the discussion on this branch of the case, it is proper to add that we do not concur in the view that the case is one of federal cognizance merely because the title to the lands in controversy is derived from the United States."

In *Railway Co. v. Ziegler*, 167 U. S. 65, 17 Sup. Ct. 728, *Ziegler* alleged in his complaint that on May 1, 1889, he was in possession, as a pre-emptor under the laws of the United States, of a tract of land containing about 80 acres, and on said date had made all the

improvements, and had lived on the land a sufficient length of time, and had done all other acts necessary, to entitle him to a patent to the same from the United States; that the defendant company, being a corporation of the territory of Washington, on said date entered upon and seized a strip of said land, 50 feet in width, and appropriated it for railroad purposes, without the consent of the plaintiff, and without having compensated him therefor; and that the entry upon and seizure by the defendant of the land were under and pursuant to the laws of the territory of Washington, authorizing railroads to appropriate land for right of way for railroad tracks. The supreme court said it would take judicial knowledge that the defendant railroad was acting under the act of congress entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875 (18 Stat. 482), when it seized plaintiff's land, and, with this knowledge to aid the complaint, it presented a federal question; but it is nowhere intimated that, if the defendant company had not been acting under an act of congress, the complaint would have presented a federal question.

In *Romie v. Casonova*, 91 U. S. 379, it was held that where, in a state court, both parties to a suit for the recovery of the possession of lands claimed under a common grantor, whose title under the United States was admitted, and where the controversy extended only to the rights which they had severally acquired under it, no federal question existed.

Applying the law as established by the foregoing decisions, and giving to the statute conferring jurisdiction upon this court a liberal interpretation, how does it appear, from the facts stated, that there may arise any federal question in the trial of the case at bar? How does it appear that the court will be called upon to construe, explain, or give effect to any law of congress? It is not sufficient for the pleader to allege merely the legal conclusion that the complainant's rights depend upon the construction of a law of the United States; but the facts themselves must be stated, so that the court can determine for itself whether the controversy is one arising under the constitution or laws of the United States. In the case at bar the facts, no doubt, are stated as fully as it was possible for the pleader to state them. The case simply presents a homestead entry man in possession of land from which he desires to oust the defendants, who are, so far as the bill is concerned, trespassers. The trial of a case would only involve the determination of questions of fact, as it does not appear from the bill that defendants are claiming any different construction of the laws of the United States than is the complainant. The complainant may be considered as a vendee in possession under a land contract. He will obtain title if he performs his contract, but the mere fact that his contract is with the United States does not necessarily involve the construction of the laws of the United States, or the determination of the meaning or effect of such laws, or any of them. The United States makes many contracts, and nearly all of them are made under and by authority conferred by some act of congress; but the mere fact that these contracts are so made would not of itself give a party to such contract the right to go into a fed-

eral court in every suit arising under the contract, between parties other than the United States. The case of *Butler v. Shafer*, 67 Fed. 161, is quite in point upon the question under consideration. Butler was a duly-qualified homestead entry man upon certain land, situated in Umatilla county, Or. At the time Butler made his entry of the land in controversy in that case the defendant Shafer and others were in possession of the land, claiming to have settled thereon June 2, 1890, with the intent to secure title by purchase from the Northern Pacific Railway Company when it should have earned the same by compliance with the terms of the act of congress granting it the said land, and that by reason of such settlement the said defendants claimed the right to purchase said land under the act of congress approved September 29, 1890. The complaint further alleged that said defendants at the time said act took effect were not in the possession of said land under any deed, written contract, or license from said railroad company, and they had not prior to January 1, 1888, settled on said lands with a bona fide intent, or any intent, to secure title, and had not prior to the taking effect of the act of September 29, 1890, settled on said land, or resided thereon, but during all said time, and up to the 30th day of July, 1891, were settlers and residents upon other lands, not contiguous to the land in dispute, claiming the same under the homestead laws of the United States; that the defendants threatened and intended, by force, to prevent the complainant from entering upon his said homestead claim, and from complying with the terms of the homestead laws, whereby he may acquire title thereto. The complaint also prayed for a decree awarding him the possession of said land, and enjoining the defendants from interfering therewith. Upon the facts stated, Gilbert, Circuit Judge, said:

"If it is true that the defendants are not in privity with the railroad company, by deed, contract, or license, and were not settlers upon the land, but resided elsewhere, the conclusion follows that their possession is without right; but, in arriving at that conclusion, there is not necessarily involved a construction of the language of the act."

And the learned judge held that the case was not one where a federal question existed; citing many cases.

The only case that would seem to be in conflict with the conclusion reached in this case is the case of *Jones v. Railroad Co.*, 41 Fed. 70. The facts in that case were that Jones was a homestead entry man upon certain land in the state of Florida, adjoining the city of Tampa. The defendant company sought to claim the right of way for the operations of its railroad across the land so occupied by Jones. Judge Locke seems not to have taken judicial notice that the railroad company, in attempting to take land for a right of way through the land in question, was acting under an act of congress, but held that the case was one where a federal question was involved, because the denial by the defendant that Jones had any such rights in the land as would be sufficient to justify a negotiation with him for the right of way made it necessary that the court determine that question, and an examination and construction of the United States land laws was necessary for that purpose. I have carefully examined

this decision, and I cannot find that, after the learned judge had taken jurisdiction, he determined any federal question in the disposal of the case. I do not think the case at bar presents a federal question. The motion for a temporary injunction is therefore denied.

PRESCOTT & A. C. RY. CO. v. ATCHISON, T. & S. F. R. CO. et al

(Circuit Court of Appeals, Second Circuit. November 8, 1897.)

No. 7.

APPEAL AND ERROR—FINAL JUDGMENT.

An order signed by the judge, and entered by the clerk, finally dismissing certain of the defendants from the case, and directing the costs to be taxed, is a final appealable order, though the amount of the costs are not taxed and inserted therein; and a writ of error taken more than six months thereafter must be dismissed, although a more formal judgment was afterwards entered, less than six months before the allowance of the writ.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action at law by the Prescott & Arizona Central Railway Company against the Atchison, Topeka & Santa Fé Railroad Company and others. On January 8, 1896, the following order was entered by the court below:

"The issues herein raised by the complaint, and the answers of the defendant John J. McCook, in his individual capacity, and as receiver of the Atchison, Topeka & Santa Fé Railroad Company, and as receiver of the Atlantic & Pacific Railroad Company, and as trustee of the Prescott & Arizona Central Railway Company, and the answer of the defendant John J. McCook and George F. Crane, as executors and trustees of and under the last will and testament of George C. Magoun, late of the city of New York, deceased, and the several answers of the defendants Russell Sage and Cecil Baring, coming on to be tried and heard at a term of this court, held on the 6th day of January, 1896, before Honorable E. Henry Lacombe, circuit judge, and a jury, and after hearing Mr. C. N. Sterry and Mr. C. B. Alexander, of counsel for said defendants, in support of a motion for the dismissal of the complaint upon the pleadings, and Mr. Delos McCurdy, of counsel for the plaintiff, in opposition, and due deliberation being had, it is, on motion of Alexander & Green, attorneys for the above-named defendants, ordered that said motion be granted, and that the complaint of the plaintiff be dismissed as to each and all of the said defendants above named, with costs, to be taxed, and that judgment be entered herein accordingly; further ordered that a stay of fifty days from the date of this order is hereby granted within which the plaintiff may make and serve a bill of exceptions herein.

"Dated January 8, 1896.

"E. Henry Lacombe, U. S. Circuit Judge."

On October 2, 1896, a more formal judgment was entered by the court, dismissing the bill as to the same defendants, and adjudging that they recover of the plaintiff \$258.63 costs, and have execution therefor. On the 12th day of October, 1896, by consent of parties, a bill of exceptions was approved and allowed. On the same day, assignments of error were filed by plaintiff, and the writ of error issued. The defendants have now moved to dismiss the writ of error, on the ground that the proceedings in error were instituted more than six months after the order on January 8, 1896, which, it is claimed, was the final judgment in the case.

Delos McCurdy, for plaintiff in error.

C. N. Sterry, for defendants in error.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. The decision of the circuit court entered January 6, 1896, ordered the dismissal of the complaint, with costs to be taxed, and that judgment be entered accordingly. 73 Fed. 438. It was signed by the judge who heard the cause, and entered by the clerk on that date. Nothing further was necessary to a final and complete disposition of the action. The circumstance that the costs were not taxed and the amount inserted in the judgment is not material. It was essentially a final judgment (*Fowler v. Hamill*, 139 U. S. 549, 11 Sup. Ct. 663; *Tuttle v. Clafin*, 13 C. C. A. 281, 66 Fed. 7; *Snell v. Dwight*, 121 Mass. 349), and must be treated as such, within the meaning of section 11 of the act regulating the jurisdiction of this court, notwithstanding a further and more formal judgment was entered subsequently. As the writ of error was not sued out within six months after the entry of the original judgment, the motion to dismiss the appeal must be granted.

LOVING v. ARNOLD et al.

(Circuit Court, D. Kentucky. November 8, 1897.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—PREFERENCE—PARTIES.

Act Ky. 1856 provides that, in suits to set aside preferential transfers of property by an insolvent debtor, the transferee and the debtor are the only necessary parties defendant. Act Ky. March 16, 1894, relating to voluntary assignments, provides that property transferred in preference shall vest in the assignee, and he shall bring suit to recover same, having therein all the remedies of creditors. *Held*, that the provisions of the two acts give to the assignee not only the right to recover of the transferee the property fraudulently transferred, but also the right to investigate the bona fides of transfers of other property which may not have been fraudulent or preferential, and that, in a suit by an assignee to recover property conveyed in preference, in which the bill contains a prayer for general relief, the insolvent debtor is a necessary party.

2. SAME.

An assignee, under a general assignment pursuant to the Kentucky statutes, does not represent the entire interest of the assignor in a suit to set aside a preferential transfer of property, since invalidating the transfer will reinstate as obligations against the assignor debts which were paid by the transfer, thereby making him directly interested in the suit and a necessary party thereto.

D. I. Heyman, for complainant.

James Quarles (Quarles, Spence & Quarles, of counsel), for defendants.

BARR, District Judge. This motion presents a new and interesting question. The complainant, as assignee of W. H. Dillingham, has brought suit against Charles E. Arnold and Charles and Nathan Allen, partners, under the style of N. R. Allen's Sons, and W. H. Dillingham, for the purpose of setting aside a conveyance made by Dillingham and wife on the 27th of March, 1897, to Charles E. Arnold, of a house and lot on Broadway street, in this city. It is alleged that this conveyance was made by Dillingham when insolvent, for the purpose of preferring the Allen's Sons in certain debts held by them against him to the exclusion of other creditors. This deed to Arnold is absolute on its face, but it is alleged that it was made to him as trustee, to be

held by him for the use and benefit of Charles and Nathan Allen as partners aforesaid, and that the real consideration of said conveyance was the payment of certain debts due by Dillingham to the Allens. The amount of these debts is alleged by the plaintiff to be unknown, but it is alleged that they are less than the \$26,000, the recited consideration in the deed to Arnold. The plaintiff brings the suit as the assignee of W. H. Dillingham, under a deed of general assignment, executed to him on May 26, 1897, and under the provisions of the Kentucky statutes commonly known as the act of 1856, and the amendment thereto adopted March 16, 1894. The prayer of the bill is to have the conveyance to Arnold set aside as a fraudulent preference, and that the court adjudge that the title of the property conveyed to Arnold vests in the complainant, as the assignee of Dillingham, and for the benefit of all of his creditors, and he "further prays for all proper general and equitable relief." The case was removed on the petition of Arnold and Charles and Nathan Allen, and in the petition it is alleged that the controversy in the suit is wholly between the plaintiff and said petitioners, and that the defendant William H. Dillingham has no interest in said controversy, and is only a formal and unnecessary party to said suit. The proper allegations as to diverse citizenship of Loving, the plaintiff, and the Allens and Arnold, are made, and nothing is stated as to the citizenship of Dillingham, who was before the state court on actual service of process. We must, in considering the motion to remand, assume that Dillingham has not a diverse citizenship with the complainant, as there is nothing alleged. The removal, therefore, is upon the theory that Dillingham has no interest in the controversy, and is only a formal, and not a necessary, party. This being the contention of the removing defendants, the inquiry is whether or not Dillingham is a necessary party in the suit. If he is a necessary party, then the case should be remanded.

It is quite clear that there is not a separable controversy which would permit a removal. The suit is brought under what is commonly known as the act of 1856, which prohibited all sales, mortgages, conveyances, or assignments of debtors, and any act or device done or resorted to by a debtor in contemplation of insolvency, with a design to prefer one or more of his creditors to the exclusion, in whole or in part, of the others. This act declares that such sales, mortgages, assignments, or devices shall operate as an assignment or transfer of all of the property and effects of such debtor, and shall inure to the benefit of all of his creditors, except as therein provided, in proportion to the amounts of their respective demands, including those which are future and contingent. See Ky. St. c. 54, art. 2, §§ 1910-1916; Sess. Acts 1891-93, c. 119, p. 398. This act also provides that, to set aside such a preference, there must be a suit filed in equity by some person interested within six months after the preferential sale, conveyance, or mortgage is lodged for record, or the property or effects transferred or delivered, and that "any number of persons interested may unite in the petition, but it shall not be necessary to make any persons defendants except the debtor and the transferee." This act only

authorized those interested to bring the suit to set aside the preferential sale, mortgage, or conveyance, and hence an assignee of the debtor could not bring such a suit under the act of 1856, but, if a preference was given before the general assignment to such assignee, it would have the legal effect of setting aside the general assignment, as the preference which is denounced by the statute operated to transfer all of the property and effects of said debtor as of the date of the giving of the preference. But by an act approved March 16, 1894, entitled "An act relating to voluntary assignments," it is enacted (section 11, c. 83, p. 192, Act 1894) that:

"If the assignor before making the deed shall have made a preferential or fraudulent transfer, conveyance or gift of any of his property or a fraudulent purchase of any property in the name of another, the property so fraudulently transferred, conveyed or purchased shall vest in the assignee and it shall be his duty to institute such proceedings as may be necessary to recover the property so conveyed or disposed of, and to this end he shall have the remedies which the creditors or any of them might exercise. If the assignee upon demand shall refuse to institute such proceedings any creditor may do so and the property so recovered shall become a part of the estate and shall be distributed as other assets."

This provision is in an act entitled "An act relating to voluntary assignments," which prescribes the effect of a general assignment, and the duties of the assignee thereunder. See, also, Ky. St. c. 7, § 84. It is insisted by counsel for the defendant that this act of 1894, which gives a right of suit to an assignee of a general assignment, has made the debtor an unnecessary party to proceedings like this, as it is claimed that all of his right, title, and interest has passed by the general assignment to the assignee. It will be observed that, by the terms of the original act of 1856, such preferential conveyances of debtors operate as an assignment and transfer of all the property and effects of said debtor, and gives control to the court of equity having jurisdiction of the property and effects of said debtor upon the petition of one or more of his creditors. To give effect to the provisions quoted of the act of 1894, it must be assumed that general assignments made after such preferential sales or conveyances, which are prohibited by the act of 1856, are not set aside and made invalid, but that the assignee, under a general assignment subsequently made, not only takes all of the property of the debtor to which he then has title, but also the title to the property which he had previously conveyed as a preference to some of his creditors, and a right to sue therefor; thus modifying the broad provision of the act of 1856, which declares that a preferential sale or conveyance shall operate as a transfer of all the property and effects of the debtor as of the time of said preference. If this is not so, then the provision of the act of 1894, which has been quoted, is not applicable at all to preferences given by a debtor which are prohibited by the act of 1856. It will be observed that in the section of the act of 1894 which is quoted nothing is stated as to the property and effects of the debtor which have not been preferentially sold or conveyed by the debtor, but which may not have been conveyed by him under a general deed of assignment to the assignee, subsequently executed. The language of this section in that respect

is: "The property so fraudulently conveyed, transferred or purchased shall vest in the assignee, and it shall be his duty to institute such proceedings as may be necessary to recover the property so conveyed or disposed of, and to this end he shall have the remedies which the creditors or any of them might exercise." It would seem to me, however, construing the entire section, that it is intended to give, and does give, to the assignee of a general assignment all the rights which creditors of the debtor have under the act of 1856. This construction would seem to be implied by the latter part of the section, which provides "that if the assignee on demand shall refuse to institute such proceedings any creditor may do so, and the property so recovered shall become a part of the estate and be distributed as other assets." If we assume that the proper construction of the two acts is to give the complainant the right, if he makes good the allegations of his bill, not only to have this deed of the 26th of March set aside, but also to investigate, and have the debtor and others surrender any property which the debtor had as of that day, and which has not been bona fide disposed of by him and for a good consideration, between the 27th of March and the 26th of May, 1897, it follows that Dillingham is a necessary, and, indeed, an indispensable, party to such relief. If the complainant is entitled to such relief, his prayer for "all proper general and equitable relief" would cover this.

If, however, we are wrong in this, and the complainant's right of action is confined to the property conveyed to Arnold, we still think Dillingham is a necessary party, since, if the conveyance to Arnold is set aside, the debts against Dillingham, which that conveyance satisfied and paid, will be valid obligations, against not only the estate of Dillingham in the hands of his general assignee, but against him individually. The question, therefore, of preferential sale or not, is a question in which he has a direct interest, since the property which has been conveyed by him, and his debts to the Allens paid thereby, may not be sufficient, with the property generally assigned, to pay all of his debts, including the Allen debt, and the unpaid balance would be an unpaid balance against him. The conveyance from Dillingham to Arnold is a valid one, though it gives the Allens a preference, unless proceedings are taken by creditors or parties in interest within six months from that conveyance, as the Kentucky law does not prohibit, generally, a preference in contemplation of insolvency of a debtor to a creditor, but it is only in the event that it comes within the provisions of the act of 1856, and proceedings are taken thereunder, that such conveyances are set aside. The complainant in this case takes the rights of the creditors, and could not, by virtue of any right of Dillingham, the assignor, have this conveyance set aside; therefore he does not represent in this proceeding the interest of Dillingham, but that of Dillingham's creditors.

In addition to the interest which Dillingham has in this litigation, we think the statute of 1856 requires that he should be a party. Such seems to be the decision of the Kentucky court of appeals. See *Bank v. McAllister's Adm'r*, 83 Ky. 151, and *McAllister's Adm'r v. Bank*, 80 Ky. 685. We have read the cases cited by counsel for the defendant in his excellent brief, and do not think they sustain the conten-

tion, if we are correct in our construction of this statute. The case of *Buffington v. Harvey*, 95 U. S. 102, was a case in bankruptcy, in which the court said:

"The bankrupt had no interest to be affected, except what was represented by his assignee in bankruptcy, who brought the suit. As to the bankrupt himself, the conveyance was good. If set aside, it could only benefit his creditors. He could not gain or lose, whatever might be decided."

Here there is no provision of the Kentucky statute by which Dillingham could be released from the indebtedness which might be adjudged against him, by reason of the setting aside of this conveyance; hence he had a direct interest, and might gain or lose, as there is no provision of the statute to discharge him from this debt. The several cases referred to, reported in the Federal Reporters, fall short of the case at bar. The case of *Judah v. Barb-Wire Co.*, 32 Fed. 561, is not in point, as there the defendant Judson, who held certain warehouse receipts, failed to answer the suit, and a receiver was appointed, and the receipts were surrendered to him by Judson. After the default of Judson, and while the warehouse receipts were in the hands of the receiver, the barb-wire company removed the case, and, on a motion to remand, the court said:

"This case was ended, so far as Judson was concerned, and the only controversy left open was whether the action of Sherman & Marsh [the debtors] in transferring these receipts to Judson was effective in law to clothe the barb-wire company with a valid title in them as their assignee. The court, in other words, is only called upon to decide whether these receipts belonged to the complainant by virtue of the assignment to him for the benefit of the creditors of Marsh, or whether they are wholly or in part to be applied in the manner contracted for by the transfer to Judson. Judson appears, from the allegations in the bill and his own confession of the truth of these allegations, to have no interest now in the controversy, and had none at the time of the application for removal."

And the court refused to remand the case.

We think our conclusion is fully sustained by the reasoning of the supreme court of the United States in *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 840; *Wilson v. Oswego Tp.*, 151 U. S. 57, 14 Sup. Ct. 259; *Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 383, 14 Sup. Ct. 367. We conclude, therefore, that the case should be remanded; and it is so ordered.

UNITED STATES v. CENTRAL PAC. R. CO. et al.

(Circuit Court, N. D. California. January 11, 1898.)

No. 7,490.

1. PUBLIC LANDS—MINERAL GRANTS.

A patent granted under Act July 25, 1866 (14 Stat. 239), which excepted mineral lands, is invalid, if at the time of the issue of the patent the land was known to be chiefly valuable for mineral.

2. SAME—CANCELLATION OF PATENT.

Under Act March 3, 1887 (24 Stat. 556), authorizing suits to cancel patents to lands erroneously certified or patented, and to restore the title thereof to the United States, a patent conveying mineral lands knowingly

purchased as agricultural lands will be canceled as having been erroneously made.

8. BONA FIDE PURCHASERS—NOTICE—GOOD FAITH.

Purchasers of land erroneously patented as agricultural land are not bona fide purchasers without notice, when they knew at the time they purchased the same that it was mineral land; and purchasers who located and worked mineral claims thereon prior to acquiring any interest therein are not purchasers in good faith.

This was a bill by the United States against the Central Pacific Railroad Company, James O. B. Gunn, William E. Brown, W. M. Bowers, John Gale, A. F. Jones, Henry A. Basford, and Milton E. Joyce, to cancel a patent issued to the Central Pacific Railroad Company under a land grant.

W. H. H. Miller, U. S. Atty. Gen. (H. S. Foote, U. S. Atty., and Samuel Knight, of counsel), for the United States.

Mastick, Belcher & Mastick, for defendants.

MORROW, Circuit Judge. This is a bill in equity brought by the United States to cancel and set aside a patent to public lands issued to the Central Pacific Railroad Company, successor to the California & Oregon Railroad Company, under the act of July 25, 1866 (14 Stat. 239). The bill, as amended, alleges that the patent was made to include section 27 in township 24 N., range 3 E., Mt. Diablo base and meridian, through mistake and inadvertence on the part of the officers of the land department. This section of land is situate in Butte county, state and Northern district of California; and it is alleged in the bill, as amended, that for a long number of years before the selection of said section 27, and prior to the issuance and delivery of said patent, said section was, and it since has been, and it is now, well-known mineral land, and that it was at all of said times, and it is now, valuable chiefly for its mineral, and that during all of said times it was, and it is now, not valuable for agricultural or timber purposes, and that during all of said times it was, and it has been, and it is now, worked successfully as mining ground, and that at all of said times there were, and there are now, in successful operation, a number of mines on said land. The defendants answered the bill as amended. The United States introduced testimony in support of the allegations as to the mineral character of the land. No evidence was presented on behalf of the defendants, beyond their sworn answers.

That a bill in equity will lie to correct material mistakes of the land department in granting patents to public lands, is beyond question. *McLaughlin v. U. S.*, 107 U. S. 526, 2 Sup. Ct. 802; *U. S. v. Minor*, 114 U. S. 233, 5 Sup. Ct. 836; *Mullan v. U. S.*, 118 U. S. 271, 6 Sup. Ct. 1041; *Williams v. U. S.*, 138 U. S. 514, 11 Sup. Ct. 457. Mineral lands were excepted from the grant made by the United States to the railroad company. See Act July 25, 1866, §§ 2, 4, 10 (14 Stat. 239). The question to be determined by the court is whether the land involved in this controversy was or was not "known mineral land" prior to the issuance and delivery of the patent therefor. The map of definite location of the California & Oregon Railroad opposite

the land in question was filed November 25, 1867, and the land was thereupon withdrawn from sale. The patent was issued March 17, 1875. The testimony shows that section 27 contains mineral lands; that the land is unfit for agricultural purposes, but is valuable chiefly for its mineral; that it was "known mineral land" at and prior to the issuance of the patent; that it was occupied by miners at very early days. Some of the witnesses state that they went on the section as early as 1850 and 1851, and that they mined there at, or shortly after, that time; that mining was carried on subsequent thereto; and that it has been remunerative. It would be useless to review the testimony in detail. It is sufficient to say that it shows clearly and satisfactorily that section 27 contains, and contained "known mineral land" when it was withdrawn from sale, and when the patent was issued. The evidence certainly satisfies the test of what are mineral lands, according to such cases as *Deffeback v. Hawke*, 115 U. S. 392, 404, 6 Sup. Ct. 95; *Davis' Adm'r v. Weibbold*, 139 U. S. 507, 519, 11 Sup. Ct. 628; *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 143 U. S. 394, 12 Sup. Ct. 543. See, also, for definition clearly stating what constitutes mineral lands, the language of Judge Knowles in *Railroad Co. v. Barden*, 46 Fed. 610; *Id.*, 154 U. S. 288, 14 Sup. Ct. 1030. The general criterion would seem to be that the land must be more valuable for mineral explorations than for agricultural purposes. There must be sufficient evidence of mineral to justify the expenditure of time and money for its extraction. And it must be so known at the time of the issuance of the patent therefor. *Deffeback v. Hawke*, supra; *Davis' Adm'r v. Weibbold*, supra; *Whitney v. Taylor*, 158 U. S. 85, 15 Sup. Ct. 796; *Barden v. Railroad Co.*, supra. All these conditions appear to be amply satisfied by the evidence presented. It follows that the patent to the railroad company, in so far as it includes section 27, was issued through mistake and inadvertence on the part of the officers of the land department, and that it is void for want of authority to issue the same. Section 2318 of the Revised Statutes of the United States provides "that in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." It being established that the lands in section 27 were valuable chiefly for mineral at the time of the issuance of the patent, the title of the grantee company could not be held valid, because acquired contrary to law. *Stoddard v. Chambers*, 2 How. 284. If the lands are valuable for mineral, and were knowingly purchased as agricultural lands, the patent issued by the government would convey no title, because issued unadvisedly, or by mistake of an officer of the government while acting ministerially. *U. S. v. Stone*, 2 Wall. 525. The mistake and inadvertence on the part of the officers of the land department are easily explained. The application by the railroad company for the land under the act of July 25, 1866 (14 Stat. 239), was entirely ex parte. The railroad company applied for the land, as being within its grant, and the officers of the land department considered that the land was subject to the application. But this cannot prejudice the rights of the United States, if the lands were in fact mineral, and were known to be such when the patent was issued.

There was no protest or contest of any kind which was likely to bring to the notice of the officers of the government the fact of the mineral character of the land. The patent having been made to include, erroneously, this section of land, to the railroad company, the United States has a paramount right to have the error or mistake corrected. The act of March 3, 1887 (24 Stat. 556), authorizes suits to cancel patents, or other evidences of title to lands "erroneously certified or patented," and "to restore the title thereof to the United States." This disposes of the case, so far as the grantee company and its trustees are concerned.

With respect to the other defendants, it is further urged that they are bona fide purchasers. It appears from the allegations of the amended bill that these defendants hold contracts with the grantee company and its trustees to purchase from the latter the legal title to certain parts of section 27. The status of a bona fide purchaser is made up of three essential elements: (1) a valuable consideration; (2) absence of notice; and (3) the presence of good faith. 2 Pom. Eq. Jur. § 745; *U. S. v. Winona & St. P. R. Co.*, 15 C. C. A. 96, 67 Fed. 948, 962. I am of the opinion that these defendants had notice, actual or constructive, of the character of the land in section 27 which they contracted to buy from the grantee company and its trustees. They were certainly chargeable with notice of the character of the land, for it had been occupied and known since 1850 as mineral land, and as being unfit for agricultural purposes. It was covered with evidences of mining claims and mining explorations. Notices of location affecting different portions of the section had been filed of record in the mining recorder's office of the Forks of the Butte mining district before the defendants entered into their contract to buy the land from the grantee company and its trustees, which was some time in 1885 and 1886. With respect to the defendants Jones and Gale, it appears further that the element of good faith is entirely wanting; for Jones had, before acquiring any interest in the land he contracted to purchase, owned and worked a claim in the same part of this section, while Gale had, with others, filed a mining location upon the same land which he contracted to buy.

Without entering into a further discussion of the points involved in this case, I am of the opinion, from the evidence, (1) that section 27, township 24 N., range 3 E., Mt. Diablo base and meridian, state of California, contains lands which are valuable chiefly for mineral explorations, and not for agricultural purposes; that this fact was known at and prior to the time when the patent was issued to the grantee company; (2) that the patent, in so far as section 27 is concerned, was issued through mistake and inadvertence on the part of the officers of the land department, and that it is void for want of authority in said officers to issue the same; (3) that the defendants, other than the grantee company and its trustees, are not bona fide purchasers. A decree will therefore be entered in favor of the complainant, the United States, declaring the patent void with respect to section 27, and directing a cancellation of the same; and it is so ordered.

HARPER et al. v. HOLMAN et al.

(Circuit Court, E. D. Pennsylvania. October 25, 1897.)

EQUITY—PLEADING—BILL—MULTIFARIOUSNESS.

A bill which seeks to restrain the publication of a book, which, it is alleged, infringes in its title a trade-mark right of the complainants, and in its text certain rights secured to them by four copyrights, is not multifarious.

This was a bill in equity, which averred the following facts:

Upon returning from a voyage of discovery, known as the "Norwegian Polar Expedition," in 1896, Dr. Fridtjof Nansen prepared a book relating to his voyage, and illustrated the same with many photographs taken in the course of the expedition. This book was written in Norwegian, and was entitled "Farthest North, Being a Record of a Voyage of Exploration of the Ship Fram, 1893-1896, and of a Fifteen Months' Sleigh Journey by Dr. Nansen and Lieut. Johansen." Dr. Nansen sold and assigned this work, together with the illustrations, to Archibald Constable & Co., of London, by whom it was translated into English. Subsequently, the book thus translated was sold and assigned to Harper & Bros., the complainants, for publication in the United States, with the privilege of selling the same in Canada. The complainants accordingly published the book in two volumes, and obtained a copyright in and to the same. The bill averred that a large outlay had been made by them in illustrating and completing the work, and in advertising and bringing it before the attention of the public.

The bill averred that the defendants had produced a "counterfeit or sham book," dressed up so as to be readily substituted for the complainants' work, and so arranged that the original work was resembled by the defendants' book in many respects. It was alleged in the bill that some of the text and many of the illustrations contained in the complainants' work had been directly copied. It was further alleged that the defendants had named their book "The Fram Expedition-Nansen in the Frozen World," and that it contained, among the accounts and portraits relating to Arctic voyages of an earlier date than the expedition made by Nansen, some which were copies of and infringements upon four other publications, which were the property of and in the possession of the complainants. These four publications were as follows: (1) A book entitled "Arctic Experiences, Containing Captain George E. Tyson's Wonderful Drift on the Ice Floe," which book had been duly copyrighted by the complainants, it was alleged, in 1874, and published by them. (2) The book or periodical entitled "Harper's Weekly," dated January 7, 1882, No. 1,307. (3) No. 1,325 of the same periodical, dated March 13, 1882. (4) No. 1,796 of the same periodical, dated May 23, 1891.

The bill further alleges that the title of the complainants' work was a trade-mark, or in the nature of a trade-mark, which was infringed by the title of the defendants' book. And, finally, it was averred that the defendants, in canvassing and offering for sale their book in English and Norwegian, were representing it to be the "Nansen Book of the Fram Expedition," and were adopting divers other means to mislead the public into purchasing the defendants' work. The complainants prayed that their rights in the trade-mark and copyrights be established, and that the defendants be enjoined from selling their work under the title adopted by them, and be restrained from interfering with the plaintiffs' rights in the copyrights aforesaid. The bill further asked for an account.

George L. Rives, Josiah R. Sypher, and Augustus T. Gurlitz, for complainants.

H. T. Fenton, for respondents.

DALLAS, Circuit Judge. Sixteen causes of demurrer have been assigned to this bill of complaint; but, upon the argument, counsel, considerably assenting that it was unnecessary to burden the court

with all the questions thus raised, agreed that all but the first four assignments should be considered as withdrawn, upon the understanding that the complainants would have leave to move to amend as they might be advised, and that the defendants would be at liberty to renew any of their present objections to the bill, except those now passed upon, and such of them, if any, as should be met and cured by amendment. The four retained assignments are as follows:

"(1) The bill is multifarious in charging infringement of five separate and distinct alleged copyrights, not connected with or related to each other in any manner. (2) The bill is multifarious in charging infringement of one or more copyrights, and joining therewith a charge of alleged infringement of trade-name or trade-mark, the latter appearing on the face of the bill to be wholly unrelated to at least four of the copyrights alleged to have been infringed. (3) The bill is multifarious in charging infringement, not only of one or more copyrights, and of a certain alleged trade-mark or trade-name, not having the most remote relation to four of said copyrights, but charging also, and founding a prayer for relief upon, alleged fraudulent or unfair competition in trade generally. (4) The bill is multifarious because the allegation that the five several and distinct and unrelated copyrighted books are capable of conjoint use, or ever have been so used, is obviously untrue on the face of the bill."

The multifariousness averred is claimed to arise, not from misjoinder of parties, but solely from the inclusion in one suit of several different and distinct grounds of complaint; and therefore the true question is, are there such diverse subjects embraced by this bill as cannot be conveniently considered together?

In *Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co.*, 60 Fed. 622, this court said:

"Courts of equity are adverse to the multiplication of suits; and no definite rule, of general applicability, has been or can be laid down as a test of multifariousness. The question, in each instance where it is presented, is largely addressed to the regulated discretion of the judge, and is to be determined with reference to the peculiarities of the particular case, upon considerations which are practical rather than theoretical in their nature."

This view of the matter was again acted upon by this court, in the case of *Union Switch & Signal Co. v. Philadelphia & R. R. Co.*, 69 Fed. 833; and it is now adhered to with confidence, because it seems not only to be in accordance with the decision of other courts of first instance, but also to be authoritatively imposed by a judgment of the supreme court of the United States.

In *Bedsole v. Monroe*, 40 N. C. 317, the supreme court of North Carolina, speaking of multifariousness, said:

"If the grounds of the bill be not entirely distinct and wholly unconnected, if they arise out of one and the same transaction or series of transactions, forming one course of dealing, and all tending to one end, if one connected story can be told of the whole, then the objection cannot apply."

In *U. S. v. American Bell Tel. Co.*, 128 U. S. 352, 9 Sup. Ct. 90, Mr. Justice Miller, delivering the opinion of the supreme court of the United States, clearly indicated the consideration which is controlling upon the question, in this language: "The principle of multifariousness is one very largely of convenience;" and, referring to the circumstances of the case with which he was dealing, he added:

"There is no such diversity of the subject-matter embraced in the assault upon the two patents that they cannot be conveniently considered together; and although it may be possible that one patent may be sustained, and the other may not, yet it is competent for the court to make a decree in conformity with such finding. It seems to us in every way appropriate that the question of the validity of the two patents should be considered together."

With the adjudications to which I have referred, and the principle which they plainly enunciate, in mind, I have carefully examined the present bill, in connection with the printed books and papers, which, upon the argument, it was agreed should be taken to constitute a part of the bill itself. This examination has led me to the conclusion that there is no reason for supposing that the infringement charged of the several copyrights in question, as well as of the alleged trade-name or trade-mark, and, in short, every subject-matter proposed for investigation, may not conveniently, and most conveniently, be considered together; and, if each of the alleged infringements had been made the subject of a separate suit, it is, I think, very doubtful, at least, whether it would not have been the duty of the court to decline to entertain such separate suits, without requiring their consolidation. *Case v. Redfield*, 4 McLean, 529, Fed. Cas. No. 2,494.

I do not deem it necessary to decide the particular point presented by the fourth assignment. Whether or not the allegation in the bill that the copyrighted books are capable of conjoint use is "obviously untrue," or, if true, is of any materiality, are questions upon which my judgment is to no extent based. It rests upon the broader consideration which I have, I think, sufficiently adverted to. The demurrer is overruled, with leave to answer sec. reg.

HARPER et al. v. HOLMAN et al.

(Circuit Court, E. D. Pennsylvania. December 29, 1897.)

1. EQUITY—PRELIMINARY INJUNCTION—WHEN GRANTED.
A preliminary injunction will not be awarded except in a plain case.
2. EQUITY—PRELIMINARY INJUNCTION—UNFAIR COMPETITION—TITLE TO BOOK.
Although a preliminary injunction will not be awarded where, in the opinion of the court, an alleged infringement of copyright by the defendant, in the text of a book published and sold by him, has not been so clearly established as to exclude substantial doubt, yet the defendant will be restrained pendente lite from making use of a title to his publication which in its "essential portion" imitates the title of the complainants' publication in a manner adopted for the purpose of misleading and calculated to mislead ordinary purchasers.
3. SAME—PRIOR USE OF COMPLAINANTS' TITLE.
In such a case the prior use of the "essential portion" of the title of complainants' book is not a valid objection to the exclusive right claimed by the complainants.

This was a suit in equity by Harper & Bros. against William A. Holman and others, trading as A. J. Holman & Co., for alleged infringement of complainants' right in the name of a book, and also for an infringement of their copyrights. A demurrer to the bill was heretofore overruled. See 84 Fed. 222. The cause is now heard upon a motion for a preliminary injunction.

George L. Rives, Josiah R. Sypher, and Augustus T. Gurlitz, for complainants.

Hector T. Fenton, for respondents.

DALLAS, Circuit Judge. The plaintiffs have moved for an injunction pendente lite to restrain the defendants—First, from continuing an alleged violation of copyright; and, second, from using, in connection with any book whatever, the name or designation “The Fram Expedition-Nansen in the Frozen World.”

1. A preliminary injunction will not be awarded except in a plain case; and, upon careful consideration of the proofs as now presented, I cannot say that the infringement of copyright alleged has been so clearly established as to exclude substantial doubt upon that subject. It must not be supposed that I have reached a final conclusion upon this matter; but, while I deem it inexpedient to enter at this stage upon a discussion of the question, I may say that I am not now entirely satisfied that the text of the defendants’ publication was not derived from sources which they were at liberty to use.

2. But, even upon the assumption that the defendants may lawfully put their volume upon the market in competition with those of the plaintiffs, equity requires such competition to be fair, and that the work of the defendants shall not be so named, advertised, or offered for sale as to indicate that it is that of the plaintiffs. *McLean v. Fleming*, 96 U. S. 245; *Estes v. Williams*, 21 Fed. 189; *Estes v. Leslie*, 27 Fed. 22; *Association v. Howard*, 60 Fed. 270. The titles of the conflicting books are not identical, and it is not necessary that they should be; but in that part which may well be called, in the words of Mr. Justice Clifford, the “essential portion,” the imitation is manifest, and in connection with the other facts proved, especially as to the method of sale adopted by the defendants, and their instructions to their agents, is certainly such as would, I think, lead ordinary purchasers of the defendants’ book to suppose that they were buying that of the complainants; and it is difficult to escape conviction that this result was foreseen and intended. *McLean v. Fleming*, *supra*; *Estes v. Leslie*, *supra*; *Manufacturing Co. v. Trainer*, 101 U. S. 65 et seq., per Clifford, J., dissenting.

The prior use of the words “Farthest North,” as shown, is not a valid objection to the exclusive right now claimed by the plaintiffs (*Estes v. Worthington*, 31 Fed. 154); and the doctrine of the cases with respect to the use of words or names which are descriptive of quality and the like is inapplicable. The title used by the plaintiffs is, as is usual, indicative of the nature and contents of their book; but the defendants’ imitation of it is applied to a volume which it does not aptly designate or describe, and its selection, instead of one more appropriate, can effect no object but to mislead purchasers, and deprive the plaintiffs of the reward earned by their enterprise and expenditures. A decree for a preliminary injunction, in accordance with this opinion, will be entered.

THE H. C. GRADY.

BLACK DIAMOND COAL-MINING CO. v. THE H. C. GRADY (LOUGHERY, Intervener).

(District Court, N. D. California. December 29, 1897.)

COSTS IN ADMIRALTY CASES—DOCKET FEE.

Where a number of libels against the same vessel are consolidated, and heard at the same time, and represented by the same proctor, but one proctor's docket fee should be allowed.

This was an intervening libel by Frank Loughery in the cause of the Black Diamond Coal-Mining Company against the steamer H. C. Grady. The suit was consolidated with various others against the same vessel, and all were heard together. The cause is now before the court on exceptions to the action of the clerk in disallowing a docket fee for the intervener's proctor.

D. T. Sullivan, for intervener.

DE HAVEN, District Judge. This suit having been consolidated with others against the steamer H. C. Grady, and final hearing in all of said actions having been had at the same time, but one proctor's docket fee should be allowed in the cases represented by the same proctor. The *Medusa*, 47 Fed. 821. The exceptions to the action of the clerk in disallowing docket fee for proctor of said intervener are overruled.

NATIONAL HARROW CO. v. HENCH et al.

(Circuit Court, N. D. New York. January 3, 1898.)

MONOPOLIES—COMBINATION OF PATENT OWNERS—INFRINGEMENT SUIT.

A combination among manufacturers of spring-tooth harrows, whereby a corporation, organized for the purpose, becomes the assignee of all patents owned by the various manufacturers, and executes licenses to them, so as to control the entire business and enhance prices, is void both as to the assignments and licenses, so that the corporation cannot maintain a suit against one of its assignors who violates the agreement, for infringement.

This was a bill in equity by the National Harrow Company against Samuel N. Hench and others for alleged infringement of a patent.

Risley & Love, for complainant.

Cookinham, Sherman & Martin and Strawbridge & Taylor, for defendants.

COXE, District Judge. This is an equity suit for the infringement of letters patent, granted to the defendants and by them assigned to the complainant. The bill is in the usual form. The demand is for an injunction and an accounting. The plea alleges that the defendants assigned the letters patent in question to the complainant as part of an unlawful agreement, which was void as in restraint of trade and as against public policy, and that it was declared void by the

circuit court for the Eastern district of Pennsylvania, and by the circuit court of appeals for the Third circuit, in a suit between these parties. The plea has been set down for argument. In the previous litigation the Pennsylvania court decided that the agreement between these parties, and other manufacturers and venders of harrows, was an unlawful combination to enhance prices and prevent competition; that one of the means used to further this conspiracy was the creation of the complainant as a convenient instrument to take and hold the legal title to the patents owned by the members of the combination, the equitable title being still in the prior owners. In short, it was held that the organization of the complainant, the assignment to it of the patents, and the license from the complainant permitting the assignors to continue to make and sell harrows under the patents so assigned, were all steps in a general scheme to create a monopoly, and that the transaction was unlawful in its conception and purpose, as a whole and in all of its parts. These decisions will be found in *Harrow Co. v. Hensch*, 76 Fed. 667, and 83 Fed. 36.

The bill is based upon the theory that, holding the legal title to the patent in controversy, the complainant can sue the owners of the equitable title, not as licensees but as infringers. The assignment of the patent was but one step in the combination. The license was another step. Both were necessary to carry out the illegal scheme. In the Pennsylvania circuit the complainant declared upon the license; now it declares upon the assignment. Both are invalid under the Pennsylvania judgment; the one as much as the other. To place any other interpretation upon the decision is to make it a mere *brutum fulmen* leading to results so illogical and inequitable as to border on the grotesque. The complainant was created solely to effectuate the purpose of the combination, the patent in suit being transferred as part of the unlawful scheme. Can it be possible that, based upon such a title, the complainant can levy tribute upon the defendants and thus accomplish by indirection the very object of the monopoly more effectually than if the court had not declared the whole transaction void? If as a result of the Pennsylvania litigation the complainant can seize the defendants' profits and also enjoin them from operating under their own patents their victory might better have been a defeat. In escaping Scylla they are hopelessly caught in the vortex of Charybdis. It certainly never was the intention of the parties that the defendants should assign their patents to the complainant with no rights reserved. The assignment was in consideration of the license back and was part of the one agreement. The complainant has no title except such as it got through this agreement and this agreement has been declared void. The complainant contends that the assignment of the patent was a distinct and separate transaction, and that the bill can be supported upon the assignment alone, which was an innocent proceeding in itself. But as before stated the Pennsylvania decision treated all these steps as part of one illegal scheme. When the foundation upon which this edifice stood was shattered, the entire structure fell. The judicial bolt struck the keystone of the arch. Neither party can build upon the fragments that remain. As both were equally involved in the

prohibited scheme the court left them where their own acts placed them, declining affirmative relief to one as against the other. The plea is allowed.

BLYTHE et al. v. HINCKLEY et al.

(Circuit Court, N. D. California. December 6, 1897.)

No. 12,144.

1. **EQUITY—INTERLOCUTORY AND FINAL DECREE—CROSS BILL.**

Where a cross bill seeks affirmative relief with respect to matters germane to the original suit, and the controversy takes such a shape that a complete and final determination of the whole case as to all the parties to the original suit may be had upon the lines of a cross bill, then it seems a final decree may be entered on the cross bill.

2. **SAME.**

A decree entered pursuant to an order pro confesso on a cross bill is not final, but interlocutory, where it leaves undetermined, as between the parties to the original and supplemental bills, the question of the legal ownership of property in dispute, and where, also, it is still necessary to refer the cause to a master for an accounting in respect to rents and profits.

3. **SAME—MOTION TO DISMISS—JURISDICTION.**

It seems that no complete and final decree upon the whole case can be entered pursuant to an order pro confesso on a cross bill while there is pending and undetermined a motion to dismiss the original suit for want of jurisdiction.

4. **SAME—DEATH OF PARTY—PRESUMPTIONS.**

Where a husband who was a co-defendant with his wife died pending the suit, and a decree was thereafter entered, *held*, that it could not be presumed in support of such decree that he had no other interest in the suit than as her husband.

5. **SAME—VACATING DECREE AFTER TERM.**

Where a decree entered pursuant to an order pro confesso on a cross bill is clearly interlocutory in character, it remains within the control of the court, and may be reconsidered and modified or set aside at the subsequent term.

6. **SERVICE OF SUBPOENA.**

Delivering a copy of a subpoena to a person described as "an adult person who is a resident in the place of the abode" of the defendant is not a compliance with Equity Rule 13, which, in default of actual personal service, requires the delivery of a copy at the defendant's dwelling house or usual place of abode, "with some adult person who is a member or resident in the family."

7. **SAME—DEFECTS CURED BY DECREE—PRESUMPTIONS.**

The rule as to the presumptions in favor of the validity and regularity of proceedings had before judgment or decree is applicable only in cases of collateral attack, and cannot be invoked to cure defects in the service of process, upon an application, in the same suit, to set aside a default decree, in order to permit a defense upon the merits.

8. **DEFAULT DECREE—SETTING ASIDE.**

A decree entered pursuant to an order pro confesso on a cross bill will be set aside where it appears that there were serious irregularities in the service of the subpoena on the cross bill, and that such bill was amended, between the date of the order pro confesso and the date of the decree, by withdrawing certain allegations, and striking out the name of another defendant.

9. **PRACTICE—ENTRY OF ORDERS—NEGLIGENCE OF CLERK.**

Under the rules of practice, counsel are entitled to rely upon the court officers to properly record in the minutes proceedings had in open court;

and a default in making an entry cannot be used to the prejudice of parties who rely on the integrity of the official records.

10. OPENING DEFAULT DECREE.

A subpoena issued upon a cross bill was served upon the counsel of the original complainants who were nonresidents. They thereupon specially appeared to contest this substituted service, and moved to quash the subpoena. There was pending at the same time, a motion made by them to dismiss their suit as to the cross complainant. *Held*, that pending these motions no binding decree could be entered against them by default on the cross bill.

11. TERMS OF COURT—VACATING ORDER OF ADJOURNMENT.

After the court had adjourned *sine die*, an order was made vacating the order of adjournment, and opening the court for business. Thereupon an order was made permitting a defendant to file a petition and affidavits in support thereof to set aside a decree, and continuing the hearing thereof until the ensuing term. Thereafter the opposite party moved to expunge these entries, on the ground that the court had no power to reopen for the transaction of business before the next term. *Held* that, as the business transacted was such as might have been done before the judge at chambers, the moving party was not prejudiced, and the motion would be denied.

This is a suit in equity, to quiet the title of the complainants to certain real property in California, as against the claim of the defendants to an adverse estate and interest in the premises.

The suit was commenced December 3, 1895, by John W. Blythe, a citizen of Kentucky, and Henry T. Blythe, a citizen of Arkansas, against Florence Blythe Hinckley, Frederick W. Hinckley, and the Blythe Company, citizens of California. The bill of complaint alleges that the complainants are the owners and tenants in common with each other of certain lands described in the bill, situated in the city and county of San Francisco, and in the county of San Diego, Cal.; that said lands are of the value of \$3,000,000 and upward; that the defendants claim that they have or own adversely to complainants some estate, title, or interest in said lands, but that the claim is false and groundless, and without warrant of law. December 12, 1895, the complainants filed an amended bill of complaint, containing additional allegations, to the effect that the defendant the Blythe Company was a corporation organized and existing under the laws of the state of California, having its office and principal place of business at the city and county of San Francisco, in said state; that the parcel of land described as situated in the city and county of San Francisco is of the value of \$3,000,000 and upward; that Frederick W. Hinckley was the husband of Florence Blythe Hinckley; that each of the defendants is a citizen of the state of California, and a resident in the Northern district of the state; and that, at the time of the commencement of the suit, neither of the parties was in possession of the lands described in the bill of complaint. A summons was issued upon this complaint, and on December 21, 1895, was served upon George W. Towle, Jr., the attorney for the defendant the Blythe Company, and personally served upon the defendants Florence Blythe Hinckley and Frederick W. Hinckley. December 28, 1895, the Blythe Company filed an answer to the amended bill. The answer contained a cross complaint against the complainants, in which it was alleged that the Blythe Company was the owner of the land described in the amended bill of complaint, and that the claim of the complainants thereto was false and groundless, and without warrant of fact or law. December 30, 1895, Florence Blythe Hinckley and Frederick W. Hinckley appeared specially, by leave of court, and moved to quash the service of summons upon them, on the ground that the suit was one that is only cognizable in a court of equity, and the proper process to be issued in such a suit to be served on the defendants was the process of subpoena. The motion was granted February 10, 1896, and the service of summons upon the Hinckleys was vacated and discharged, and the summons quashed. August 27, 1896, the Hinckleys again appeared specially by leave of court, and moved to dismiss the action, under rule 66 of this court, on the ground that the complainant had not prosecuted the action with due diligence,

and had failed to have process of subpoena issued within 90 days after filing the bill of complaint. This motion was denied upon a showing by complainants' counsel that he was not aware of the existence of rule 66. A subpoena was thereupon issued, and personally served upon the Hinckleys on September 28, 1896, and on November 2, 1896, they entered a general appearance to the amended bill of complaint.

On December 14, 1896, the Hinckleys filed a plea in bar to the action, alleging that the statement in the amended bill of complaint that the complainants were the owners, as tenants in common with each other, of the lands therein described, was based solely upon the claim that they were the lawful heirs and next of kin of Thomas H. Blythe, deceased, and that upon his death they inherited and acquired, by succession, the title to the real property described in the bill of complaint. The plea alleged that Thomas H. Blythe died, intestate, in San Francisco, April 4, 1883, and that at and before his death he was a citizen of the United States, and the owner of the real estate in controversy. The plea then proceeds to set forth in detail the probate proceeding in the superior court of San Francisco in the estate of Thomas H. Blythe, deceased, and the proceedings in the superior court upon the petition of Florence Blythe, under the provisions of section 1664 of the Code of Civil Procedure of the state, wherein, on October 22, 1890, it was adjudged and decreed that Florence Blythe (afterwards Florence Blythe Hinckley) was the child and daughter of Thomas H. Blythe, deceased, and that he legally adopted her as his lawful child and heir, and that she was the sole owner of all the estate of Thomas H. Blythe, deceased, of every name, nature, and description, wherever situated, and that she was his sole surviving and only lawful heir, and was the only person entitled to have and receive distribution of his estate. The plea also recited proceedings on appeal to the supreme court of the state, and the judgment of that court affirming the judgment of the superior court; also the proceedings in the superior court resulting in a decree distributing the estate of Thomas H. Blythe to Florence Blythe Hinckley; an appeal from that decree to the supreme court of the state; and the affirmance of the decree by that court. The plea further alleged that on December 4, 1894, and prior to the commencement of this suit, and prior to the filing of the amended bill of complaint, the possession of the whole of the real property had, under the decree of distribution, been given and delivered to Florence Blythe Hinckley, and that she had, and ever since that time continued to have, the possession of the same. Before the plea was heard, the complainants, on January 14, 1897, filed a second amended and supplemental bill, referring only to the real estate situated in the city and county of San Francisco, and containing many allegations not contained in previous bills. It is alleged that Boswell M. Blythe, a citizen of California, and a resident at Downey, in California, was one of the heirs at law of Thomas H. Blythe, and was entitled to have some share in the estate adjudged and decreed to him; but, by reason of his citizenship, he could not be joined as complainant in the bill, and he was therefore made a defendant, that his rights and interests might be protected in the final decree. This amended bill also set forth the substance of the proceedings in the state courts with respect to the estate of Thomas H. Blythe, substantially as contained in the plea of Florence Blythe Hinckley and Frederick W. Hinckley, and alleged, further, that the defendant Florence was born in England, the bastard child of an unmarried woman; that at the time of her birth her mother was a resident of England, and a subject of Victoria, queen of Great Britain and Ireland; that she remained in England at all times until after the death of Thomas H. Blythe; that she came to California for the first time in 1883; that she was then an infant, about 10 years of age, ineligible to become a citizen of the United States, and, when she arrived in California, she was a nonresident alien. The bill then refers to the treaty of 1794 between Great Britain and the United States, sections 17 and 22 of article 1 of the constitution of the state, and sections 671, 672, and 1404 of the Civil Code of California, relating to the rights of foreigners and aliens to take real estate by succession as heirs at law of deceased citizens of California; and the bill alleges, in various forms, that the superior court of San Francisco was without jurisdiction to adjudge or decree that Florence Blythe was capable of inheriting the real estate as heir at law of Thomas H. Blythe.

The bill further alleges that, at the date of the filing of the original bill, neither party was in possession of the land situated in San Francisco, but that the same was in the hands and possession of the public administrator of the city and county of San Francisco; that on October 26, 1894, the superior court granted a decree of distribution, wherein all the real property belonging to the estate of Thomas H. Blythe, deceased, was distributed to Florence Blythe Hinckley, and that on December 4, 1894, she secured possession of the same; that said real property is all of it built upon, being covered with stores and tenements which are much used and in great demand as places of business, and which are all occupied by tenants, and bring in a monthly rental of about \$12,000, which the defendant Florence receives each month; that on January 18, 1896, the superior court granted a final decree of distribution, wherein the residue of said estate remaining in the hands of the public administrator, amounting to \$89,842.94, being the rents accrued from the real property, was distributed to the defendant Florence. The prayer of the bill is that the title of the complainants to the real estate be quieted, and that they be let into possession thereof; that, as to the defendants Florence Blythe Hinckley and Frederick W. Hinckley, her husband, an account of the rents and profits which had been received, or which might thereafter be received, up to the final hearing by the defendant Florence, or any one claiming under her, be taken, and, upon the coming in of the report of the value thereof and the confirmation of the report, be adjudged and decreed to the complainants.

On February 1, 1897, the Blythe Company filed an answer to this second amended and supplemental bill, in which the material allegations of the supplemental bill were placed in issue, and the heirship of the grantors of the Blythe Company to the estate of Thomas H. Blythe, deceased, fully set forth. Thereupon the defendant Florence Blythe Hinckley, by leave of court, appeared specially, and on February 15, 1897, made two motions: (1) A motion to strike from the files the last-mentioned pleading of the Blythe Company, on the grounds, among others, that it could not be determined therefrom whether it was intended as an answer or a cross bill, or both an answer and a cross bill; that, if it was intended as a cross bill, no defendants were named or designated; that it contained no prayer for a subpoena, or for any process; and that it was not signed by counsel or by the Blythe company. (2) A motion to strike out certain portions of the answer (in the event the first motion should be denied), on the ground, among others, that, in the matter alleged, it was attempted to introduce a new controversy into the suit, and one wholly distinct and separate from that mentioned and set forth in the bill, and a controversy between the defendant the Blythe Company and the defendant Florence Blythe Hinckley, who were citizens of the same state. The order of the court granting to the defendant Florence Blythe Hinckley leave to appear and make these two motions contained the further order of the court "that no further appearance in respect to said pleading, so filed by said Blythe Company need be entered by said defendant Florence Blythe Hinckley until 10 days after her solicitor herein is served with written notice of the decision of the court on her said motion, and then only if said motion should not be sustained in whole or in part; and, for like cause, said defendant is hereby granted ten days after her solicitor herein is served with written notice of the decision of her said motion in which to enter a general and further appearance to said pleading, and to file any further motion, plea, demurrer, or answer in said suit in relation thereto, and then only if said motion should not be sustained." On the same day that the foregoing proceedings were had with respect to the pleadings of the Blythe Company, the defendant Florence Blythe Hinckley made a motion to dismiss complainants' suit, on the ground that the court had no jurisdiction of the cause of action stated in the bill of complaint, and because the defendant Boswell M. Blythe and the defendant Florence Blythe Hinckley were citizens of the same state; that Boswell M. Blythe was interested wholly on the same side of the controversy in the suit with the complainants, and was therefore to be arranged and regarded as one of the complainants in the suit. On February 16, 1897, the Blythe Company, by leave of court, filed a cross complaint, in substance the same as the answer of the corporation to the second amended and supplemental bill, but alleging the death of the defendant Frederick W. Hinckley since February 1, 1897, making John W.

Blythe, Henry T. Blythe, Boswell M. Blythe, and Florence Blythe Hinckley defendants, and praying that the usual process of subpoena be issued and directed to the defendants, and for a decree in favor of the Blythe Company for the possession of the lands described in the cross complaint, together with the rents, issues, and profits thereof, and that the complainants, John W. Blythe and Henry T. Blythe, and the defendants Boswell M. Blythe and Florence Blythe Hinckley, and all persons claiming by or through them, or any of them, be enjoined and forever restrained from asserting title to or interest in said lands, or any thereof, adverse to the interest, ownership, and title of the cross complainant. February 26, 1897, the complainants, John W. and Henry T. Blythe, obtained an order from the court dismissing the suit against the Blythe Company; but on the following day, on the application of the solicitor for the Blythe Company, this order was vacated and set aside, but without prejudice to a renewal of the motion by complainants to dismiss as to the said Blythe Company at any time should they be so advised in the premises. Subpoenas were issued on the cross complaint, and on March 1, 1897, served on the defendant Florence Blythe Hinckley, in the manner hereinafter described, and the others returned unserved as to the complainants, John W. and Henry T. Blythe.

On March 4, 1897, the attorney for the Blythe Company stipulated that the complainants need not file their replication to the answer which the Blythe Company had interposed to the complainants' second amended and supplemental bill until the expiration of 10 days after notice had been given by the Blythe Company that the replication was required. He also stipulated that the complainants need not plead or move to the cross bill filed by the Blythe Company until further notice from the Blythe Company. Subsequently an alias subpoena was issued and order served upon the solicitors for the complainants, and this service was accordingly made April 9, 1897. The service of the subpoena on the complainants to appear and answer the cross bill was accompanied by a notice from the attorney for the Blythe Company to the same effect, in accordance with the terms of his stipulation of March 4, 1897. The subpoena served upon Florence Blythe Hinckley was returnable on April 5, 1897, and the one served on the solicitors of John W. and Henry T. Blythe was returnable May 3, 1897. On April 6, 1897, the solicitor for the Blythe Company entered in the rule book a rule taking the cross bill pro confesso as to Florence Blythe Hinckley for not appearing to said bill; and on May 4, 1897, a similar order was entered in the rule book, taking the cross bill as confessed against John W. and Henry T. Blythe. On April 28, 1897, or seven days prior to the entry of the last-mentioned order, the solicitors for the complainants served a notice on the attorney for the Blythe Company that on May 3, 1897, they would move the court to set aside and rescind the order entered on February 27, 1897, which vacated and set aside the previous order of February 26, 1897, dismissing the suit as to the Blythe Company, and would move the court to reinstate and give force and effect to said prior order of dismissal, and that the suit stand dismissed as to the Blythe Company, and would also move the court to set aside the order of April 8, 1897, providing that the subpoena issued upon the cross bill be served upon the complainants by delivering a copy to their solicitors. On May 3, 1897, the complainants petitioned the court for leave to appear specially for the purpose of making these motions, and the petition was thereupon granted, and it was further ordered "that no further appearance in respect to said pleading so filed by said Blythe Company need be entered by said complainants John W. Blythe et al. until 10 days after the solicitors of said complainants are served with written notice of the decision of the court upon said motion, and then only if said motion should not be sustained in whole or in part. And, for the like cause, said complainants are hereby granted 10 days after their solicitors are served with written notice of the decision upon their said motion in which to enter a general and further appearance to said pleading, and to file any further motion, plea, demurrer, or answer in said suit in relation thereto, and then only if said motion should not be sustained; and it is further ordered that a copy of this order be served upon the solicitor for said the Blythe Company herein." It appears that a copy of the order was served as directed, and that the motions were called on the motion calendar of the court on May 3, 1897; but, on the application of

the attorney of the Blythe Company to the solicitors for the complainants, the latter moved the court to continue the motions to May 10, 1897, and they were accordingly so continued. On May 10, 1897, these motions were again called on the motion calendar, and the motion to dismiss the suit as to the Blythe Company was heard, the solicitors for the complainants appearing and submitting argument in its support, and the attorney for the Blythe Company appearing and submitting argument in opposition thereto; and thereupon leave was granted to both sides to file briefs. The motion to quash the substituted service was continued. On the same day, to wit, May 10, 1897, the solicitor for the Blythe Company filed amendments to his cross bill, and obtained an order from the court that the cross bill should stand amended in the manner specified, and the several parts specified be stricken therefrom and withdrawn. The changes made by these amendments in the cross' bill consisted in the abandonment and withdrawal of all reference to certain property situated in another judicial district of the state, described in the cross bill as originally filed, and the dismissal of the cross bill against the defendant Boswell M. Blythe. On June 1, 1897, the complainants, by leave of court, amended their second amended and supplemental bill, by striking out the name of Boswell M. Blythe as a party defendant, but leaving the allegation as to his being an heir of Thomas H. Blythe, deceased, remain, with this explanation: "But, as the said Boswell M. Blythe resides out of and beyond the jurisdiction of the court, your orators state the facts concerning him." No new rule taking the cross bill as amended pro confesso was entered in the rule book; but on July 1, 1897, the solicitor for the Blythe Company filed his own affidavit, showing that the subpoena issued on the cross bill was served on Florence Blythe Hinckley in the Northern district of California on the 1st day of March, 1897; that no appearance had been entered by or for her, and the time for her appearance had not been enlarged; that a decree pro confesso had been entered in the rule book; that the alias subpoena issued upon the cross bill was served pursuant to the order of the court upon John W. and Henry T. Blythe, returnable on the first Monday of May, 1897; that no appearance had been entered by or for them, and the time for their appearance had not been enlarged; that a decree pro confesso had been entered in the rule book. Thereupon an order was entered by the court that the cross bill of the Blythe Company be taken pro confesso, and that the judgment and decree of the court be entered accordingly. On July 3, 1897, a decree in conformity with this order was entered in favor of the Blythe Company, and the court soon after adjourned for the term. At the time this decree was entered, there were pending before the court undetermined the following motions: (1) The motion of the defendant Florence Blythe Hinckley to strike from the files the answer of the Blythe Company to the complainants' second amended bill. (2) The motion of the same defendant to strike out certain portions of the answer of the Blythe Company. (3) The motion of the same defendant to dismiss complainants' suit. (4) The motion of the complainants to dismiss the suit as to the Blythe Company. (5) The motion of the complainants to quash the substituted service of the subpoena issued upon the cross bill. The first, second, third, and fourth motions had been argued and submitted; the last briefs having been filed on the first and second motions on April 30, 1897, on the third motion on May 22, 1897, and on the fourth motion on June 25, 1897.

On July 7, 1897, Florence Blythe Hinckley filed a petition to have the judgment of July 3, 1897, set aside and vacated, on the ground that she had never been served with any process or received a copy of any process issued upon said cross bill; that she had never seen or received said cross bill or a copy thereof; that no cross bill or any copy thereof, or any process or any copy of any process, had ever been delivered to her or left at her dwelling house or usual place of abode with any adult person who was ever a member or resident in her family. The petition was supported by the petitioner's affidavit, together with the affidavits of her attorney and counsel, to the effect that prior to July 6, 1897, they had no knowledge that a subpoena or any other process had ever been issued upon the cross bill filed by the Blythe Company; that they had no knowledge or information that a default had been entered against Florence Blythe Hinckley, or that an order had been made that the cross bill should be taken pro confesso. The complainants also ap

peared, and moved to set aside the decree, on the ground that certain motions submitted by them were pending undetermined at the date of the decree. Upon this showing the order of adjournment for the term entered on July 3, 1897, was on July 7, 1897, set aside and vacated, and the defendant Florence Blythe Hinckley permitted to file her petition and affidavits in open court; and her counsel thereupon moved that the decree of July 3, 1897, against her, and in favor of the Blythe Company, be vacated. The hearing of this motion was then continued until the first day of the next term, and, pending such continuance, all proceedings upon the decree of July 3, 1897, were stayed until the further order of the court. The first day of the next term was July 12, 1897, when the hearing of the motion was continued to August 2, 1897, and reached on August 3, 1897. Preliminarily to hearing the motion to vacate the decree of July 3, 1897, a number of objections were interposed by counsel for the Blythe Company: (1) That the moving parties had not appeared in court in accordance with the rules of chancery practice; (2) that, by reason of the expiration of the term, the decree had become final, and the Blythe Company dismissed from further attendance upon the court. (3) The Blythe Company had not been brought into court by any order, writ, or process of the court. With respect to the first objection, I think the petition presented to me by the defendant Florence on July 7, 1897, to set aside and vacate the decree of July 3, 1897, and the order entered upon that petition, permitting her to file the petition and affidavits, and continuing the hearing of the same until the first day of the next term, is a substantial compliance with the rules of equity practice. The other objections will be disposed of in the determination of the defendants' motion.

S. W. & E. B. Holladay (L. D. McKissick and Jefferson Chandler, of counsel), for complainants.

W. H. H. Hart (Robert Y. Hayne, Garber, Boalt & Bishop, Aylett R. Cotton, and W. W. Foote, of counsel), for defendant Florence Blythe Hinckley.

George W. Towle, Jr. (E. S. Pillsbury and Lorenzo S. B. Sawyer, of counsel), for defendant Blythe Co.

MORROW, Circuit Judge (after stating the case as above). The first question is as to the character of the decree entered by this court on July 3, 1897. If it was an interlocutory decree, all the parties are still in court, awaiting the final determination of the cause, and the court retains its control over the decree, with power to reconsider and modify or set it aside, as the rights of the parties may require. *Fourniquet v. Perkins*, 16 How. 82. If it was a final decree, the parties have undoubtedly been dismissed, and they can only be brought back, and the decision reviewed, by certain well-established rules of procedure. *Fost. Fed. Prac.* §§ 350-359.

The bill filed by the Blythe Company has been called a "cross bill," and it will be so treated in disposing of the question now under consideration. As an original bill it would probably not be within the equity jurisdiction of this court, for the reason that it does not appear that the Blythe Company was in possession of the premises in controversy when the bill was filed, or that both parties were out of possession. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495; *Whitehead v. Shattuck*, 138 U. S. 147, 11 Sup. Ct. 276; *Railroad Co. v. Goodrich*, 57 Fed. 880. The object of a cross bill is either (1) to bring before the court new matter in aid of the defense to the original bill; (2) to obtain a discovery of facts from the plaintiff or co-defendant in aid of the defense to the original bill; (3) to obtain

some affirmative relief as to the matters in issue in the original bill; or (4) to obtain full relief for all parties, and a complete determination of all controversies which arise out of the matters charged in the original bill. The cross bill is auxiliary to the original suit, and a graft and dependency upon it. *Cross v. De Valle*, 1 Wall. 5, 14; *Rubber Co. v. Goodyear*, 9 Wall. 807, 809; *Dows v. City of Chicago*, 11 Wall. 108, 112; *Slason v. Wright*, 14 Vt. 208. While a decision or decree upon a cross bill seeking merely a discovery is obviously not a final decree, it is a question not involved in this suit, and requires no further consideration.

It is contended, however, in support of the motion to vacate the decree of July 3, 1897, that no decree rendered upon a cross bill can, in the nature of things, be other than interlocutory; and *Ayres v. Carver*, 17 How. 594, and *Ex parte Railroad Co.*, 95 U. S. 221, are cited as establishing this doctrine. Are those cases authority to that extent? In the first case the original bill charged that the complainant had taken the necessary steps to purchase certain lands acquired by the government under a treaty with the Chickasaw Indians; that the register and receiver of the land office where the lands were subject to entry would not permit him to make the purchase, but allowed the defendants to enter and purchase the several tracts in sections and subdivisions; that the defendants had notice of the rights and equities of the complainant at the time of the purchase. The prayer of the bill was that the complainant be permitted to enter and purchase the land, or that the defendants be decreed to convey the same to the complainant, and to deliver up the possession. Two of the defendant filed cross bills against the complainant and co-defendants, charging that they had obtained a title to the several tracts in controversy, or to portions of them, long prior to the title claimed by their co-defendants. The cross bills were dismissed, and an appeal taken to the supreme court by the parties who filed them. The court held that the decree upon the cross bill was not final, and dismissed the appeal. Mr. Justice Nelson, speaking for the court, said:

"A cross bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original and independent suit. The cross bill is auxiliary to the proceedings in the original suit, and a dependency upon it. It is said by Lord Hardwick that both the original and cross bill constitute but one suit, so intimately are they connected together. *Field v. Schieffelin*, 7 Johns. Ch. 253. * * * It is manifest from this brief reference to the doctrine that any decision or decree in the proceedings upon the said cross bill is not a final decree in the suit, and therefore not the subject of an appeal to this court, under the 22d section of the judiciary act. The decree, whether maintaining or dismissing the bill, disposes of a proceeding simply incidental to the principal matter in litigation, and can only be reviewed on an appeal from the final decree disposing of the whole case. That appeal brings up all the proceedings for re-examination when the party aggrieved by any determination in respect to the cross bill has the opportunity to review it, as in the case of any other interlocutory proceeding in the case."

In referring to the cross bill in that case, the court said "that the matters sought to be brought into the controversy between the complainants in that and their co-defendants do not seem to have any connection with the matters in controversy with the complainants in the original bill." In other words, the matter in the cross bill was not germane to any matter in controversy in the original bill, and no final decree could be entered upon it disposing of the whole case.

In *Ex parte Railroad Company*, *supra*, the original bill was filed by the complainant to foreclose a mortgage on the property of a railroad company. The complainant held bonds secured by a mortgage on which the company had defaulted in the payment of interest. Afterwards the holder of a prior mortgage was admitted as a defendant, and filed an answer and a cross bill. The cross bill prayed for the sale of the mortgaged property for the purpose of paying the prior debt. Thereupon the holders of certain statutory securities intermediate in time brought another suit to enforce their liens, making all the parties to the original suit parties to the second suit. In the original suit the court entered a decree in favor of the complainant in the cross bill, and also entered a decree in both suits directing the sale of the property and the application of the proceeds to the payment of the claim of the cross complainant, in preference to that of the other mortgage creditors. From these decrees appeals were taken to the supreme court, and a bond for supersedeas filed. The next day after these appeals were taken, the court again considered the cause, and entered a decree in both suits, consolidated for that purpose, settling the equities of the parties, other than the cross complainant, ordering a sale of the property subject to the lien of the cross complainant, and directing that the purchaser take title subject to such lien as the same might be finally adjudged and determined. The cross complainant appeared, and prayed an appeal from the decree, to operate as a supersedeas upon the filing of the necessary bond, but the court refused to grant the appeal or accept a bond. Thereupon the cross complainant applied to the supreme court for a mandamus requiring the circuit court to grant the appeal, and accept a good and sufficient supersedeas bond. The court granted the writ directing the circuit court to allow the appeal and accept a supersedeas bond. In the opinion delivered by Mr. Chief Justice Waite, the decision in *Ayres v. Carver* is cited as authority, to the effect that any decision or decree in the proceedings upon the cross bill is not a final decree in the suit, and not the subject of an appeal to the supreme court, but the learned judge adds that "a cross bill must grow out of the matters alleged in the original bill, and is used to bring the whole dispute before the court, so that there may be a complete decree touching the subject-matter of the action." In the case before the court the cross bill had this object in view, but the decree entered upon it was not a complete determination of all the controversies involved in the original bill, and hence it was not a final decree.

In *Holgate v. Eaton*, 116 U. S. 33, 6 Sup. Ct. 224, the controversy was of such a character that the prevailing equities were found in

favor of the complainants in the cross bill, and the substantial effect of a complete determination of all the controversies in the case was the entry of a final decree upon that bill. Practically the same result was reached in *Peay v. Schenck*, Woolw. 175, 21 Fed. Cas. 667, 672; *Lowenstein v. Glidewell*, 5 Dill. 325, 15 Fed. Cas. 1027; *Markell v. Kasson*, 31 Fed. 104; *Jesup v. Railroad Co.*, 43 Fed. 483; *Springfield Milling Co. v. Barnard & Leas Mfg. Co.*, 26 C. C. A. 389, 81 Fed. 261. From these authorities it certainly appears as the established doctrine that where a cross bill seeks affirmative equitable relief with respect to matters germane to the original suit, and the controversy has taken such a shape that a complete and final determination of the whole case as to all parties to the original suit may be had upon the lines of the cross bill, then a final decree may be entered upon that bill.

This brings us to the inquiry, in the present case, whether there is in the decree of July 3, 1897, a complete and final determination of all the controversies involved in the original cause. In complainants' second amended and supplemental bill the allegations of the original bill are repeated; among others, the allegation that the complainants were the owners, as tenants in common with each other, of the lands in controversy. The bill further alleges that, at and before the time of the death of Thomas H. Blythe, he was the owner in fee, and seised and possessed, of the real property described in the bill; that the complainants and one Boswell M. Blythe were the next of kin and heirs at law of the said Thomas H. Blythe, deceased; that the complainant John W. Blythe was the assignee of Elizabeth Shelton and William S. Blythe, next of kin and heirs at law of said Thomas H. Blythe, deceased, and, as such assignee, he owned the interest to which they would have been entitled in the estate of Thomas H. Blythe, and were entitled to take and have by succession, and they did take by succession, the estate of Thomas H. Blythe, deceased, and they were the owners in fee of the real property described and entitled to the possession thereof. To this second amended and supplemental bill the Blythe Company interposed an answer, in which it denied that the complainants, or either of them, or Elizabeth Shelton or William S. Blythe, were the next of kin or heirs at law of Thomas H. Blythe, deceased, and denied that the complainants were the owners of the property in controversy, but alleged that certain other persons named were at the time of the death of Thomas H. Blythe his next of kin, and were collectively his only heirs at law, and, as such, were, under the laws of the state of California then existing and in force in said state, entitled to, and did, succeed to the entire estate and property of said Thomas H. Blythe upon his death, and that all the right, title, interest, succession, and estate of such persons had been granted, sold, conveyed, and confirmed to the Blythe Company. Here was a controversy between the complainants and this defendant involving the whole question at issue. The complainants might succeed in the action against the defendant Florence Blythe Hinckley, and still be defeated by the Blythe Company. By the stipulation of the attorney for the Blythe Company,

dated March 4, 1897, the complainants were not required to file their replication to the answer of the Blythe Company until the expiration of 10 days after notice that the same was required. No replication has been filed, and, so far as the records show, none has been required. The controversy between the complainant and the Blythe Company to the second amended and supplemental bill was therefore not at issue when the decree of July 3, 1897, was entered. It is true this decree disposes of the adverse claim and interest of the complainants to the property in dispute upon the issues of the cross complaint, but the fact remains that the legal ownership of the property by reason of being next of kin to Thomas H. Blythe, deceased, was still a subject of controversy between these parties to the original and second amended and supplemental bill, to be determined on its merits, and, so far as that bill was concerned, was undetermined at the date of the decree.

The controversy between the complainants and the defendant Florence Blythe Hinckley was also left undetermined by the decree. Her motion to dismiss the entire suit had been elaborately argued and submitted, and the last brief had been filed as late as May 22, 1897. Here was a motion that involved the question of the jurisdiction of the court over the parties and the subject-matter. The cross bill, being dependent upon the proceedings in the original suit, was subject to whatever disposition might be made of the question of jurisdiction. *Dows v. City of Chicago*, 11 Wall. 108, 112. In this state of the cause as to the general subject of controversy, it is difficult to see how a complete and final decree upon the whole case could be entered on the cross bill; but still further difficulties are encountered in the way of such a disposition of the case when we come to examine the issues in detail. The principal subject of controversy is the valuable real estate left by Thomas H. Blythe, and situated in San Francisco, but this is not all. It appears that there was in the hands of the public administrator, at the close of the administration, the sum of \$89,842.94, being the accrued rents of the real property. By the decree of January 18, 1896, the superior court distributed this sum to the defendant Florence, as the residue of the estate. The complainants appear to claim this sum as rents and profits, but whether, under the decree, the Blythe Company is entitled to it, is not so clear. In any event, a reference to the master for an accounting would be necessary, and some directions required. Here, then, is a question left open for the future judgment of the court, and to this extent the decree is incomplete. *Beebe v. Russel*, 19 How. 285; *Iron Co. v. Martin*, 132 U. S. 93, 10 Sup. Ct. 32; *Lodge v. Twell*, 135 U. S. 235, 10 Sup. Ct. 745; *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. 201.

In the original bill, Frederick W. Hinckley, the husband of the defendant Florence, was a party defendant. He was also joined as a defendant in the amended bill, and in the second amended and supplemental bill. He was also referred to in the answer of the Blythe Company. In the cross bill it is alleged that he had died since the 1st day of February, 1897. In the decree it is recited that he had

died since the commencement of the suit. It is contended in support of the decree that Frederick W. Hinckley had no other interest in the property other than that of husband to the defendant Florence, and that, therefore, the recital in the decree is sufficient. This would undoubtedly be correct if the cross bill had contained an allegation to that effect, but it does not, and the court is not at liberty to supply the omission by such a construction of the decree. These undetermined questions fix the character of the decree. It was not complete and final in the sense in which such a decree is recognized under the established rules of practice in the courts of the United States. It was clearly an interlocutory decree, and, as such, is subject to the control of the court, and may be reconsidered and modified or set aside at any time prior to the entry of the final decree. *Fourniquet v. Perkins*, 16 How. 82, 84; *Kilbourn v. Latta*, 150 U. S. 540, 14 Sup. Ct. 201. Whether the court will set aside such a decree depends upon the proceedings and the merits of the application. In this case it is contended, in support of the motion and petition to set aside and vacate the decree, that there was no service of subpoena on the defendant Florence, and therefore the court had no power to enter the decree; in any event, that the proceedings which resulted in the decree were of such an irregular character as to justify the court in opening the default.

Under Equity Rule 13 the service of subpoena is required to be made as follows:

"The service of all subpoenas shall be by delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant with some adult person who is a member or resident in the family."

The subpoena issued upon the cross bill has this return by the marshal:

"I hereby certify that I received the within writ on the first day of March, 1897, and personally served the same on the first day of March, 1897, on Florence Blythe Hinckley, by delivering to and leaving with Mrs. Harry Hinckley, an adult person, who is a resident in the place of the abode of Florence Blythe Hinckley, said defendant named therein, at the county of Alameda in said district, an attested copy thereof, at usual place of abode of said Florence Blythe Hinckley, one of the defendants herein."

It will be observed that the return does not show that Mrs. Harry Hinckley, to whom a copy of the subpoena was delivered, was a member or resident of the family of Florence Blythe Hinckley; and it is contended that this departure from the requirement of the rule is fatal to the service, and therefore renders the decree absolutely void. It appears that Mrs. Harry Hinckley is the wife of the brother of the deceased husband of the defendant Florence. The difference between leaving a copy of a subpoena at the dwelling house or usual place of abode of the defendant with some adult person who is a member or resident of the family of the defendant, and leaving it with a person who is a resident of the place of the abode of the defendant, is certainly very great, and might be very important. Take the case of a defendant living at one of our large hotels. A service such as is required by the rule would secure the delivery of the writ

to some person so related to or associated with the person to be served that the substituted service would practically be the equivalent of an actual personal service by the officer; but a service such as was made in this case might be made by the delivery of the writ to an entire stranger, or to some indifferent or ignorant servant residing in the hotel, with no probability whatever that it would reach the party for whom it was intended. *White v. Primm*, 36 Ill. 418. Clearly, the rule is not complied with by any such service. *Harris v. Hardeman*, 14 How. 334. But it is said that the return of the marshal is that he has made personal service of the subpoena on Florence Blythe Hinckley, and that, as there is nothing in his certificate as to the method of making the service inconsistent with this return, a good and sufficient service will be presumed. It is also further contended that, if the return is defective in this respect, the defect has been cured by the recital in the decree that the subpoena "had been duly and regularly served within the Northern district of California upon the respondent in said cross bill of complaint." The doctrine here invoked to support the decree would be applicable if the decree were now being subjected to a collateral attack. In such a proceeding every intendment would be indulged in support of the decree, and whatever appeared in the record as having been done would be presumed to have been rightfully done. But this doctrine does not control the discretion of the court in opening a decree obtained by default for the purpose of permitting a defense on the merits. Indeed, it has been held "that a meritorious defense and a reasonable degree of diligence in making it are all that it is necessary to establish, in order to justify the setting aside of an interlocutory judgment." *Adams v. Hickman*, 43 Mo. 168. It will not be necessary, therefore, to review in detail all the objections that have been made to the subpoena, the return that has been made upon it, and generally to the irregularity of the proceedings. It will be sufficient, for the present purpose, to say that it is contended very earnestly that the proceedings have been so irregular and defective that when the decree was entered on July 3, 1897, no jurisdiction had been obtained by the court over the defendant Florence in the action on the cross bill. And in this connection it is pointed out that the subpoena was served on March 1, 1897, and the return made on March 2, 1897; that the certificate recites that Mrs. Harry Hinckley "is a resident," etc.; that this recital relates only to her residence on March 2, 1897, and not what it was on the day the subpoena was served; that it does not appear from the return that Mrs. Harry Hinckley was ever a resident in the usual place of abode of the defendant Florence; that the service was not made at the required place; and, finally, that the subpoena was dated February 16, 1896; that in the memorandum at the bottom of the subpoena, required by Equity Rule 12, the defendant was notified that she must appear "on or before the first Monday of April next, at the clerk's office of said court, pursuant to said bill, otherwise the said bill will be taken pro confesso"; that this requirement, considered with respect to the date of the subpoena, was that she should appear on or before the first

Monday of April, 1896, and as the service of the subpoena was made on the first of March, 1897, she was upon the face of the writ required to make an impossible appearance.

If the court is limited in its inquiry to the subpoena and its return, it is difficult to see how it can find that the requirements of the rules as to the service of process have been followed with such precision in obtaining jurisdiction over the defendant that it would be justified in refusing to set aside the decree. But in support of these objections a number of affidavits of the defendant Florence and others have been filed, relating to her residence at about the time of the service of the subpoena, from which it appears that about January 1, 1896, the defendant and her husband rented the house No. 1221 California street, in San Francisco, for the term of two years; that they resided at the house until February 6, 1897, when Frederick W. Hinckley died, at Portland, Or.; that the funeral took place February 9, 1897, at which date, and after the funeral, the defendant Florence visited Mrs. Harry Hinckley at the former residence of George W. Grayson, the father of Mrs. Harry Hinckley, at the corner of Ninth and Madison streets, in the city of Oakland; that she spent her nights there until after March 1, 1897; that between the 9th of February, 1897, and the 5th day of March, 1897, defendant was more or less at the house No. 1221 California street, where she kept her servants, and took many of her meals, and received visits from her physicians and friends; that she retained possession and paid the rent of the house No. 1221 California street until May 1, 1897. The affidavits enter into considerable detail concerning the movements of the defendant Florence between the dates mentioned, but enough has been stated to show that she had a residence in San Francisco from some time in January, 1896, down to the death of her husband, on February 6, 1897, and that she claimed a residence at the same place down to May 1, 1897. The service of the subpoena referred to in the return of the marshal was made by leaving a copy of it with Mrs. Harry Hinckley, at the house of George W. Grayson, in Oakland, on March 1, 1897. The affidavits of the defendants Florence, Harry G. Hinckley, Mary Grayson Hinckley (Mrs. Harry G. Hinckley), Robert R. Grayson, and George W. Grayson specifically deny that the Grayson house was ever the residence or usual place of abode of the defendant Florence. A number of counter affidavits were filed, from which it appears that Mr. and Mrs. Harry G. Hinckley resided at the Grayson house from about November, 1896, to May 1, 1897; that the defendant Florence attended the funeral of her husband, Frederick W. Hinckley, on February 9, 1897, riding in her own carriage, but with horses furnished by a livery stable in San Francisco; that after the funeral she was driven to the Grayson house, the carriage placed in a livery stable in Oakland, and the horses returned to San Francisco; that thereafter, and until some time in April, 1897, the carriage remained in Oakland, subject to the call and use of the defendant, with horses furnished by the Oakland livery stable. It is also alleged by one Charles Bone, upon information, obtained by inquiry, that the Grayson house was the usual

place of abode of the defendant Florence. The affidavit of the deputy marshal who served the subpoena has also been introduced, from which it appears that he called at the Grayson house, at Ninth and Madison streets, in Oakland, on the 1st day of March, 1897, and asked for Mrs. Hinckley. The lady who responded said she was Mrs. Hinckley. The deputy marshal then said: "You are Mrs. Harry Hinckley. I want to see Mrs. F. B. Hinckley." Her reply was that "Mrs. F. B. Hinckley could not be seen." The deputy marshal then asked if Mrs. F. B. Hinckley was stopping at the house, to which the lady replied, "She is stopping here temporarily." He then asked her, "Is she here at the house now?" She said, "Yes." He then asked her, "Does she sleep here?" She said, "Yes." The deputy marshal then explained that he had a subpoena in equity to serve upon Mrs. F. B. Hinckley, and wanted to see her personally. The lady replied in a positive manner that "he could not see her." He then handed Mrs. Harry Hinckley a copy of the subpoena, who said she did not want to have anything to do with it. The deputy marshal said that he was satisfied that Mrs. F. B. Hinckley was living at the house, and he would leave the subpoena with her (Mrs. Harry Hinckley). She took the subpoena, and the deputy marshal said, "A delivery of the subpoena to you will be a service of it on Mrs. F. B. Hinckley." The conclusion drawn from these affidavits is that the defendant Florence was temporarily residing at the Grayson house, in Oakland, at the time the copy of the subpoena was left with Mrs. Harry G. Hinckley, but her permanent residence and abode had been for more than a year, and was then, at No. 1221 California street, in San Francisco. The substituted service was therefore not within the requirement of Equity Rule 13.

But it is contended in support of the decree that, even if it be determined that the subpoena was insufficient, and that no service was made upon the defendant Florence, still, by her own showing, she voluntarily appeared to the cross complaint by counsel, on March 22, 1897; that she was thereby charged with notice of the subsequent proceedings, and is therefore bound by the decree. *Jones v. Andrews*, 10 Wall. 327. This contention is based upon an order of the court alleged to have been made on March 22, 1897. The order is not found upon the minutes of the court or among the records, but the evidence that it was made is contained in certain affidavits submitted by counsel for the defendant Florence upon the present motion. In an affidavit of William H. H. Hart, one of the counsel for the defendant Florence, he refers to the argument had in this court, on March 22, 1897, on the motion to dismiss the suit; and he alleges that his attention was at that time called by William Rix, Esq., to the fact that the Blythe Company had filed a cross complaint under the date of February 16, 1897, and that, out of abundance of caution, in open court, he asked the court for a further order that the defendant Florence should have the same time within which to appear to said cross complaint that had been previously granted upon the application of the defendant Florence in reference to the answer and cross complaint filed by the Blythe Company on February 1, 1897. The order referred to provided that no further appearance in respect to the pleading

filed by the Blythe Company need be entered by the defendant Florence Blythe Hinckley until 10 days after her solicitor should be served with written notice of the decision of the court upon her motion respecting such pleading, and then only if said motion should not be sustained. The affidavit of William Rix corroborates the statement of Mr. Hart, and adds that the court granted the order. The affidavit of W. A. Kirkwood is to the effect that for over two years he had been connected with the office of William H. H. Hart, and during that time had to a large extent had charge of the business of obtaining orders in connection with suits in which Mr. Hart had been engaged; that he was present in court on March 22, 1897, and heard Hart mention to the court that, in an order previously granted, the defendant Florence had been given 10 days, after notice of the decision of a motion that had been made in relation to a pleading in the case filed by the Blythe Company, in which to appear to said pleading, and to plead to the same; that Hart asked that the order be made to apply to the cross complaint, and the order was granted by the court. In a second affidavit filed by Mr. Hart he again refers to the application to the court on March 22, 1897, for an extension of time for the defendant Florence to appear to the cross complaint, and alleges that the order was granted by the court. The fact that no minute or record of this application or order has been found raises a presumption that the application was not made, or, if made, was not granted. It is known that the court-room clerk of this court is attentive and accurate in recording the proceedings of the court, and it will be presumed that he performed his duty; but, on the other hand, the affidavits are direct and positive that an application was made to the court for an extension of time for the defendant Florence to appear to the cross bill filed February 16, 1897, and that the application was granted, and these affidavits have not been contradicted. Besides, it would not be unreasonable to expect that the cross bill would be found by counsel for the defendant among the papers in the case, in the course of the proceedings in court. The condition of the case and the situation of the parties were therefore favorable to just such action as it was claimed was taken on March 22, 1897; and, in view of the uncontradicted evidence that such action was taken, the court is disposed to accept it as an established fact, notwithstanding the strong contrary presumption in favor of the minutes of the court; but whether the defendant can claim any benefit from the terms of such an unrecorded order of the court under the circumstances of this case is not clear.

It is further contended in support of the decree that, admitting that such action was taken, all it amounts to is this: that the defendant Florence appeared in court by counsel at the date named, and by such appearance became subject to the jurisdiction of the court, and bound by its proceedings; that the rule taking the cross bill pro confesso against her, entered in the clerk's office on April 6, 1897, was a legal notice to her that the Blythe Company was proceeding under the rules to a decree upon that bill. There is much force in the argument

advanced in support of this position, but let us see what consequences legitimately follow from this contention. If the statements contained in the affidavits are true, there was not merely an appearance on behalf of the defendant Florence to the cross bill of February 16, 1897, but an order of court extending her time to appear to that bill, which had not expired when the decree was entered on July 3, 1897. Under this order she was not subject to any proceeding against her on the cross bill until 10 days after the court had decided a pending motion in the case. But it is said that her counsel neglected to have the order entered of record, and, as the Blythe Company had no notice of it, they were entitled to proceed with their case. This would be true if, under the rules of practice, counsel were required to see that proceedings in court were properly recorded in the minutes; but this duty belongs to the officers of the court, and their default cannot be used to the prejudice of parties relying upon the integrity of official records. In *re Wight*, 134 U. S. 136, 10 Sup. Ct. 487. The most serious difficulty, however, in the way of maintaining the decree against the effect of an appearance by the defendant Florence, arises out of the fact that after the entry of the rule taking the cross bill *pro confesso* against her on April 6, 1897, the cross bill was twice amended, first by an order dated May 10, 1897, and again by an order dated July 3, 1897. It is true these amendments did not introduce new matter, but withdrew allegations respecting property in another judicial district; struck out the name of Boswell M. Blythe, residing out of the district, and corrected a clerical error relating to the designation of the cross complainant as a defendant; but it is a general rule that any amendment of a bill, however trivial and unimportant, authorizes a defendant, after his appearance, to put in an answer making an entirely new defense, and contradicting his former answer, if one has been filed. 1 *Daniell*, Ch. Prac. (6th Am. Ed.) 409; 1 *Fost. Fed. Prac.* (2d Ed.) 280; *French v. Hay*, 22 Wall. 246; *Nelson v. Eaton*, 13 C. C. A. 523, 66 Fed. 376; *Fisher v. Simon*, 14 C. C. A. 443, 67 Fed. 387. Moreover, the defendant Florence had an order of court, dated and duly entered on July 3, 1897, extending her time to appear in the case until after receiving 10 days' notice of the disposition of the motion to dismiss the amended and supplemental bill of complaint, as amended by the order of the court dated June 1, 1897, and then only in case said motion should be denied. It is true this order applied to the amended supplemental bill, but the language of the order appears to cover more than this one pleading, and extend her appearance in the cause generally. Surely, the court will not be expected to give any narrow construction to its orders as against a default.

Referring now to the remaining preliminary objection interposed by the Blythe Company to this hearing,—that, by reason of the expiration of the term, the decree of July 3, 1897, had become final, and the Blythe Company dismissed from further attendance upon the court, and had not been brought into court by any order, writ, or process of the court,—I think it sufficiently appears from the proceedings to which reference has been made that the decree in question was not

final, and did not dispose of all the controversies which arose out of the matters charged in the original bill, and that, therefore, the Blythe Company has not been dismissed, but has continued in attendance upon the court to abide its final determination in the case.

It follows from these considerations that the court, in the exercise of a sound discretion, if not recognizing an absolute right, must set aside and vacate the decree of July 3, 1897, as far as it affects the interests of the defendant Florence.

With respect to the petition of the complainants to have the decree set aside so far as it affects them, many of the reasons that have operated in favor of the defendant Florence also obtain in their favor; but they advance other reasons in that behalf, which they contend place their petition on the grounds of an absolute right. By order of the court, the subpoena issued upon the cross bill was served upon their counsel in the case. They appeared specially by leave of the court, and, contesting this substituted service, submitted a motion to quash the subpoena. This motion was pending when the decree was entered. There was also a motion of the complainants pending to dismiss the suit as to the Blythe Company. It is contended that, while these motions were pending, no binding decree could be entered against them on the cross bill. This is certainly the general rule of equity practice, and no sufficient reason appears why it should not be applied in this case. The decree will therefore be reversed as to all parties upon the payment of costs by the defendant Florence Blythe Hinckley.

Motion to Correct Minutes.

After the entry of the decree of July 3, 1897, the court, then being in the March term, adjourned sine die. The succeeding or July term commenced on Monday, July 12, 1897. When application was made to the judge of this court in chambers on July 7, 1897, by the solicitors for the defendant Florence Blythe Hinckley, and by the solicitor for the complainants John W. and Henry T. Blythe, to vacate and set aside the decree of July 3, 1897, the circuit court was reopened in the March term, in accordance with an order reciting that, good and sufficient reasons appearing therefor, the order of adjournment of the court sine die, entered on July 3, 1897, was ordered vacated and set aside, and the court was thereupon opened for the transaction of business. The business transacted consisted in the entry of an order permitting the defendant Florence Blythe Hinckley to file her petition and affidavits in the matter of the application to set aside the decree of July 3, 1897; and the hearing of the same continued until the first day of the next term, and a like order was entered for and on behalf of the complainants. The attorney for the Blythe Company has moved to correct the minutes of the court by expunging therefrom this record and the entries relating thereto of the date of July 7, 1897, on the ground that after the court had adjourned for the term, on July 3, 1897, it had no power or authority to reconvene

or reopen for the transaction of business prior to the day fixed by law for the commencement of the next term, except in special or adjourned session, in the manner provided by sections 664 and 672 of the Revised Statutes, a method not pursued by the court on this occasion. The business transacted on July 7, 1897, consisted merely in permitting the parties to file certain papers with the clerk of the court, and continuing the hearing of the same until the first day of the next term. If permission was required for the filing of these papers, it could have been obtained as well from the judge in chambers, and the hearing, in any event, could have been set down for the first day of the next term. The business transacted by the court on July 7, 1897, was therefore without any legal significance or controlling effect; and, as it does not appear to have in any way prejudiced any right of the Blythe Company, the motion will be denied.

BLYTHE et al. v. HINCKLEY et al.

(Circuit Court, N. D. California. December 6, 1897.)

1. JURISDICTION OF FEDERAL COURTS—PRESENTATION OF JURISDICTION OF QUESTIONS—MOTION TO DISMISS.

Under section 5 of the judiciary act of March 3, 1875, which imposes on the circuit courts the duty of dismissing a suit, if it appears at any time before final disposition that it does not really and substantially involve a controversy of which it may properly take cognizance, a motion to dismiss for want of jurisdiction may be considered by the court at any time before final judgment or decree.

2. SAME—SUIT TO ANNUL STATE JUDGMENT.

Complainants, claiming land in California, as collateral heirs of the deceased owner, filed a suit in a federal court to quiet title, against his natural daughter and others. By a second amended supplemental bill, they set up at length certain probate proceedings, to which they were parties, theretofore had in the superior court of San Francisco, which is a court of full and complete probate powers. These proceedings resulted in a final decree, affirmed by the state's supreme court, adjudging that the lands had descended to such natural daughter. Complainants then alleged that the state court was without jurisdiction to make this decree, because the daughter, at the time of her father's death, was a nonresident alien, incapable of becoming a naturalized citizen, and therefore incapable of inheriting, and because, further, complainants were the heirs of the deceased at the time of his death, and thereupon eo instante the title vested in them, so that no court could divest it. All the facts affecting the daughter's capacity to inherit appeared upon the face of the record in the state courts. *Held*, that the case came within the rule that a federal court will not assume jurisdiction of a suit to vacate or annul a decree of a state court for alleged want of jurisdiction appearing on the face of the record.

3. EQUITY JURISDICTION—POSSESSION OF LAND—REMEDY BY EJECTMENT.

A bill in equity was filed to obtain possession of land which at the time was in the possession of the public administrator, under state authority. Afterwards the land was surrendered to one of the defendants, to whom the title had been adjudged by the state court of probate jurisdiction. Still

later complainants filed a second amended supplemental bill. *Held* that, as the defendant was then in possession, there was an adequate remedy at law by ejectment, and the equity suit must be dismissed.

S. W. & E. B. Holladay (L. D. McKissick and Jefferson Chandler, of counsel), for complainants.

W. H. H. Hart (Robert Y. Hayne, Garber, Boalt & Bishop, Aylett R. Cotton, and W. W. Foote, of counsel), for defendant Florence Blythe Hinckley.

George W. Towle, Jr. (E. S. Pillsbury and Lorenzo S. B. Sawyer, of counsel), for defendant Blythe Co.

MORROW, Circuit Judge. This is a motion to dismiss the action as it is set forth in the second amended and supplemental bill of complaint. The first ground of the motion is that it appears that the court has no jurisdiction of the matters and things alleged in the bill of complaint. A preliminary objection has been interposed to the consideration of the question of jurisdiction on this motion. The objection must be overruled. Section 5 of the act of March 3, 1875 (18 Stat. 472), imposes upon the circuit court the duty of dismissing a suit, if it appears at any time after it is brought, and before it is finally disposed of, that it does not really and substantially involve a controversy of which it may properly take cognizance. *Robinson v. Anderson*, 121 U. S. 522, 7 Sup. Ct. 1011; *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289.

The second amended and supplemental bill of complaint contains a recital of the proceedings in the superior court of the city and county of San Francisco with respect to the estate of Thomas H. Blythe, deceased. It alleges, among other things, that the defendant Florence Blythe Hinckley was born in England, the bastard child of an unmarried woman; that at the time of her birth her mother was a resident of England, and a subject of Victoria, queen of Great Britain and Ireland; that she remained in England at all times until the death of Thomas H. Blythe; that she came to California for the first time in 1883; that she was then an infant, about 10 years of age, ineligible to become a citizen of the United States, and, when she arrived in California, she was a nonresident alien. And, among other things, the bill alleges:

"That after the death of said Thomas H. Blythe, as hereinbefore alleged, the public administrator of the city and county of San Francisco took charge of the estate of said Blythe, and entered upon the administration of the same. * * * That, after the said Florence first came to San Francisco, one James Crisp Perry, who was then and there a subject of the queen of Great Britain, was appointed by said superior court of the city and county of San Francisco guardian of said Florence; and thereafter, as such guardian, he commenced a proceeding in said superior court, in the name of said Florence, to have the court ascertain, adjudge, and determine the heirship to the said Thomas H. Blythe and the ownership of his estate, and, in substance, that she (said Florence) was the daughter and the sole heir of said Thomas H. Blythe, under and by virtue of said sections 230 and 1387 of said Civil Code, or under and by virtue of one or the other of said sections; and also, by virtue thereof, to have the said court adjudge and decree that the said Florence was the sole heir at law of the said Thomas H. Blythe, and entitled to inherit his estate. That your orators appeared in said action or proceeding, and filed their answer

and cross complaint therein, denying and contesting the right and title of said Florence, and claiming for themselves to be heirs of said Blythe. That thereafter such proceedings were had in said court in the said cause that it was for the first time made to appear plainly to the court, upon the record, that said Florence was an illegitimate child, that she was born in England, and that neither she nor her alleged mother, nor the mother nor father of the alleged mother, had ever been within the United States, or eligible to become citizens thereof, until after the death of the said Thomas H. Blythe. And your orators, in that behalf, allege that when it was so made plainly to appear to said court that the said Florence was a nonresident alien, and had never been a bona fide resident of the state of California, until after the death of said Thomas H. Blythe, and descent cast, it was the duty of the court to dismiss the petition or complaint, or both, of the said Florence, in so far as the title and descent of the above-described real estate was involved or affected, for want of jurisdiction in said court to adjudge or decree that said Florence was capable of inheriting said real estate as an heir at law of said Thomas H. Blythe.

"Your orators further say that, in the said proceeding wherein the said Florence was petitioner and plaintiff, it was at the trial thereof attempted to be proven by her and in her behalf that the said Thomas H. Blythe, after the birth of the said Florence, and before his death, and while he was living in the state of California, and while the said Florence was living in England as aforesaid, attempted to legitimate the said Florence, by adoption, under said section 230 of the Civil Code, or to institute her as his heir, under said section 1387 of said Code. And your orators say that the parties went to trial, and the said superior court, without jurisdiction so to do, decided in substance and effect that said Thomas H. Blythe had in his lifetime adopted and legitimated the said Florence; that from said judgment your orators appealed to the state supreme court, and in that court the cause was argued, and by a divided court it was, without any jurisdiction so to do, in substance and effect decided that said Thomas H. Blythe had not adopted or legitimated the said Florence, under or in conformity with said section 230 of the Civil Code, but that he had constituted her his heir, under and pursuant to the provisions of section 1387 of said Civil Code. And in that behalf your orators say that neither the said superior nor the said supreme court considered, adjudged, or construed, in making its decision, the said section 17 of article 1, and said section 22 of article 1, of the constitution of the state of California; nor were the rights of your orators, under those sections, adjudged or determined by either of said courts, or by its decision. And in that behalf your orators say that said last decision made by a divided court was and is contrary to and in violation of the constitution of the state of California, and was and is contrary to and in direct conflict with numerous former decisions of said supreme court, which former decisions had long before established a rule of property in said state, which rule had excluded aliens and foreigners who occupied the same or similar status as did said Florence from inheriting real estate in the state of California. And in that behalf your orators further say that they are informed and believe, and upon their information and belief say, that they are not precluded by the said conflicting decisions of the state court, nor by anything contained in the record of the proceedings upon which said last decision was made, from prosecuting this, their action, in this court; nor is this court precluded from entertaining jurisdiction of this action, and deciding it upon its merits; nor is said last decision binding or obligatory, as authority or otherwise, upon this court. And your orators further say that heretofore, to wit, on June 13, 1894, said Florence, calling herself Florence Blythe, filed in said superior court, in the matter of the estate of said Thomas H. Blythe, deceased, her petition for distribution, praying for an order of said court distributing to her the share of said estate to which she claimed to be entitled, to wit, the whole of said estate, embracing the real property first above described, to which she alleged herself to be entitled only as sole heir at law and sole next of kin to said Thomas H. Blythe, deceased. That in her said petition it was made plainly to appear to said court that said Florence, the petitioner, was a nonresident alien, and was not and had never been a bona fide resident of the state of California until after the death of said Thomas H. Blythe and

descent cast. And your orators say that it was the duty of said court to dismiss the said petition for distribution of said Florence in so far as the title and descent of the above-described real estate was involved or affected, for want of jurisdiction in said court to adjudge or decree that said Florence was capable of inheriting said real estate as heir at law of said Thomas H. Blythe, or to distribute said estate to her. That your orators answered said petition for distribution, and thereby took issue upon all the material averments thereof, and therein claimed said estate as heirs of said Blythe. That afterwards the court, sitting in probate, without right or jurisdiction so to do, heard said petition for distribution; and afterwards, on October 26, 1894, said court went through the idle form of granting a decree of distribution; and on that day a document which falsely purported to be a decree of distribution of nearly all the property of said estate of Thomas H. Blythe to said Florence, embracing all of the real property above described, was signed by the judge of said court, and filed by the clerk, and on the next day thereafter was recorded in the minute book of said court. And your orators say that said pretended decree of distribution was and is null and void, for want of jurisdiction in said court to make the same. * * *

"And your orators further say that heretofore, and since the filing of the original bill herein, to wit, on January 2, 1896, said Florence, calling herself Florence Blythe Hinckley, filed in said superior court, in the matter of the estate of Thomas H. Blythe, deceased, her petition for final distribution to her of said estate, wherein and whereby she prayed for an order of said court distributing to her the residue of said estate then remaining in the hands of the public administrator, amounting to the sum of \$89,842.94; the same and the whole thereof being the rents accrued from the real property aforesaid, to which she alleged herself to be entitled only as the sole heir at law and sole next of kin to said Thomas H. Blythe, deceased. That in her said petition it was made plainly to appear to said court that said Florence, the petitioner, was born and continued to be a nonresident alien until after the death of said Blythe, and was not and had never been a bona fide resident of the state of California until after the death of said Thomas H. Blythe and descent cast. And your orators say that it was the duty of said court to dismiss said petition for final distribution to said Florence, in so far as the above-described real estate and said rents were involved or affected, for want of jurisdiction in said court to adjudge or decree that said Florence was capable of inheriting said real estate as heir at law of said Thomas H. Blythe, deceased, or to distribute said estate to her. That notice of said petition was given to your orators, who were notified and invited to come into court, and show why said petition should not be granted. That, in obedience and response to said notice, your orators did on January 16, 1896, file in said court their answer, wherein and whereby they denied the right of the said Florence to have said rents distributed to her, and claimed that they were the heirs and next of kin of said Thomas H. Blythe, deceased, and entitled to said rents. That afterwards, on the 16th day of January, 1896, said court, sitting in probate, without right or jurisdiction so to do, heard said petition for final distribution, and wrongfully struck from the files the answer and opposition so theretofore filed by your orators; and when your orators arose, and attempted to object to and to show cause why said petition should not be granted, said court refused to permit your orators to be in any wise heard. And afterwards, on January 18, 1896, said court went through the idle form of granting a decree of final distribution; and on that day a document which falsely purported to be a decree of final distribution, distributing to said Florence all the residue of said estate, based upon said petition last aforesaid, was signed by the judge of said court, and filed by the clerk, and the same was thereafter recorded in the minute book of said court. And your orators say that said pretended decree of final distribution was and is null and void for want of jurisdiction in said court to make the same. And your orators further say that, at the date of filing the original bill herein, neither party hereto was in possession of the land hereinbefore described, but the same was in the hands and possession of the public administrator of the city and county of San Francisco, state of California. But since the filing of said bill, to wit, December 4, 1895, said Florence has secured possession of said real property, and the whole thereof,

through said pretended judgment and decrees aforesaid, and without any other or further right than as above set forth, and she is now in the possession of the same. * * *

It will be observed that the bill charges that the proceedings in the superior court of San Francisco, and in the supreme court of the state, respecting the right of the defendant Florence Blythe Hinckley to inherit the estate of Thomas H. Blythe, deceased, were without jurisdiction in either court to adjudge or determine. This charge of want of jurisdiction in the state court appears to be a conclusion drawn from the averments of the bill, and must be disregarded unless the facts alleged are sufficient to support the charge. It is based primarily upon the alleged want of capacity on the part of the defendant Florence Blythe Hinckley to inherit the estate of Thomas H. Blythe, by reason of the fact that she was an illegitimate child, and an alien at the time of his death; but it is contended, further, that the state court, in adjudging that she had the capacity to inherit, destroyed a rule of property in the state, after the estate had vested by descent in complainants. Upon this claim the complainants insist that they are entitled to maintain this action to recover their several interests in an estate in which they allege the defendants are in possession of under a void judgment.

The first inquiry is as to the jurisdiction of the state court to hear and determine the controversy as to the right of inheritance, and the conclusive character of the judgment of that court between the same parties in the present action.

In the Broderick Will Case, 21 Wall. 503, a suit in equity was brought in the circuit court of the United States for the district of California, by the alleged heirs at law of David C. Broderick, to set aside the probate of his will, and have the same declared a forgery, and to recover the said estate, much of which consisted of lands in the city of San Francisco. Demurrers were interposed, and upon argument the bill was dismissed. An appeal was taken to the supreme court, where the decree was affirmed. In speaking of the jurisdiction of the probate courts, the court said:

"The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be affected with least chance of injustice and fraud; and that the result attained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. These objects are generally accomplished by the constitution and powers which are given to the probate courts, and the modes provided for reviewing their proceedings. And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief."

After reviewing the authorities establishing the general rule that a court of equity will not interfere with probate proceedings, the court proceeds to consider the jurisdiction of the probate courts of California, and concludes with this observation:

"In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth."

Under the present constitution of the state of California, jurisdiction of all matters of probate is vested in the superior court, a court of general jurisdiction.

In *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 369, a bill in equity was brought in the circuit court of the United States for the Eastern district of Pennsylvania. The object of the bill was to charge the defendant, as the former owner of a tract of land in Wisconsin, as the trustee for complainants with respect to said ownership, and have him account for the value of the lands, and for all the rents and profits received by him and his grantees, and for all loss and damage resulting to the property by reason of the cutting of timber thereon by the defendant and his grantee, and for any other loss occasioned by the defendant's acts. The complainants were the collateral heirs of Robert M. Simmons, who died unmarried and intestate, in Louisiana, about the year 1830. At the time of his death he was seised and possessed of an inchoate land claim in Louisiana, for 640 acres, founded upon a purchase of a settlement right conferred by an act of congress. For reasons involving no fault on the part of Robert M. Simmons or any of his heirs, the claim remained unlocated and unsatisfied until congress passed an act in 1858, under which the surveyor general of the district in which the claim was situated was authorized, upon satisfactory proofs, to issue to the claimants or his legal representatives a certificate of location for a quantity of land equal to that so confirmed and unsatisfied; and it was provided that this certificate might be located upon any of the public lands of the United States subject to sale at private entry, etc. By the law of Louisiana, the heirs of a decedent become seised and possessed of his whole estate, both real and personal, immediately upon his death, subject only to their right to renounce said succession, or to the right of creditors to require administration thereof in case of nonaction of the heirs. In 1872 such action was taken in a parish court in Louisiana, at the instance of a stranger to the estate, that the judge of the court issued an order purporting to appoint an administrator of the estate of Robert M. Simmons, directing an inventory of the estate to be made, and a sale of the property belonging thereto to pay debts. An inventory was returned, and a sale of the land claim made, in accordance with the order. The claim was sold for \$30, which sum was wholly used and expended in the payment of the costs and expenses of the pretended administration, no other debts than those created thereby existing or being shown to exist. This claim was thereupon presented to the surveyor general of Louisiana by the purchaser, claiming to be the legal representative of Robert M. Simmons; and the surveyor general thereupon prepared certificates of location for the claim, and, in the course of proceedings authorized by the act of congress, certain of the certificates were located upon lands in Wisconsin, and a patent therefor issued by the United States, in the name of Robert M. Simmons, or his legal representatives. By several mesne conveyances, the lands in question passed to the defendant, who neg-

lected to pay the taxes assessed thereon, and the lands were conveyed for the unpaid taxes; but, while the defendant was in possession of the land, he removed therefrom timber and other valuable products, and sold the same for large sums of money, and received large rents and profits from the lands, which it was the object of the bill to recover. All the proceedings in relation to the claim in suit, the cutting of the timber, and all other acts in any wise connected with the claim, were done and had without the knowledge of the complainants or of any person interested in the claim. The bill alleged that the Louisiana court was without jurisdiction, and that its proceedings in the matter did not conform to the statute under the authority of which it assumed to act; and the prayer of the bill was that complainants might be adjudged and decreed to be the true legal representatives of Robert M. Simmons; that the proceedings in the parish court in relation to the sale of the land claim be adjudged null and void; and that an account be taken, etc. The defendant demurred to the bill; the demurrer was sustained, and the bill dismissed. An appeal was taken to the supreme court, where the judgment of dismissal was affirmed. The questions discussed in the opinion of the court were the validity of the judgment of the parish court of Louisiana ordering the sale of the unlocated land claim, the legality of the sale, and the fraud by which it was alleged the judgment was procured. The court reviews the authorities upon the questions involved in the case, and arrives at the conclusion that the parish court had a clear and unquestionable jurisdiction of the intestate estate or succession of Robert M. Simmons; that whatever errors there were in the proceedings could have been corrected on appeal or avoided in a direct action of annulment, but could not be made the grounds on which the decree of the court could be collaterally assailed.

In *Railway Co. v. Burke*, 13 C. C. A. 341, 66 Fed. 83, the complainant, claiming to be the owner by inheritance of a lot of land in the city of Little Rock, Ark., filed a bill of complaint against the Little Rock Junction-Railway, to establish his title thereto, and to recover the premises from the possession of the defendant. The bill averred, in substance, that the railway company was in possession of the land under a conveyance from one S., who claimed to have purchased the property at a sale for overdue taxes, which sale had been made in obedience to a decree of a state court of Arkansas in Pulaski county, having full chancery powers; that the title thus acquired by the railway company from S., its grantor, was unfounded and void, for the reason that the court never in fact acquired jurisdiction over the complainant to condemn and sell the property for overdue taxes; that service of process was by publication; and that notice was not properly given. The defendant denied the material allegations of the bill touching the jurisdiction of the chancery court, and averred that said court acquired full jurisdiction of the case, and of all persons having any interest in the property. The defendants also pleaded that the case made by the bill of complaint was not a case of which the federal circuit court, sitting in equity, could properly take cognizance. The circuit court rendered a decree in favor of the complainant, whereby it adjudged that his title was not divested by the sale under the

decree of the state court. On appeal to the circuit court of appeals, the decree of the circuit court was reversed, and the cause remanded, with directions to the circuit court to vacate its decree and dismiss the bill of complaint, without prejudice to the complainant's right to take such action in the state court as he might deem proper. Judge Thayer, speaking for the circuit court of appeals, and referring to the testimony introduced in the circuit court relating to the publication of notice of the suit in the state court, said:

"That the trial of the case clearly resolved itself into a review of the proceedings of Pulaski chancery court for matters apparent on the face of the record."

After pointing out the various proceedings that might have been taken by the complainant in the state court to correct the error of the chancery court, Judge Thayer said:

"We think, therefore, that it may be accepted as a general rule, in the absence of any statutory provisions on the subject, that the proper forum in which to seek relief, otherwise than by an appeal or writ of error, against a judgment or decree which is alleged to be void on the face of the record, is in the court by which such judgment or decree was rendered, and that other courts of co-ordinate jurisdiction have no authority to grant relief in such cases. But, whatever may be the correct rule in this respect as between state courts of equal authority, it is manifestly true, we think, that, owing to the peculiar relations which exist between state and federal courts of co-ordinate jurisdiction, the federal circuit court ought not to review, modify, or annul a judgment or decree of a state court, unless such review is sought on a state of facts not disclosed by the record of the state court, which, for that reason, has not undergone judicial examination. The sufficiency of the service, whether by publication or otherwise, to support a final adjudication, and every other matter apparent upon the face of the record, are supposed to have received due consideration by the court rendering a judgment or decree before the same was entered. Therefore, when a suit is instituted to nullify a decree for matters disclosed by the record, and for no other reason, the proceeding is not a new suit, but is essentially in the nature of an appeal from the original adjudication or a bill of review. The federal courts should remit proceedings such as these to the judicial tribunal of the state which made the record that is to be reviewed or impeached."

Reference is then made to the fact that the bill had been brought to quiet complainant's title against the claims of the defendant, and that the prayer of the bill was that the complainant might be restored to the possession of the premises wrongfully withheld from him by the defendant, and that the bill was filed after the alleged void decree of the chancery court was fully executed, and after the defendant had acquired a title thereunder. Commenting upon this feature of the case, the court does not find in it a sufficient reason for holding that the circuit court was authorized to review the proceedings of the chancery court, and to afford relief on the ground that the complainant was without means of redress for the alleged wrong in the state court, by which the supposed void decree was rendered; the court holding that not only was the bill of review open to the complainant as a remedy, but the action of ejectment, and upon this point the court says:

"Moreover, as the present action was brought and prosecuted upon the theory that the decree of the chancery court is utterly void when tried by the record, it follows that the remedy by ejectment was also open to the com-

plainant, for no doctrine is better established than that a sale under a decree that was rendered without jurisdiction confers no title, and that such a decree is open to impeachment in any collateral proceeding when the want of jurisdiction is apparent upon the face of the record,"—citing *Galpin v. Page*, 18 Wall. 350; *Coit v. Haven*, 30 Conn. 190; *Adams v. Cowles*, 95 Mo. 501, 8 S. W. 711; *Frankel v. Satterfield* (Del. Super.) 19 Atl. 898; *Furgeson v. Jones* (Or.) 20 Pac. 842; *Black*, Judgm. §§ 278, 407, and cases there cited.

Judge Sanborn concurred specially in the judgment of the circuit court of appeals, on the ground that:

"A bill of equity cannot be maintained in the national courts to recover possession of real property in cases in which there is no impediment to an action of ejectment."

In *Barrow v. Hunton*, 99 U. S. 80, the supreme court draws a distinction between a suit to set aside a decree on evidence outside of the record, establishing fraud in obtaining the decree, and a proceeding to vacate a judgment for matters disclosed upon the face of the record. In that case *Hunton* had recovered a judgment by default in a state court of Louisiana. Subsequently the judgment debtor filed a petition in the state court, praying for a decree to nullify the judgment, on the ground that he had not been lawfully served with process. *Hunton* caused the proceedings to nullify the judgment to be removed to the circuit court of the United States, where the question arose whether the federal court could lawfully entertain jurisdiction of the proceedings. In discussing that question, Mr. Justice Bradley, in delivering the opinion of the court, said:

"The question presented with regard to the jurisdiction of the circuit court is whether the proceeding to procure [the] nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case. Otherwise, the circuit courts of the United States would become invested with power to control the proceedings in the state courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different states. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding; and according to the doctrine laid down in *Gaines v. Fuentes*, 92 U. S. 10, the case might be within the cognizance of the federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; and in the other class the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof."

These cases clearly establish the doctrine that the courts of the United States will not take jurisdiction of a case to correct an error appearing on the face of the record in a judgment rendered in a state court, nor will they take jurisdiction of a case the object of which is to set aside a judgment of a state court void upon its face. Now, if we examine the present bill, we find that the latter object is its substantial scope and purpose; and, to accomplish this object, there is set forth,

with great particularity, the record and proceedings in the superior and supreme courts of the state in a controversy between the same parties, concerning the same subject-matter, together with references to the treaty of 1794 between Great Britain and the United States, sections of the constitution of the state, and sections of the Civil Code of California, relating to the rights of foreigners and aliens to take real estate by succession as heirs at law of deceased citizens of California; and the question arises whether, upon that record, the contention of the complainants takes the case out of the general rule limiting the jurisdiction of the circuit court to interfere in such cases. This contention, fully stated, is: First, that the state court had no jurisdiction to award the estate of Thomas H. Blythe to a nonresident alien, who was ineligible to become a naturalized citizen of the United States; second, that, under a settled rule of property in existence in this state at the death of Thomas H. Blythe, and descent cast, the complainants were his heirs at law, and the title to the real estate vested in them *eo instante* on the death of Blythe, and no court could afterwards divest that title, and vest it in another; third, that this court is not precluded by the decision of the state supreme court made in 1892 in the case of *Blythe v. Ayres*, 96 Cal. 552, 31 Pac. 915.

The claim that the superior court of the state had no jurisdiction to award the estate of Thomas H. Blythe to the defendant Florence Blythe Hinckley, because at his death she was a nonresident alien, and ineligible to become a naturalized citizen of the United States, appears to involve a federal question, for the reason that the eligibility of a nonresident alien to inherit real property in any of the states of the Union may be a matter of treaty regulation between the federal government and foreign powers, and the states are forbidden to enter into any treaty stipulations; but the complainants do not contend for jurisdiction in the circuit on that ground. Moreover, the tribunal to review the decision of a state court, involving such a question, would be the supreme court of the United States, and that court has determined that it has no jurisdiction for that purpose in this case. *Blythe v. Hinckley*, 167 U. S. 746, 17 Sup. Ct. 991. This necessarily leaves the question of inheritance to be determined by the state law and by the state courts. The novel doctrine that, in the absence of treaty regulations upon the subject, the right of an alien to inherit does not exist, and that the courts of the state, otherwise competent to pass upon this question, are without jurisdiction, cannot be entertained at this period of our judicial history. Some consideration must be given to the fact that heretofore this whole question of inheritance has, by judicial acquiescence, been left to the jurisdiction of the states, and has become a general rule of property right. This being so, it follows that the jurisdiction of the circuit court cannot be maintained, because the state court, in the exercise of its general jurisdiction, determined the eligibility of the defendant Florence to inherit an estate which that court was called upon to distribute under the laws of the state.

The other propositions contended for by complainants are, for the same reason, deemed insufficient to take this case out of the general

rule that, after a court of a state, with full jurisdiction over property in its possession, has finally determined all rights to that property, a court of the United States will not entertain jurisdiction to annul such decree, and disturb rights once definitely determined.

But there is still another reason why this action cannot be maintained. It appears from the bill of complaint that when the original bill was filed, on December 3, 1895, neither party was in possession of the land in controversy, but that it was in the hands of the public administrator of the city and county of San Francisco. Section 738 of the Code of Civil Procedure of California provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." In *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, it was held, under a statute similar to this in Nebraska, that a suit in equity could be maintained against a party claiming an adverse interest in real property, where neither party was in possession, and where it was "unoccupied, wild, and uncultivated land"; and it was explained that an action of ejectment would not lie in such a case, because the land had no occupant,—in other words, it was vacant land. In the present case, not only did the land have an occupant when the original bill was filed, but it was in the possession of the public administrator under the authority and jurisdiction of the superior court of the state. "An administrator appointed by a state court is an officer of that court. His possession of the decedent's property is a possession taken in obedience to the orders of that court. It is the possession of the court, and it is possession which cannot be disturbed by any court." *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906. It follows that, while the possession of the administrator continued, no decree for the possession of the real property in his custody could have been entered in favor of the complainants. But it appears that, on the next day after the filing of the original bill, the defendant Florence secured possession of the property, and she has ever since continued in the possession of the same. She was therefore in possession when the second amended and supplemental bill was filed; and against her, at that time, so far as appears from the bill of complaint, a suit in ejectment by the complainants, claiming to be heirs of Thomas H. Blythe, would have afforded a plain, adequate, and complete remedy. Section 1452 of the Code of Civil Procedure of California provides that heirs may themselves, or jointly with the executor or administrator, maintain an action for the possession of real estate. Such an action by the heir alone was sustained in *Crosby v. Dowd*, 61 Cal. 557, 600. And see, also, *Janey v. Throckmorton*, 57 Cal. 368. When the right set up by the plaintiff in a court of the United States is a title to real estate, and the remedy sought is its possession and enjoyment, the remedy should be sought at law, where both parties have a constitutional right to call for a jury. *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276; *Sanders v. Devereux*, 8 C. C. A. 629, 60 Fed. 311; *Railway Co. v. Burke*, 13 C. C. A. 341, 66 Fed. 83. As the view here taken of this feature of the case disposes of the motion to dismiss the bill, it will not be necessary to consider the question of parties and diverse citizenship. The bill of complaint will be dismissed.

FRONT STREET CABLE RY. CO. v. DRAKE, U. S. Marshal.

(Circuit Court, D. Washington, N. D. October 29, 1897.)

1. RECEIVERSHIPS—JUDGMENTS—PREFERRED CLAIMS—DISCRETION OF COURT.

The court has no discretion to allow, as a preferred claim against a mortgaged street railway, a judgment for damages rendered prior to the appointment of the receiver. *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 24 C. C. A. 511, 79 Fed. 227, and *Farmers' Loan & Trust Co. v. Nestelle*, 25 C. C. A. 194, 79 Fed. 748, followed.

2. MORTGAGE—EXTENSION OF MORTGAGED PREMISES.

An extension of a street railroad is covered by a mortgage on such railroad, executed prior to the building of such extension.

This cause was heard on the petition of Christopher B. Dudley to establish priority over the mortgage of a judgment in his favor given for damages on account of a personal injury caused by negligence in the operation of the Front Street Cable Railway, prior to the appointment of a receiver herein.

L. H. Wheeler, for petitioner.

E. C. Hughes, for receiver.

HANFORD, District Judge. Recent decisions of the circuit court of appeals for the Ninth circuit, reversing judgments of this court, which allowed claims for damages caused by negligence in the operation of mortgaged railroads to be paid as preferential claims, leave to this court no discretion. The claim to priority in every such case must be disallowed. *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 24 C. C. A. 511, 79 Fed. 227; *Farmers' Loan & Trust Co. v. Nestelle*, 25 C. C. A. 194, 79 Fed. 748.

The petitioner, however, has introduced evidence tending to prove that, after the date of the mortgage upon the property of the Front Street Cable-Railway Company, the turntable at the southern terminus of the railway, and the track originally placed in Front street between said turntable and Cherry street, were taken up, and a new track and cable railway was constructed from the foot of Cherry street through Commercial street to King street, and a new turntable constructed there, and it is claimed that the mortgage does not cover this extension. The mortgage, however, does cover all after-acquired equipments and the franchises of the company. It will be impossible to operate the railway if the extension should be severed from that part of it which was constructed and in use prior to the date of the mortgage, and it will be impossible to sell the extension separately from the rest of the Front Street Cable-Railway property, without impairing the value of both parts to such an extent as to destroy the security. I hold that the security of the mortgage bondholders cannot be impaired by additions to the mortgaged property. If the owner of a house or building should give a mortgage upon it, and afterwards build an addition to such house or building, or otherwise increase the value of the mortgaged premises by betterments which could not be severed from the property as it existed at the time of giving the mortgage, without destroying the security, certainly the mortgagee would be entitled to claim a lien upon the entire premises,

including the additions and betterments. The mortgage in this case had attached prior to the inception of any right of the petitioner. Therefore, according to the decisions of the circuit court of appeals for this circuit, he cannot claim priority over the mortgage.

BREWER et al. v. CENTRAL OF GEORGIA RY. CO. et al.

(Circuit Court, S. D. Georgia, E. D. January 8, 1898.)

1. INTERSTATE COMMERCE LAW—LONG AND SHORT HAULS.

It is not unlawful to charge more for a shorter than for a longer haul, when the circumstances and conditions are in fact substantially dissimilar, although the interstate commerce commission has made an order forbidding such charges in the particular case. *Interstate Commerce Com'n v. Alabama M. R. Co.*, 18 Sup. Ct. 45, followed.

2. SAME—EFFECT OF COMPETITION.

Competition between rival railroads, and not merely between rail and water carriers, is a factor to be considered in determining the substantial similarity or dissimilarity of circumstances and conditions under the fourth section of the interstate commerce law. *Interstate Commerce Com'n v. Alabama M. R. Co.*, 18 Sup. Ct. 45, followed.

3. INTERSTATE COMMERCE—LONG AND SHORT HAUL—DISCRIMINATION—SIMILARITY OF CONDITIONS.

The charging of a greater rate for a shorter than for a longer haul is not a violation of the fourth section of the interstate commerce law, when the rate charged for the shorter distance is not in itself unreasonable, and the more distant point is a commercial center and large distributing point, where there exists strong competition, both by land and water, none of which conditions are present at the other point, as such difference creates a dissimilarity of "circumstances and conditions" within the meaning of the act.

In Equity.

W. E. H. Searcey, Jr., and L. A. Shafer, for complainants.

Ed Baxter, for defendants.

SPEER, District Judge. This suit in equity is brought by *Brewer & Hanleiter*, wholesale and retail grocers of Griffin, Ga., to compel compliance by the *Central of Georgia Railway Company* with an order of the interstate commerce commission. It appears from the record that *Brewer & Hanleiter* complained to the interstate commerce commission that freight rates to Griffin by the defendant company and its connections from Western points, such as Cincinnati, Ohio, and Louisville, were materially greater than rates on like traffic carried a greater distance of 60 miles through Griffin to Macon. The commission, on the 29th of June, 1897, announced its conclusions in favor of the complainants, and directed that the *Central of Georgia Railway Company*, with its connecting lines, should wholly cease and desist from enforcing rates and practices found and declared in the opinion of the commission to be unlawful, and that the defendants, including the *Central of Georgia Railway Company*, should wholly cease and desist from giving undue preference or advantage to the city of Macon, Ga., and merchants and dealers therein, and from "subjecting the city of Griffin, and complainants or other merchants or

dealers therein, to undue and unreasonable prejudice and disadvantage by maintaining, collecting, and receiving higher rates and charges for the transportation of freight of any kind or class from Cincinnati, Ohio, or Louisville, Ky., to Griffin, aforesaid, than they maintain, collect, and receive from the transportation of like kind of traffic from the same point of shipment, Cincinnati or Louisville, to Macon aforesaid"; and, further, that they should "wholly cease and desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of various kinds or classes of freight articles from Cincinnati, in the state of Ohio, for the shorter distance to Griffin, in the state of Georgia, than they contemporaneously charge, demand, collect, or receive for the transportation of like kind of traffic from Cincinnati, aforesaid, for the longer distance, over the same line, and in the same direction, to Macon, in the state of Georgia." And the commission reiterates this order with regard to freight or articles shipped from Louisville, in Kentucky, to Griffin, in Georgia.

The defendant the Central of Georgia Railway Company, not obeying the order and directions of the commission, this bill was brought. It is alleged therein that the defendant company charges and receives greater compensation in the aggregate for the transportation of property or freight, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, in that the said Central of Georgia Railway Company has charged and received from complainants on 50 barrels of flour from Nashville, Tenn., to Griffin, Ga., $29\frac{1}{2}$ cents per 100 pounds, and on 115 pounds of chewing gum from Louisville, Ky., the sum of \$1.43 per 100 pounds, whereas said defendant company charges and receives on the like kind of property the sum of 23 cents per 100 pounds and \$1.07 per 100 pounds, respectively, to Macon, Ga., the same being a longer distance, over the same line, in the same direction, under substantially similar circumstances and conditions, the shorter distance to Griffin being included within the longer distance to Macon, Ga. This, it is alleged, is contrary to the laws of the United States of America, in that it violates section 4 of the act to regulate commerce, approved February 4, 1887; and, further, in that it violates and disobeys the report, opinion, and order of the interstate commerce commission of the United States, lawfully made and issued, and served upon said Central of Georgia Railway Company. The prayer of the bill is for an injunction restraining the defendant company, its officers, agents, and servants, under a proper penalty, from further continuing such violation and disobedience of the aforesaid order and requirement of the interstate commerce commission, and enjoining and requiring obedience to the same. The matter now under consideration by the court is an application for a temporary injunction pendente lite.

The answer of the Central of Georgia Railway Company presented by its counsel, Mr. Baxter, among other defenses, denies that the defendant company charges and receives, as alleged in the bill, greater

compensation in the aggregate for the transportation of freight, under substantially similar circumstances and condition, for a shorter than for a longer distance over the same line, in the same direction, for that the circumstances and conditions affecting such transportation existing at the one place are substantially dissimilar to those existing at the other. There follows from this defense the further contention that the order of the interstate commerce commission, upon which the complainant relies, is unlawful, and that the defendant ought not to be compelled by the court to obey it.

It is not contended by the complainant that the freight rates charged by the defendant company and its connections on goods shipped to Griffin are unreasonable. Neither in this court nor in the hearing before the commission was evidence offered to show that the Griffin rates were unreasonable. The contention is that these rates were unreasonable as compared with the Macon rates. Indeed, upon that subject the commission itself declares: "There is no testimony in this case from which we can say that the rate to Griffin was or was not too high 'in and of itself,' and we make no finding upon that question." The commission further holds, however: "The claim that the rate to Griffin is 'in and of itself unreasonable' is not sustained. The burden of proving that issue is upon the complainants, and this burden they have not met." On the other hand, there is much evidence that the rate to Griffin is reasonable.

Adopting the lucid order of the commission, the next inquiry is, do the lesser rates to Macon make an unjust discrimination against Griffin? The deliverance of the commission upon this question is emphatic in expression, and, if justified by the facts, momentous and far-reaching in effect. With, I trust, appropriate deference to the views of that learned and experienced board, I quote from the opinion itself:

"(2) Do the rates unjustly discriminate against Griffin in favor of Macon? That they discriminate, clearly appears from the findings of fact. Every inhabitant of Griffin who buys a barrel of flour or a can of beef pays more for it than as though he resided in Macon. The complainants are absolutely prohibited from competing upon equal terms with the Macon wholesaler outside the limits of the city of Griffin itself. This sort of discrimination is intolerable, and should, under no circumstances, be permitted, unless justified by necessity. Competition is alleged as the justification. Plainly, water competition cannot be successfully invoked, for the only water competition is that from the East, and Griffin enjoys substantially the same Eastern rate as does Macon. Macon has five competing railroads. Griffin has two. The two lines which enter Griffin are among the most powerful and active in the South. Both these lines, by their connections, directly reach Louisville and Cincinnati, and compete directly for the business upon which the obnoxious rates are charged. Why, then, does Macon enjoy the benefit of this competition, while Griffin does not? Apparently for no other reason than that the railways interested arbitrarily determine that Macon shall be a 'basing point,' and that Griffin shall not be; competition shall be given its effect at Macon, and shall not be given its effect at Griffin. No other reason is suggested, and no other reason is possible. We do not think this accords with the spirit or the letter of the act to regulate commerce, the prime object of which was to do away with all sorts of discrimination. It should not be left to the whim of one or half a dozen railroad managers to determine whether a given city may or may not be a 'trade center.' The same causes which operate in one instance should have the same effect in another in-

stance. We hold, upon the findings before us, that Griffin is entitled to as low a rate from Louisville and Cincinnati as is Macon, and that the charge of a higher rate is an unjust discrimination under section 3. This Southern system of rate-making has been uniformly condemned by the commission as vicious in principle and in contravention of the act to regulate commerce. *Harnell v. Railroad Co.*, 1 Interst. Commerce Com. R. 236; *La Crosse Manufacturers' & Jobbers' Union v. Chicago, M. & St. P. Ry. Co.*, Id. 631; *Martin v. Railroad Co.*, 2 Interst. Commerce Com. R. 46; Id., 32; *In re Atlanta & W. P. R. Co.*, 3 Interst. Commerce Com. R. 24, 2 Interst. Commerce Com. R. 461; *Cordele Mach. Shop v. Louisville & N. R. Co.*, 6 Interst. Commerce Com. R. 361."

Notwithstanding these vigorous utterances, and the fact that they are buttressed by reference in the opinion to a large number of precedents made by the commission in other cases, it is well to consider carefully the reasoning by which the finding of unlawful discrimination must be tested. We have seen that the rates to Griffin are not in themselves unreasonable. This is found by the commission itself. There is no contention that the Macon rates are in themselves unreasonable. By what specific charge, and by what specific facts, then, is the finding of unjust discrimination supported? Not, certainly, by the mere fact that the Griffin rate is higher and the Macon rate is lower. There can be no unjust discrimination of which commissions and courts can take cognizance, even though it be of that "intolerable" sort which should, "under no circumstances, be permitted, unless justified by necessity," unless it also be an unlawful discrimination. To have merited the animadversions of the commission, these rates relative to these two Georgia cities must have been denounced by positive law, or its necessary implications. In this statement the court finds high warrant in the ruling of the commission in *Re Louisville & N. R. Co. v. Interstate Commerce Com'n*, 1 Interst. Commerce Com. R. 57, expressed by Judge Cooley, one of its eminent members: "That which the act does not declare unlawful must remain lawful if it was so before, and that which it failed to forbid the carrier is left at liberty to do without permission of any one." That statement is, indeed, axiomatic. The courts and the commissions of the United States must look to what is expressed or necessarily implied by the law for their authority to decide issues, and thus ascertain and determine the rights of contending parties. To what law, then, are these rates obnoxious, if, indeed, they are, in any sense, illegal? It is to be found, not in the third, but in the fourth, section of the interstate commerce act of congress of 1887. This is popularly known as the "long and short haul clause." It provides:

"Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance." 24 Stat. 380.

For an alleged violation of this clause the specific charges of the complainants' bill are made. No violation of the third clause, or other violation of the terms and provisions of the interstate commerce act of congress, is made in the bill, save the formal indictment that the defendant has disobeyed the report, opinion, and order of the

interstate commerce commission lawfully made and issued, and served in this case, etc.; and whether that order, opinion, and report was lawfully made must be determined with strict regard to the charges made by the complainants in their case. It is obvious, then, that the sole question for the court to determine is this: Does the action of the defendant company in charging a rate on freight shipped from Western points to Griffin, greater than it charges on freight on the same class snipped to Macon, the longer distance, violate the fourth section of the interstate commerce act? It is equally obvious that, if the more favorable rates to Macon are justified by circumstances and conditions at that point substantially dissimilar from those existing at Griffin, there has been no violation of law, and no judicial action is justifiable. There are many circumstances and conditions at the important distributing point Macon affecting railroad rates which do not exist at Griffin, one of the most attractive and prosperous cities in the state. A feature of this dissimilarity of the most substantial and striking character is pointed out by the commission itself. In the opinion from which I have already quoted appears this language:

"The defendants also rely upon competition between railroads and markets which exists at Macon. This competition does undoubtedly exist in a most active form, and is the controlling factor in making the Macon rate; but that it creates such dissimilarity of circumstances and conditions as will justify the carrier in charging more for the short than for the long haul, without an order of this commission, is no longer an open question with us."

It is perhaps a legitimate inference from this language, no doubt carefully considered, that, while the dissimilarity of conditions actually exists, the sine qua non of the situation is an order from the commission adjudicating that fact. It is presently to be seen, however, that, if the defendant company and its railway connections had applied to the commission for such an order, it would have been refused by that body, for, as further stated in the opinion, it was finally held in *Trammell v. Steamship Co.*, 5 Interst. Commerce Com. R. 324, and *In re Alleged Excessive Freight Rates & Charges on Food Products*, 4 Interst. Commerce Com. R. 120, that competition between railroads subject to the act would never make out a case of dissimilar circumstances and conditions within the meaning of the statute. This is conclusive, so far as the action by the commission is concerned, and yet the conclusion seems to be erroneous. On November 8, 1897, since the opinion from which I have so largely quoted was rendered, and since the bill now before this court was filed, the supreme court, in the case of *Interstate Commerce Com'n v. Alabama M. R. Co.*, 18 Sup. Ct. 45, has decided the commission's ruling that competition between railroads subject to the act could never make out a case of dissimilar circumstances within the meaning of the statute to be a misconstruction of the act. The case decided by the supreme court is singularly like that at bar. The Board of Trade of Troy, Ala., filed a complaint before the commission charging that the rates exacted for transportation of freight by the Alabama Midland Railway and its connections discriminated against the town of Troy, in Alabama, in violation of the interstate commerce act. It is sufficient to show the

pertinency of the authority to state the first specific charge, which was that the Alabama Midland Railway and the defendant railroads forming lines with it from Baltimore, New York, and the East to Troy and Montgomery, charge and collect a higher rate on shipments of class goods from those cities to Troy than on such shipments through Troy to Montgomery; the latter being the longer distance point by 52 miles. If Griffin is substituted for Troy and Macon for Montgomery, we seem to have the precise case before us. There was also a charge of unjust discrimination under the third section of the interstate commerce act, such as the commission found to exist in the case now before the court. There, too, the commission brought a bill in equity in the circuit court of the United States for the Middle district of Alabama, to compel obedience to its order. The circuit court dismissed the bill. 69 Fed. 227. The circuit court of appeals for the Fifth judicial circuit affirmed the decision. 21 C. C. A. 51, 74 Fed. 715. An appeal was taken to the supreme court of the United States. 18 Sup. Ct. 45. That court affirmed the decision of the circuit court of appeals, and the ruling of the supreme court is conclusive of all material issues now under consideration. The learned Justice Shiras, speaking for the court, discusses in the outset of his opinion the effect of competition at one point as an element of dissimilarity of conditions between two shipping points:

"Whether," he announces, "competition between lines of transportation to Montgomery, Eufaula, and Columbus justifies the giving to those cities a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the interstate commerce commission under the proviso to the fourth section of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case."

The learned justice continues:

"That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of congress in the passage of the act to regulate commerce, has been held by many of the circuit courts. It is sufficient to cite a few of the number: *Ex parte Koehler*, 31 Fed. 319; *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.*, Id., 862; *Interstate Commerce Com'n v. Atchison, T. & S. F. R. Co.*, 50 Fed. 306; *Interstate Commerce Com'n v. Cincinnati, N. O. & T. P. R. Co.*, 56 Fed. 943; *Behlmer v. Railroad Co.*, 71 Fed. 835; *Interstate Commerce Com'n v. Louisville & N. R. Co.*, 73 Fed. 409. In construing statutory provisions forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable. *Denaby Colliery Co. v. Manchester, S. & L. Ry. Co.*, 11 App. Cas. 97; *Phipps v. Railway Co.*, [1892] 2 Q. B. Div. 229. But the question whether competition as affecting rates is an element for the commission and the courts to consider in applying the provisions of the act to regulate commerce is not an open question in this court. In *Interstate Commerce Com'n v. Baltimore & O. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, it was said, approving observations made by Jackson, Circuit Judge, 43 Fed. 37, that the act to regulate commerce was 'not designed to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate

as an unjust discrimination against other persons traveling over the road; that it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail; that it is not all discriminations or preferences that fall within the inhibitions of the statute,—only such as are unjust or unreasonable.”

The court, however, carefully guards the rights of the public against what may be termed a pretense of competition as a basis for discriminating rates, and uses this language:

“In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of ‘undue or unreasonable preference or advantage,’ or what are ‘substantially similar circumstances and conditions.’ The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates; and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration.”

The opinion of Justice Shiras then meets the contention of the commission that it is the tribunal exclusively intrusted with the power to determine whether or not the presence of competition produces circumstances and conditions which are substantially dissimilar:

“The claim now made for the commission,” says the learned justice, “is that the only body which has the power to relieve railroad companies from the operation of the long and short haul clause on account of the existence of competition, or any other similar element which would make its application unfair, is the commission itself, which is bound to consider the question upon application by the railroad company, but whose decision is discretionary and unreviewable.”

This position is at once assailed by Justice Shiras with ammunition taken from the magazine of the commission itself. He cites *In re Louisville & N. R. Co. v. Interstate Commerce Com’n*, 1 Interst. Commerce Com. R. 47, when Judge Cooley, for the commission, said, in speaking of the effect of the introduction into the fourth section of the words, “under substantially similar circumstances and conditions,” and of the meaning of the proviso:

“The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. * * * Beyond question, the carrier must judge for itself what are the ‘substantially similar circumstances and conditions’ which preclude the special rate, rebate, or drawback which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law.”

The supreme court concludes that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of conditions and circumstances may justify carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line. With even more decisiveness it

disapproves the proposition that it was the intention of congress that the decision of the commission could not be reviewed by the courts.

I need now to advert briefly to the circumstances and conditions which exist at Macon and do not exist at Griffin. In the copious quotations made by the supreme court from the valuable opinion of Circuit Judge McCormick in the circuit court of appeals may be found a striking parallel in their relative conditions:

"The volume of population and of business at Montgomery is many times larger than it is at Troy. There are many more railway lines running to and through Montgomery, connecting with all the distant markets. The Alabama river, open all the year, is capable, if need be, of bearing to Mobile, on the sea, the burden of all the goods of every class that pass to or from Montgomery. The competition of the railway lines is not stifled, but is fully recognized, intelligently and honestly controlled and regulated by the traffic association in its schedule of rates. There is no suggestion in the evidence that the traffic managers who represent the carriers that are members of that association are incompetent, or under the bias of any personal preference for Montgomery, or prejudice against Troy, that has led them, or is likely to lead them, to unjustly discriminate against Troy."

Looking, however, to the record of the case as presented to the supreme court, the parallel is even more striking. Troy is at the intersection of the Alabama Midland Railway, which is part of the Plant System, and the Mobile & Girard Railroad, which is part of the Central of Georgia. Griffin is at the intersection of the Central of Georgia Railway and of the Southern Railway. There is no other railroad at Troy, and it has no water transportation. This is true of Griffin. Its population is between 3,000 and 4,200. The population of Griffin is perhaps between 5,000 and 6,000. Montgomery is situated practically at the head of navigation on the Alabama river. Macon occupies the same position on the Ocmulgee river. Montgomery possesses five independent lines or systems of railroad. Macon has the same number. To be more specific, Macon is reached by the Central of Georgia, from Savannah to Macon and Macon to Atlanta; the Southern Railway, from Atlanta to Macon and Macon to Brunswick; the Georgia Southern & Florida Railway, from Macon to Palatka, Fla.; the Southwestern, from Macon to Eufaula, Ala., including branches to Albany, Ft. Gaines, and Columbus; Macon & Northern, from Macon to Athens; Macon & Dublin, from Macon to Dublin; the Macon & Birmingham, from Macon to La Grange; the Georgia Railroad, from Macon to Augusta and to Atlanta, now controlled by the Louisville & Nashville, giving an additional independent line to the West. The population of Montgomery is between 30,000 and 35,000. The population of Macon is between 35,000 and 38,000. There are between 130,000 and 175,000 bales of cotton handled at Montgomery annually. Macon receives from local planters 75,000 bales annually, and handles through her three large compresses 225,000 more. The wholesale and retail trade of Montgomery, estimated, is \$40,000,000. As early as 1890 the volume of business transacted in Macon amounted to \$45,441,650. While Montgomery has three cotton factories, Macon has five. To show the importance of Macon as a trade center and distributing point for railway traffic, it appears that during the month of November Macon received 2,318 car loads of freight,

300 more than any other city in Georgia save Atlanta, and more than ten times as many as were received in Griffin. Macon is almost in the exact geographical center of the state. It was the first inland terminus of the first railroad constructed in Georgia,—what is now the Central of Georgia Railway. It is situated on the Ocmulgee river, and was for many years, and until the phenomenal development of the railway system of the South, at the head of active navigation on that important stream. It is but 49 miles from Hawkinsville, to which point a line of steamboats regularly ply. The railroad commission of Georgia have fixed a rate from Macon to Hawkinsville, which, with the steamboat rates, even now affords to Macon all the advantages of water competition. It is, moreover, true that very recently a new steamboat has been constructed to navigate the Ocmulgee from Macon to the sea and from the sea to Macon. Its industrial development is remarkable, and various in character. It has ever been, since its settlement, a great distributing point for middle, southwest, and northern Georgia, and its wholesale trade is very large. It is true that the traffic on the Ocmulgee does not, at present, approximate that borne by the Alabama to and from Montgomery, but the Ocmulgee is a navigable stream. The government has compelled the construction of draws, so that river craft may pass all of the bridges which might interfere with the navigation to Macon. It has made appropriations for its improvement. The river was long used by the government for the transportation of its troops and material in the Indian wars, and for many years lines of steamboats were operated to and from Macon, and very recently these ventures have been renewed. It cannot be doubtful that it is easily feasible for Macon merchants to confront the railroads with water competition, if injurious rates were imposed upon them. But water transportation is not the important element of that strenuous competition between carrier and carrier and market and market which makes the conditions and circumstances at Macon so dissimilar from those at Griffin. It is perhaps enough to point out that the commission reports this competition to exist in its most active form. To test the extent of these dissimilar conditions, I have but to point to what would be the result if the Macon rates were advanced to equal the Griffin rates. Railroad competition at Macon exceeds that at Griffin as the competing roads which center at Macon exceed the competing roads which pass Griffin, and the competition of markets which Macon merchants are compelled to meet is far greater than that which confronts the Griffin merchants. To illustrate, Macon competes with Savannah for the trade of much of the country traversed by the main line of the defendant company. It competes with Eufaula and Columbus on the Southwestern Railroad and its several branches, and on the several other lines reaching the city with numerous markets and communities, none of which the merchants of Griffin can reasonably hope to reach. It is evident, therefore, that, since these competitive markets have, many of them, equal advantages in rates with Macon, if there be an advance in the cost of transportation, the commerce of Macon would be destroyed in exact proportion with its inability to meet the prices of its competitors. While this is true, the

producers and consumers at Griffin would not be benefited by the advance of Macon rates. If there should be an advantage at all accruing to Griffin, it would be to a few merchants. Besides, Augusta, Savannah, Brunswick, and Columbus all have water competition. Columbus may compete with Griffin, but the three other cities do not, while all are lively competitors of Macon. Analyzing the proposition of the complainant, made, it seems to me in disregard of the dissimilar circumstances and conditions existing at Macon, it would, if successfully maintained, result in the destruction of the immense wholesale and retail commerce of Macon upon which thousands depend for their daily livelihood, which serves a vast territory, and the increment of which adds thousands annually to the aggregate wealth of the state, in order to give a possible benefit to a few Griffin merchants. Even this advantage to the merchants of Griffin is scarcely more than problematical. Griffin, with equal rates, could not successfully compete with Macon, unless it could approximate its large supply of capital, so essential to modern commerce. To illustrate, Brunswick has the same rates as Savannah. Its harbor is as fine as that of Savannah, and yet, not possessing the abounding capital of Savannah, no one can pretend it has been its successful competitor. While the increased rates to Macon would, therefore, not probably benefit Griffin to any appreciable extent, for the reason that Macon is a point where competition with many other markets exists, it would, in all likelihood, so seriously cripple the business of Macon as to be injurious beyond measure. The effect on the defendant company would also be damaging, perhaps incalculably so. It is not to be presumed that such great railroads as, for instance, the Louisville & Nashville, now reaching Macon by an independent line of its own, would increase its rates, and offend its patrons, in order to save the Central from loss of shipments. The Louisville & Nashville would seek to retain and increase its popularity by serving its shippers at the rates already of force. The inevitable result would be that the Central, with a compulsory advance of rates, would lose its business, and its competitor would acquire it. Now, in the celebrated case of *Texas & P. R. Co. v. Interstate Commerce Com'n*, known as the "Import Case," 162 U. S. 235, 16 Sup. Ct. 666, after elaborate consideration of the English and American cases, the supreme court of the United States concludes that:

"In passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrier company as of the traders and shippers, and in considering whether any particular locality is subjected to any undue preference or disadvantage the welfare of the communities occupying the localities where the goods are to be delivered is to be considered, as well as that of the communities which are the localities of the place of shipment, * * * and should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country."

In view of this salutary declaration, how stands the trivial and problematical advantage which Brewer & Hanleiter, and perhaps

other Griffin merchants, might obtain by increasing the Macon rates, when compared to the stupendous disadvantage which would almost certainly result to the latter community, and to one of its principal railroads, if the competition of carrier with carrier and market with market, ever present there, should be ignored by the courts? Shall the authorities of government have no concern for the safety of millions of capital invested or accumulated through long years of enterprise and diligent business exertion by the people of the latter city? Shall the millions they have invested in railroads from their own means, to afford to the state great systems of transportation, result in their ruin? Shall government undertake the impossible, but injurious, task of making the commercial advantages of one place equal to those of another? It might as well attempt to equalize the intellectual powers of its people. There should be no attempt to deprive a community of its natural advantages, or those legitimate rewards which flow from large investments, business industries, and competing systems of transportation to facilitate and increase commerce. The act to regulate interstate commerce has no such purpose, and yet this appears to be the inevitable result of the relief the complainants seek in this case, without any adequate corresponding advantage either to themselves or to the community in which they live. The application is for a temporary injunction, the first effect of which would be to immediately disorganize and disarrange the entire commerce of which Macon is the receiving and distributing point, with the more injurious consequences to which I have already adverted. For the reasons stated, and because of this immediate and this ultimate result, the order of the interstate commerce commission, on which the application is based, is believed to be contrary to the policy of the law, and the relief sought by the complainants in this application is denied.

CITIZENS' BANK OF TINA, MO., v. ADAMS et al.

(Circuit Court, N. D. Illinois. February 15, 1897.)

No. 22,883.

EQUITABLE LIEN—ADVANCES BY BANK.

A bank advancing money to stockmen for the purchase of stock, with the understanding that, according to the previous course of business, the stock would be shipped to commission merchants, sold, and the proceeds placed to the credit of the bank, for its reimbursement, gives the bank a right to such proceeds as against the commission merchants, who are aware of the understanding and previous course of business, and they cannot appropriate such proceeds to the payment of a debt due them from the shippers.

F. A. Riddle, for complainant.

L. H. Bisbee, for defendants.

GROSSCUP, District Judge (orally). The material facts in this case are as follows: Parsley & Markwell were buyers of cattle and shippers

of the same to the stock yards at Chicago, beginning early in 1889 and running until October, 1892. They had an arrangement with the complainant whereby the complainant honored their checks for the cattle thus purchased, and thus advanced them the purchase money. During this whole period the cattle were shipped to the defendants, who were commission merchants in the Chicago Stock Yards, who, upon the receiving and selling of the same, after the deduction of their commissions, deposited the proceeds principally with the Drovers' National Bank of Chicago to the credit of the complainant. Occasionally a small amount, such as from \$5 to \$45, seems to have been given in currency to Markwell, and sometimes drafts and checks for considerable amounts appear to have been credited to the defendants' account as against Parsley & Markwell; but almost the entire amount of the proceeds during this period of more than three years was deposited directly to the complainant,—so much, at least, undoubtedly, as kept the complainant's charges on account of advances to Parsley & Markwell fully balanced. The fact that Adams & Burke during this whole period made these deposits to the credit of the complainant was unquestionably due to the arrangement between the parties to the transaction. or, at least, to the request made by Parsley & Markwell upon Adams & Burke that the proceeds should thus be dealt with. During this period, from time to time, beginning in August, 1890, and ending in November, 1891, drafts were given by the defendants to Parsley & Markwell, for which the defendants took Parsley & Markwell's notes. These aggregated \$5,000. The first note was executed by Parsley & Markwell as a firm, but upon its renewal, and at the insistence of the defendants, the note was executed, supposedly, by Parsley and Markwell each individually. This indebtedness ran along from August, 1890, until October, 1892, without any portion of it being paid, and without its existence ever having come to the knowledge of the complainant. During that whole period the defendants were receiving, each month, large amounts from the proceeds of shipments of Parsley & Markwell, and deposited the same, as usual, to the credit of the complainant. At almost any time during this period the defendants were obtaining from the shipments enough money to discharge this note. I am convinced that the defendants knew that the complainant was advancing money upon the faith of the arrangement that the proceeds should be deposited to their credit, and knew, also, that any interruption of this arrangement by the withholding of proceeds to pay off these notes would lead to a rupture, and probably to a demand by the bank for a return of the fund. The last shipment made was in October, 1892, when the cashier of the complainant, in the presence and hearing of a soliciting agent of the defendants, advanced something like \$8,000, upon the assurance that, as soon as the stock was received in Chicago, the money would be deposited to the credit of the bank to meet certain obligations that the bank was obliged to keep with another bank. The defendants, however, upon the receipt and sale of this stock, withheld sufficient to pay off their note, and deposited the balance. This bill is to compel them to account to the complainant for the sums thus withheld.

I hold, upon the ruling in *Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, that as between the defendants, the commission merchants, and the complainant advancing the money, and by virtue of the understanding between them, both as evidenced by a long course of dealing and direct communication, the complainant bank was the beneficial owner and shipper of these cattle, and was therefore entitled to the proceeds up to the amount of its advancements. There will therefore be a decree for the complainant.

ADAMS et al. v. CITIZENS' BANK OF TINA, MO.¹

(Circuit Court of Appeals, Seventh Circuit. January 3, 1898.)

No. 401.

CUSTOM—EQUITABLE LIEN—DECLARATION OF AGENT—PLEADING.

A firm purchased live stock, paying therefor with money borrowed from a bank under a promise that the proceeds of the sale thereof "should come back to the bank," and consigned the same to a commission firm, who, in prior like consignments, had deposited the proceeds of sales to the credit of such bank for the benefit of the consignors, but who applied a portion of the proceeds in this instance to the payment of a note owing to them from the consignors, who authorized such application. Prior to the shipment, an agent of the commission firm stated to the bank, but not in the presence of the consignors, that the proceeds would be deposited in the usual way, but it appeared that the bank did not rely thereon, but upon the good faith previously shown by the commission men. *Held*, that the bank had no equitable lien or interest in either the stock or in the proceeds of the sale, entitling a recovery from the commission firm of the amount retained by them from the proceeds of such sale. *Bank v. Gillespie*, 11 Sup. Ct. 118, 137 U. S. 411, distinguished.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This suit was brought by the Citizens' Bank of Tina, a corporation of Missouri, against George Adams and John C. Burke, citizens of Illinois, doing business under the name of George Adams & Burke, as commission merchants selling live stock at the stock yards of Chicago. John Parsley and William Markwell, residing at Tina, Mo., were partners, engaged there in purchasing and shipping live stock to the Chicago market for sale, shipping mainly, if not exclusively, to Adams & Burke. Frank Lovell was an agent of Adams & Burke, employed to solicit consignments of stock to that firm for sale. Parsley & Markwell were accustomed to pay for stock which they purchased by means of checks, which commonly were overdrafts, upon the Citizens' Bank, the bank being reimbursed by the net proceeds of sales, which, under instructions to that effect from Parsley & Markwell, Adams & Burke were accustomed to deposit with the Drovers' National Bank of Chicago to the credit of the Citizens' Bank for the use or benefit of Parsley & Markwell. The original bill was amended by striking out the fourth to ninth paragraphs, inclusive, and inserting other or modified averments, and, as amended, the bill charges, in substance, in addition to the facts above stated, that on October 1, 1892, Parsley & Markwell, having purchased of Joe Allamong & Son a number of cattle for the price of \$8,012.68, gave in payment a check upon the Citizens' Bank; that, in pursuance of the usual and ordinary course of the business relations which had existed between the bank and Parsley & Markwell and Adams & Burke for several years before, the bank credited Allamong & Son with the amount of the check, and thereby paid them the full price of the stock so sold; that Adams & Burke had notice, before the sale of the stock by

¹ Rehearing denied March 5, 1898.

them in Chicago, that the bank had paid the purchase price; that at the time and before the bank received and paid the check, Lovell, the agent of Adams & Burke, in response to inquiries by the bank, stated that the cattle would sell at Chicago for an amount more than sufficient to repay the bank the amount of the check, and that the stock, consisting of seven car loads of cattle and two car loads of hogs, would be consigned to his principals, Adams & Burke, at the Union Stock Yards, for sale in the usual and ordinary course of business which had obtained and which had been observed and carried out for several years prior to October 1, 1892, between the said firms of George Adams & Burke, Parsley & Markwell, and the bank, in respect to the purchase and shipment by the said firm of Parsley & Markwell of live stock, the proceeds of which purchases and shipments had theretofore uniformly been deposited by the said firm of Adams & Burke to the credit and account and for the use of the bank in the Union Stock Yards National Bank, because Adams & Burke had been notified and had notice that the bank had uniformly during such period advanced the money with which Parsley & Markwell had purchased the live stock so consigned to them for sale aforesaid; that at the same time Lovell said he would accompany the cattle from Tina to the Union Stock Yards; that he would request Adams & Burke to notify the bank of the price at which the sale had been made; and further assured the bank that in the usual course of business which had theretofore obtained and been observed between the bank and the firms named the proceeds of the sale would be deposited by Adams & Burke in the Union Stock Yards National Bank as early as the afternoon of Monday, October 3, 1892; that, relying upon the good faith theretofore observed by Adams & Burke in all transactions between the parties, the Citizens' Bank, on October 1, 1892, paid Allamong & Son the full sum of \$8,012.68; that, with full notice of the fact of such payment, derived both from the usual course of business and from Lovell, Adams & Burke, having sold the stock for the net sum of \$9,212.68, retained thereof the sum of \$5,000, and deposited only the remainder to the credit of the Citizens' Bank. The suit was brought to recover that sum of \$5,000. In the original bill it was averred, without reference to the prior course of business, that Lovell, as agent for Adams & Burke, stated and represented to the complainant that, if it would advance the amount of the check to Parsley & Markwell to pay for the cattle and hogs, Adams & Burke, as soon as the sale should be made, would notify the bank of the price received, and would deposit the proceeds, less their commission as brokers, to the credit of the complainant in its correspondent bank at Chicago. The answer of the respondents, to which there was the usual replication, contained explicit denials of the allegations of the bill, and in some particulars affirmative averments, inconsistent with the allegations of the bill. The court pronounced an opinion, which is in the record but has not been reported, and entered, after a recital of facts, the following decree: "It is therefore further ordered, adjudged, and decreed that the said defendants, George Adams and John C. Burke, or one of them, pay to the said complainant, or to its solicitor, the sum of \$6,095, being the amount of principal and interest due and owing from said defendants to the said complainant bank, within ten days from the date of entry of this decree, and that the said complainant have and recover of and from said defendants its costs, to be taxed by the clerk of this court; and it is further ordered that the complainant have execution in due form of law therefor. It is further ordered and decreed that upon payment of this decree the complainant, the Citizens' Bank of Tina, surrender to the defendants the note for five thousand dollars (\$5,000), dated October 6, 1892, signed by Parsley & Markwell and John Forsythe, and payable to the order of George Adams & Burke, in four (4) or six (6) months from its date, and indorsed by George Adams & Burke without recourse, and that said defendants thereby become entitled to said note, and to hold the same for collection." The assignment of errors contains eight specifications, the first four of which are unavailing, because predicated upon things said to be in the decree, which are not to be found there. The fifth and sixth, in so far as they can be deemed material, are embodied in the eighth, which is to the effect that the court erred in finding the issues and in entering a decree in favor of the complainant. The seventh is that the court erred in not dismissing the bill, the averments thereof showing that there was a complete remedy at law.

Mason B. Loomis, for appellants.

Francis A. Riddle, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The case decided in *Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, is broadly different from the present case. "In equity," it was there said, "the Gillespies may properly be considered the owners. They paid for the cattle; the orders for possession, equivalent to bills of sale, were in their name; they controlled the shipments; and, until their money advanced and stipulated profits were realized, they were equitably the owners and in control." No such situation is disclosed here either by averment or by proof. The Citizens' Bank, instead of being in the position of the Gillespies, did not pay for the cattle, did not receive bills of sale or the equivalent, did not control the shipment, and, instead of being the equitable owners of either cattle or proceeds, had simply the legal liability of Parsley & Markwell to repay the money advanced by the bank, in accordance with their agreement, made four or five years before, when they commenced business, that the bank should pay their checks given for stock purchased, and they would "have the proceeds come back to the bank." That, in effect, was to extend credit to Parsley & Markwell, and not to create a lien or equitable interest for the benefit of the bank, either in the live stock purchased or in the proceeds thereof. The inference that no more than this was intended by the parties is further justified by the consideration that Parsley was a man of affairs in close relations with the bank, and that in the course of business adopted, whereby the bank was accustomed to receive prompt notice of sales and of the deposits made of the proceeds, it would receive timely information of any disposition of the proceeds of a sale, contrary to the agreement or custom, as it did in the instance complained of.

It is alleged that Lovell represented to the bank that the consignment and the deposit of the proceeds of sale would be in the usual course of prior business, "because Adams & Burke had been notified and had notice," but it is not averred as a fact that they had notice, "that the bank had uniformly during such period advanced the money," etc.; but, if the direct averment had been made of such notice, it would have meant no more than knowledge that the bank had uniformly given credit to Parsley & Markwell. It is not averred, and there is no proof, that Adams & Burke had notice of the agreement of Parsley & Markwell with the bank that they would have the proceeds of sales come back to the bank. Their custom was, it is true, under supposed directions from Parsley & Markwell, to deposit the net proceeds of sales in the Drovers' National Bank to the credit of the Citizens' Bank, but it was done for the use or subject to the order of Parsley & Markwell, and there was nothing in the course of the business, from their standpoint, by which they were required to infer an agreement, if there had been one, which gave the bank an

interest in or lien upon the proceeds of a sale before the deposit was made.

In respect to the particular shipment in question, while it appears that the bank made inquiries of Lovell, and obtained of him statements which, if he had the requisite authority to bind them, might be deemed to show an agreement by Adams & Burke to deposit in the usual way the proceeds of the pending consignment, it is to be observed that Parsley & Markwell were not present, nor, so far as it appears, cognizant of what was said between the cashier of the bank and Lovell; and without their participation it would seem to have been impossible that, by reason of anything said by Lovell, the bank should have acquired a special interest in the proceeds of the transaction. Besides, it is evident on the averments of the bill, that whatever assurance Lovell gave was a matter of opinion, based on the custom of business, and was not a promise that the proceeds of this consignment should be deposited to the credit of the bank. The bank relied on no such promise, but solely, as it is alleged, "upon the good faith theretofore observed by Adams & Burke." It is beyond question that the cashier, who acted for the bank in the premises, expected that the proceeds of the consignment would be deposited to the credit of his bank, and that Lovell knew of that expectation; but it is at the same time true that the bank had no lien upon the cattle, or control of the shipment, and therefore had no equitable ground for pursuing the proceeds of the sale into the hands of Adams & Burke, who applied the amount in controversy to the payment of an obligation which they held against Parsley & Markwell, who had authorized the application. That our conclusion involves no inequity is shown by the subsequent conduct of the bank, and other considerations. The bank was informed of the alleged misappropriation within two or three days thereafter, but made no complaint, though the opportunity to do so to Lovell in person was frequent, gave no notice of its claim upon the money, and made no demand for it, until the middle of the ensuing May. On the contrary, it made complaint to Markwell, and urged him to replace the money, and, Markwell having brought to the bank, or to the cashier, a note for \$5,000, signed by Parsley & Markwell and John Forsythe, payable to the order of Adams & Burke, dated October 6, 1892, the bank on the same day made a draft on Adams & Burke, and sent the note and draft together to them at Chicago, on the statement of Markwell that, if that were done, he would furnish the money to pay the draft, implying that he would obtain the money of Adams & Burke, as a new loan upon the note. The note and draft were returned to the bank, Adams & Burke declining to make the loan, though assured of Forsythe's pecuniary responsibility, which is unquestioned. Afterwards, at the request of some one, presumably an agent of the bank, Adams & Burke indorsed the note without recourse, and the bank holds it as collateral security for the liability of Parsley & Markwell to the bank. There is no basis in the pleadings, nor, as we conceive, in equity, for that part of the decree which directs the surrender of the note to Adams & Burke. It never became theirs. They refused to accept it, and, if returned to

them under the decree, it is far from certain that they could enforce payment. If the Citizens' Bank had given prompt notice of their claim upon the money, the appellants might have been able to secure payment of their demand against Parsley & Markwell in other ways not now available. The course taken by the bank was equivalent to a concession, if not a representation, that they had no such right as they now assert. The decree below is reversed, and the cause remanded, with direction to dismiss the bill at the cost of the appellee.

VEATCH et al. v. AMERICAN LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. December 6, 1897.)

No. 832.

1. RAILROADS—PETITION BY JUDGMENT CREDITORS AGAINST RECEIVER—PLEADING.

A complaint filed by a judgment creditor of a railroad company against a receiver operating its property, seeking to enforce payment of the judgment, which alleges the receipt by the receiver of earnings properly applicable thereto, need not aver that such earnings have not been disbursed; such fact, if it exists, being matter of defense.

2. SAME—SURPLUS EARNINGS IN HANDS OF RECEIVER—RIGHTS OF CREDITORS.

A mortgagee of a railroad has no preferred right, above that of a judgment creditor, to surplus earnings that have accumulated in the hands of a receiver, appointed at the instance of stockholders, prior to the filing of a bill for foreclosure.

Opinion on petition for rehearing. For former opinion, see 25 C. C. A. 39, 79 Fed. 471.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

BREWER, Circuit Justice. A petition for a rehearing has been filed by the appellees in this case, in which they challenge so much of the ruling of this court as sustained the third cause of action stated in the intervening complaint of appellants. We shall not stop to restate the facts at length, but refer to the opinion heretofore filed for a full statement thereof. It is enough now to say that the appellants, on June 1, 1895, recovered judgments against the Union Pacific, Denver & Gulf Railway Company, in actions for torts. These torts took place on the 27th of July, 1893. On October 12, 1893, the railroad was taken possession of by the receivers of the Union Pacific Railway Company, that company having been theretofore operating the Union Pacific, Denver & Gulf Railroad. These receivers continued in possession until December 18, 1893, when a suit was begun by one of the stockholders of the Union Pacific, Denver & Gulf Railway Company. In that suit Frank Trumbull was appointed a receiver, and forthwith took possession of the property of the company, and continued operating the road, as such receiver, until October 31, 1894, when he was again appointed receiver of the same property in a suit brought by the American Loan & Trust Company, as trustee of certain mortgage bondholders. On the same

day an order was entered in the latter suit, consolidating it with the one brought by the stockholders. The allegations of the third cause of action are that while Trumbull, as receiver, was operating the road, under the appointment made in the stockholders' suit, he realized from the operation of the railroad a sum exceeding \$400,000 in excess of taxes and operating expenses, and that this sum was now, or ought to be, in his possession as receiver. It was not affirmatively stated that such sum had not been paid out under orders of the court, nor that it had not been appropriated in payment of interest or principal of mortgage indebtedness, nor that it was not necessary therefor. The case is left on the simple showing of a tort prior to any receivership, of a judgment therefor after the receivership at the instance of the mortgagee, of an intervening receivership at the instance of a stockholder, and a net income during such receivership of more than enough to pay the judgment.

Involved in the matter thus called to our attention is a question of pleading. If the case is to be considered as though the other causes of action had been stricken out, then the question presented arises upon the facts as above stated. It is insisted, however, by the appellees, that in other portions of the complaint it is affirmatively shown that this accumulation of net income had been disposed of, and was no longer in the hands of the receiver. A distinct charge in one count of a complaint is not, however, to be overthrown by any mere inferences from matters alleged in other counts. It may be that, if such disposal was distinctly averred elsewhere in this complaint and in either of the other counts, we should be compelled to take notice of such averment, and consider whether the disposition thus shown was one which defeated appellants' right to recover; but, as we read the complaint, there is no such distinct averment, or at least none which shows a disposal by the receiver of the whole \$400,000. It is in the light of this construction of the complaint that we proceed to reconsider the question presented upon the facts stated in the third cause of action.

It is true, the pleader does not negative any disposal of these earnings. He simply alleges that they are still in the hands of the receiver, or, if diverted by him, should in equity be restored to the income account. Was it necessary that he should negative the fact of disposal, or, in case other disposition had been made, show for what purpose it had been made, in order that the court might determine whether that disposition was rightful? We think not. It was enough for the pleader to aver the accumulation of this fund, and that it had passed into the hands of the present receiver. If he had disposed of it in such a way as to prevent its appropriation to the payment of appellants' claim, it was matter of defense, and to be by him set up. A plaintiff is not compelled to show that there cannot be any defense. It is enough for him to allege a state of facts which shows *prima facie* a right of recovery.

Turning now to the question of law, it will be noticed that a railroad receivership may be at the instance of the mortgagee, or of a judgment creditor, or of a stockholder. If at the instance of the

mortgagee, the income is impounded for its benefit; if of a judgment creditor, for the payment of his judgment. There is in the latter case an equitable levy on such income, and the mortgagee can claim no superior right thereto.

In *Sage v. Railroad Co.*, 125 U. S. 361, 377, 379, 8 Sup. Ct. 887, 892, it was said:

"Had the receiver never been appointed, and had the railroad company operated the property just as the receiver did, producing the same amount of net earnings that were in the hands of the receiver, at the time of his discharge, would the trustees in the mortgage of May 1, 1877, have been entitled to demand that such earnings be paid over to them? Clearly not. 'It is well settled,' this court said in *Dow v. Railroad Co.*, 124 U. S. 652, 654, 8 Sup. Ct. 673, 674, 'that the mortgagor of a railroad, even though the mortgage covers income, cannot be required to account to the mortgagee for earnings, while the property remains in his possession, until a demand has been made on him therefor, or for a surrender of the possession under the provisions of the mortgage. That is the effect of what was decided by this court in *Railroad Co. v. Cowdrey*, 11 Wall. 459, 483.' See, also, *Gilman v. Telegraph Co.*, 91 U. S. 603; *Bridge Co. v. Heidelberg*, 94 U. S. 798; *Kountze v. Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. 911; *Teal v. Walker*, 111 U. S. 242, 250, 4 Sup. Ct. 420. * * * If the trustees, pending the receivership, had intervened and asked possession of the property, they might perhaps have been entitled, as against general creditors, to the income of the property thereafter accruing, upon the principles announced by this court in *Dow v. Railroad Co.* (as reorganized) 124 U. S. 652, 8 Sup. Ct. 673. But we do not perceive any legal ground upon which they are entitled to the net earnings of the property while it was in the hands of the receiver, in a suit instituted by a judgment creditor for the protection of his own interests, and not of the interests of the trustees, or of the bondholders, or of other creditors. His suit was, in effect, an equitable levy for his benefit, upon the net income of the property. Other creditors, who filed their claims, based upon judgments, gain nothing, as between themselves and Sage, by the fact that their judgments were rendered upon coupons, which were secured by lien upon the mortgaged property."

When, as in this case, a receiver is appointed at the instance of a stockholder, to whom does any surplus income belong, and what power of disposition of such income has either the receiver or the court appointing him? Before any receivership, and while the railroad property is being operated by the company mortgagor, it has all the rights of an owner in respect to the income. It may not, of course, convey away the fixed property so as to relieve it from the lien of the mortgage; but it may use the income in the payment of such debts as it sees fit, and if, in the absence of any special statute, it elects to pay a general creditor, or one who has simply a claim for damages on account of a tort, instead of paying interest or principal of its mortgage debt, the mortgagee has no recourse against the party thus receiving payment to compel reimbursement. In other words, the mortgagor's power over the income is the same as though there were no mortgage debt. It may prefer whatever creditor or claimant it pleases, and, provided it pays only a just debt or an honest claim, a secured creditor has no ground of action against the party thus paid. But this absolute freedom of disposition ceases when a receiver is appointed. The moment the court takes possession of property, certain equitable rights exist, which cannot be ignored by receiver or court. The property and the income received

therefrom is taken possession of by the court for the benefit, according to certain equitable rules, of all parties in interest. The mortgagee does not have those special rights to the income which it acquires when the receivership is at its instance. Not that its claims can be wholly ignored, but it can no longer insist that it has taken the special contract or statutory remedies for impounding the income. If, during this stockholders' receivership, there was, as alleged, accumulated \$400,000 of net income above both operating expenses and taxes, and that sum passed into the hands of the receiver appointed under the mortgage foreclosure proceedings, it may have been disposed of by him for one of three purposes,—either in payment of claims accruing prior to the stockholders' receivership, for betterments on the property, or in payment of interest or principal of mortgage indebtedness. The mere fact that the same person is appointed receiver under the mortgage foreclosure as was receiver under the stockholders' bill does not make the two proceedings identical. The case is the same as though a distinct party was appointed receiver under the foreclosure proceedings, to whom the railroad property was turned over by the prior receiver. There would then remain the duty of the court in respect to the prior receivership to administer the accumulated earnings in the hands of that receiver, and it would not necessarily follow that it was the duty of the court to turn those funds over to the second receiver for the sole benefit of the mortgagee.

Doubtless, the circuit court in which the foreclosure proceedings were pending was fully aware of the disposition, if any, made of these surplus earnings, and very likely the conclusion to which it came in sustaining the demurrer to the entire intervening complaint may have been influenced by such knowledge; but the record before us does not advise as to these matters, and it does not seem wise for us to determine, in ignorance of the facts, whether the disposal which has been made (if any has been made) was such a disposal as precluded these appellants from any claim against the receiver. It is settled that a claim for damages for personal injuries, such as were the claims of these appellants, is not a preferential debt. *Trust Co. v. Riley*, 36 U. S. App. 100, 16 C. C. A. 610, and 70 Fed. 32. And, if these surplus earnings have been appropriated in payment of preferential debts, it would follow that these appellants have no claim on account thereof. It may be that they had, before these claims for torts had passed by judgment into debts, been appropriated by order of the court in payment of interest on underlying mortgages, or of past-due interest on the mortgage in suit. In that case it would be a question of doubt as to whether there were any equities in behalf of these appellants to compel the mortgagees to, in effect, pay back interest which they had already received. Or it may be that, the present earnings of the road having been sufficient to pay all accumulated interest, the receiver has, by direction of the court, expended these past earnings in betterments on the property; and then it would become a still more serious question whether, not being necessary for interest, the court has power to expend such sur-

plus earnings in mere improvements on the property mortgaged, leaving claims for torts unpaid. Particularly is this true if it should turn out that there is to be no sale of this property under the foreclosure proceedings, and it is to be surrendered to a reorganized company. But it hardly seems wise for us to speculate as to what the rights of the appellants might be under these various contingencies. We do not wish to be deciding moot cases. We think, therefore, that the appellees should be called upon to answer this third cause of action, and make full disclosure of the facts, and then there will be no difficulty in applying the law to the facts, and determining what are appellants' rights. The former decree of this court reversing the order and decree of the circuit court, and remanding the cause, with directions for further proceedings, is confirmed; and the stay of proceedings entered in this court on June 14, 1897, shall now cease, and a mandate will issue to the circuit court forthwith.

NEDERLAND LIFE INS. CO., Limited, v. HALL.¹

(Circuit Court of Appeals, Seventh Circuit. January 22, 1898.)

No. 468.

1. PARTIES—ASSIGNEE OF LIFE POLICY—RIGHT TO SUE.

The assignee of a life insurance policy, payable to the assured, his executors, administrators, and assigns, cannot maintain an action at law thereon in his own name in a state where the common-law procedure prevails.

2. FEDERAL COURTS—ADOPTION OF STATE PRACTICE—PARTIES.

Under Rev. St. § 914, where an assignee of a chose in action cannot sue thereon in his own name in the courts of a state, the same rule is obligatory on the federal courts held within such state.

3. PARTIES—RIGHT TO SUE—LEX LOCI CONTRACTUS.

The fact that the assignee of a contract is authorized to sue thereon in his own name in the state where the contract and assignment were made does not give him that right in the courts of another jurisdiction.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Henry B. Mason, for plaintiff in error.

James A. Fullenwider, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge. This action is brought by Fannie Gideon Hall, the defendant in error, to recover the sum of \$10,000, the amount of a policy of life insurance issued by the Nederland Life Insurance Company, Limited, the plaintiff in error, upon the life of Elbert Mills Hall. The policy was executed in the city of New York, was dated October 5, 1895, and the sum stated was made payable to him, his executors, administrators, and assigns. The assured assigned the policy to the defendant in error on the 3d day of February, 1896. Elbert Mills Hall died March 25, 1896, and due proof of his death was given to the insurance company. The defendant below

¹ Rehearing denied March 5, 1898.

pleaded (1) the general issue; (2) the suicide of the assured within one year following the date of the policy; (3) false statements by the assured in his application for the insurance, which, by the terms of the policy, was made a part of the contract.

One of the assignments of error is to the effect that the trial court erred in admitting the contract of insurance, because the cause of action thereunder, if any, exists in the administrator of Elbert Mills Hall, and not in the assignee of the policy, and that suit should have been brought in the name of such administrator, for the benefit of the assignee, instead of being brought in her own name. We are of opinion that this assignment of error must prevail. Undoubtedly, in the state of New York, and in those states in which the Code of Procedure obtains, the suit should, in general, be brought in the name of the real party in interest. It is otherwise, however, in those jurisdictions where the strict rules of the common law prevail. There choses in action are assignable in equity only, and courts of law will not recognize the assignment, so as to allow the assignee to sue on the policy in his own name. *Insurance Co. v. Ludwig*, 103 Ill. 305, 312. The supreme court of Illinois in *City of Carlyle v. Carlyle Water, Light & Power Co.*, 140 Ill. 445-452, 29 N. E. 556, ruled that the assignee of a chose in action might sue in his own name, where the debtor, after notice of the assignment, expressly or by implication, agrees with the assignee to pay him the debt. The facts of this case do not bring it within that ruling. The company here was not informed of the assignment until after the death of the assured, and neither expressly nor by implication promised to pay the amount of the policy to her or to any one. The courts of the United States are required (Rev. St. § 914) to conform, as near as may be, the practice, pleadings, and forms and modes of procedure in civil causes, other than equity and admiralty causes, to that existing in the courts of record of the state within which such courts are held; and, whether the formality with respect to the name in which suit should be brought in a case like the present is essential to or obstructive of the administration of justice, we are obligated to follow the established rules of the state wherein the suit is brought. It was ruled by the court below that, because the policy and assignment were made in the state of New York, and the law of that state authorizes suit in the name of the assignee, the courts of another jurisdiction, sitting in another state, must be governed by the law of the state of New York in considering the rights of the assignee under the contract. This holding was manifestly erroneous, as here applied. The contract, possibly, must be construed with respect to its validity and meaning by the *lex loci*; but the law to which reference is made is a rule of procedure with respect to the remedy, and is not a term of the contract. It might with equal propriety be said that, in the enforcement of a contract executed in a foreign country, and sought to be enforced here, the courts of this country must adopt for its enforcement the procedure of the place of the contract. The remedy for the enforcement must conform to the practice of the court enforcing it.

The record discloses 207 assignments of error, alleged to have occurred in a trial not exceeding in time three days. These assignments are grouped in the brief, and are comprehended in 11 errors specified. In view of our conclusion upon the error considered, it becomes unnecessary, and possibly would be improper, to consider the other errors assigned upon the rulings at the trial. We observe upon the fact merely to say that the rules of this court do not contemplate that an assignment of error need be couched in the particularity of statement which is required of a special plea, or reiterated in as many different expressions as the ingenuity of counsel may be able to suggest. It need be only a simple statement, that will call the attention of the court to the specific error complained of. The practice here adopted tends to unnecessarily incumber the record, and is "industriously bad." The judgment will be reversed, and the cause remanded, with directions to the court below to grant a new trial.

WEBSTER v. CITY OF BEAVER DAM.

(Circuit Court, E. D. Wisconsin. January 10, 1898.)

1. MUNICIPAL CORPORATIONS—SIDEWALKS—PERSONAL INJURY.

Charter provisions imposing upon abutting property owners the duty of keeping sidewalks in repair, and making such owners primarily liable for any negligence therein, are for the protection of the city, not the traveler, and do not relieve the municipality of its duty to provide safe thoroughfares, nor release it from liability for damages for failure to perform the same.

2. SAME—COMMON-LAW LIABILITY.

A municipal corporation is responsible for its negligence under its common-law liability, independent of any statutory declaration.

3. SAME—NOTICE.

An action against a municipality to recover for personal injuries will not fail because notice was not given within 15 days after the injuries were received, as required by the charter and general law, when the injured person was by the accident rendered incapable of serving such notice within that time, but served the same as soon as she was able.

This was an action at law by Adelaide H. Webster against the city of Beaver Dam to recover for personal injuries alleged to have been caused by a defective sidewalk in the defendant city. The case was heard on demurrer to the complaint.

George F. Martin and Quarles, Spence & Quarles, for plaintiff.

M. E. Burke and O'Connor, Hammel & Schmitz, for defendant.

SEAMAN, District Judge. The demurrer raises the question of the sufficiency of the complaint to charge liability against the municipality upon two grounds: (1) That it appears that the abutting lot owner described in the complaint is primarily liable, and the city is not liable until that remedy is exhausted; (2) that notice was not given within 15 days, as required both by the charter and the general law to maintain an action of this nature.

1. The first objection is based upon provisions of the charter (1) making it the duty of abutting lot owners to keep the sidewalk "in

good and sufficient condition for use"; and (2) in case of injury to any person by reason of defects, which include sidewalks, "produced by the default or negligence of any person or corporation, such person or corporation guilty of such negligence shall be primarily liable," and all legal remedies must be exhausted against such person before the city shall become liable. The recent decision of the supreme court of the state in *Selleck v. Tallman*, 93 Wis. 246, 67 N. W. 36, effectually disposes of this point, under charter provisions of the city of Janesville which are substantially identical with those of the defendant city so far as relates to this inquiry. As there held, the duty of the lot owner to repair runs to the corporation, not to the traveler. The municipality owes the duty to the public (which includes the traveler) of providing safe thoroughfares, and, so far as the lot owner is required to repair or bear the expense of repairing them, it is only as a means for the performance by the city of its public duty. The provision as to primary liability is then construed as applicable to cases of active negligence, where the lot owner places obstructions, makes excavations, or otherwise produces the cause of injury, and not to cases of mere default, as in the failure to repair. See, also, *Toutloff v. City of Green Bay*, 91 Wis. 490, 65 N. W. 168. These cases are decisive both upon principle and as authority.

2. The second ground presents a question which has not been passed upon by the supreme court of the state. Numerous decisions are cited having reference to the previous general statute which prescribes a notice to be given within 90 days of the injury, and in some instances to charter provisions having less than that time limit; but I have found no Wisconsin case in which the direct inquiry arose of the applicability or reasonableness of the limitation, where the injured person was disabled by the injury or otherwise, so that notice could not be given within the time limited, as alleged in this complaint. Nor is there any determination of the reasonableness or unreasonableness of an unqualified limit within the brief period allowed by the statutes in question, except the pertinent intimation in *Hughes v. City of Fond du Lac*, 73 Wis. 380, 382, 41 N. W. 407, 408, in reference to a charter limit of five days for such notice, which appears in the following remark by Chief Justice Cole in the opinion:

"I should have great doubt about the validity of the provision requiring the notice to be given within five days of the injury, even if the liability of the city in the case was wholly statutory. The time fixed is unreasonably short, and in many cases could not be complied with. The injured person might be unconscious, or so seriously hurt that he could not state 'the place where, and the time when, such injury was received, and the nature of the same,' within that period; so that the remedy given is coupled with an impossible condition. Such a provision is unreasonable and unjust, and fairly obnoxious to all the objections taken to the enactments in *Durkee v. Janesville*, 23 Wis. 464, and *Hincks v. City of Milwaukee*, 46 Wis. 559, 1 N. W. 230. It is an arbitrary and unreasonable provision which professes to give a remedy for an injury, but annexes to it a condition which in many cases cannot be complied with, because the time fixed for serving the notice is so short."

Therefore the duty is devolved upon this court to ascertain the force and interpretation of this statutory requirement so far as the demurrer raises that question. Whether the time given is

per se reasonable or not does not arise in the present aspect of the case, for the reason that the complaint alleges, in substance, the physical incapacity of the plaintiff to give the notice within the time required, and that it was given as soon as she was in condition to attend to it. With these allegations taken as true, and in the light most favorable to the plaintiff, as required upon demurrer, a case is presented in which the application of the literal terms of the statute must bar any recovery for the injury suffered, and solely because the severity or nature of the injury delayed the giving of notice beyond the 15 days, although a right of action is distinctly recognized and preserved by the same statute in favor of one who, by reason of the moderation of his injury, is not so disabled, and is not prevented by other intervening cause from serving the notice. So construed, there is manifest injustice in the strict application of the proviso to the case at bar; and, if it is open to the test of reasonableness in that view, there is no room for doubt that it must be held inoperative. Whether the statute may be tested by that rule, as intimated in *Hughes v. City of Fond du Lac*, supra, even in case the right of action were wholly statutory, is not material for determination of the question here as one of first instance, for the reason that the doctrine is now firmly established by decisions of the supreme court of the United States that municipalities are responsible for their mere acts of negligence in the care of streets and the like, as a common-law liability, not dependent upon express statutory declaration. *Barnes v. District of Columbia*, 91 U. S. 540, 551; *Cleveland v. King*, 132 U. S. 295, 303, 10 Sup. Ct. 90; *Weightman v. Washington*, 1 Black, 39, 52; 2 Dill. Mun. Corp. § 1017.

Counsel for the defendant relies upon a line of decisions in Massachusetts, and especially upon remarks in certain of the numerous cases upon this general subject in opinions by the supreme court of Wisconsin, as maintaining the contrary doctrine. As to the rule held by Massachusetts, it is sufficient that the supreme court of the United States has distinctly pronounced otherwise; and the question being one of the general law of liability, independent of statute, it establishes a rule of decision for this court. Referring to the Wisconsin cases cited (*McLimans v. City of Lancaster*, 63 Wis. 596, 23 N. W. 689; *Sowle v. City of Tomah*, 81 Wis. 349, 51 N. W. 571; and *McKibben v. Amory*, 89 Wis. 607, 62 N. W. 416), I am of opinion that it was not necessary to the decision in either case to hold the liability to be created by the statute; that the remark thereupon in the first-mentioned case, followed in the other two, was inadvertent, as the only citation was to a case of township liability, and the view stated does not appear to have entered into the prior well-considered cases in the same line, nor to be entirely in accord with the reasoning in *Hincks v. City of Milwaukee*, 46 Wis. 559, 1 N. W. 230; and that the expressions are clearly not controlling for the present consideration. With her right of action existing independent of statute, and a certain remedy guaranteed by article 1, § 9, of the state constitution, I am satisfied that neither statute in question can be

held to operate as a bar under the circumstances alleged. *Durkee v. Janesville*, 28 Wis. 464, 471; *Hincks v. City of Milwaukee*, 46 Wis. 559, 566, 1 N. W. 230. The demurrer must be overruled, with leave to defendant to answer in 30 days. So ordered.

WOODSIDE et ux. v. CANTON INS. OFFICE, Limited.

(District Court, N. D. California. December 24, 1897.)

No. 11,203.

MARINE INSURANCE—CONSTRUCTION OF CONTRACT.

A policy of marine insurance, on "personal effects," consisting of clothing, silverware, nautical instruments, etc., of the insured and his family, and containing the clause, "Warranted free from all average," though ambiguous, because of uncertainty as to whether such clause refers to the entire property in gross, or to each separate article, will be construed against the insured as a severable contract, upon which the insured may recover for each article totally lost. The cases of *Blays v. Insurance Co.*, 7 Cranch, 415, *Humphreys v. Insurance Co.*, Fed. Cas. No. 6,871, 3 Mason, 489, and *Gardere v. Insurance Co.*, 7 Johns. 514, distinguished.

This was an action by Alexander Woodside and Isabella Woodside to recover on a policy of marine insurance.

Page & Eells, for libelants.

Andros & Frank, for respondent.

DE HAVEN, District Judge. This is an action to recover upon a policy of marine insurance. The policy was dated March 12, 1895, and by it the defendant insured Alexander Woodside in his own name, and for himself and all others interested, in the sum of \$2,000, for the term of one year, upon property described in the policy as "personal effects belonging to himself and his family, valued at the sum insured." There was written on the margin of the face of the policy the following memorandum clause: "Warranted free from all average." The personal effects thus insured consisted of various articles of clothing, silverware, an organ, sewing machine, nautical instruments, charts, etc., belonging to the libelants, and in the steamer *Bawnmore*, of which the libellant Alexander Woodside was master. On or about the 28th day of August, A. D. 1895, the said steamer was stranded on the coast of Oregon, and became a total loss; and all of the personal effects belonging to the libelants, and covered by the policy of insurance sued on, were at the same time totally lost, by reason of perils insured against by said policy, except one sextant, which was saved in a damaged condition, 13 charts, a few clothes, including the apparel worn by the libelants at the time, four pairs of shoes, and a few suits of underwear. These articles, in the condition in which they were saved, were worth about \$78.

The question for decision is whether, upon the foregoing facts, the libelants are entitled to recover. The memorandum "Warranted free from all average" has a well-settled meaning in the law relating to marine insurance. The legal effect of such a memorandum is to protect the underwriter from liability on account of a partial loss of any particular article or class of articles to which the memoran-

dum applies, so that the only question that can possibly arise in relation to such article or class of articles is whether the loss was total or not. *Morean v. Insurance Co.*, 1 Wheat. 219; *Marcardier v. Insurance Co.*, 8 Cranch, 39; *Biays v. Insurance Co.*, 7 Cranch, 415; *Humphreys v. Insurance Co.*, 3 Mason, 429, Fed. Cas. No. 6,871; *Wadsworth v. Insurance Co.*, 4 Wend. 34; *Ralli v. Janson*, 88 E. C. L. 423. It will be observed that there is nothing upon the face of the memorandum clause contained in the policy under consideration here to indicate whether such memorandum is to be applied to all of the personal effects insured, considered as one entire subject of insurance, or, on the other hand, whether it was the intention of the parties that it should apply to each article separately. It might be applied either to all of the effects collectively, or distributively to each, without violence to its language. Such being the case, in reaching a conclusion as to the true meaning of the memorandum, it is necessary to consider whether, in describing the property insured as "personal effects," it was the intention of the parties that such effects should be treated as an integral subject of insurance, or whether it was the intention that each of the different articles included in the general description "personal effects" should, for the purposes of the contract, be regarded as retaining its separate and distinct character. Under the former construction, there would be only one subject-matter of insurance to which the memorandum clause could apply, and the respondent would not, under the rule declared in the cases above cited, be liable in this action, because there was not a total loss of all the property comprising the effects of the libellants; while, under the latter construction, the memorandum would be applied to each of the articles insured, and the defendant would be liable, in a sum not exceeding the amount named in the policy, for each and all articles which were totally lost.

Whether a contract is entire or severable is a question of construction. If, in this case, the policy had enumerated the different articles, and had expressly stated the amount of insurance on each, there would be no difficulty in holding that the contract of insurance sued on is severable in law; and so, on the other hand, if there were an express provision in the policy to the effect that the underwriter was not to be liable, except in the event of a total loss of all the personal effects insured, it would be equally clear that such contract would be entire within the meaning of the law; but in this policy neither of these explicit provisions is to be found, nor any other language which would indicate with equal certainty whether the contract of insurance contained therein is to be classed as an entire or severable one. The intention of the parties in this respect can therefore be ascertained only by a resort to some one or more of the general rules observed by courts in the interpretation of contracts.

It was said by Mr. Justice Washington, in delivering the opinion of the court in *Perkins v. Hart*, 11 Wheat. 237:

"Where the agreement embraces a number of distinct subjects, which admit of being separately executed and closed, it must be taken distributively, each subject being considered as forming the matter of a separate agreement after it is so closed."

Applying that rule, I see no difficulty in holding that the contract under consideration here is severable. The articles comprising the effects insured are essentially separate and distinct, and each might have been made, by express language, the subject of a separate insurance. To have enumerated each separately, and with the amount of insurance on each, would have been somewhat inconvenient, and, in my judgment, was not absolutely necessary in order to make the contract of insurance severable. That the contract related to articles, each having a distinct character and value, just as clearly appears from their general description as "personal effects" as if the chronometer, organ, sextant, sewing machine, silverware, silk dresses, and other things had been separately enumerated and valued in the policy; and there is no difficulty in apportioning the gross amount for which all were insured, so as to cover the value of any one of the different articles wholly lost, and it is not perceived how a separate enumeration and valuation would have added to the protection or security of the underwriter against a fraudulent or unjust valuation of any article wholly lost.

The conclusion that the contract of insurance sued on should be construed as separately insuring the different articles therein described as "personal effects" is fully sustained by the case of *Duff v. Mackenzie*, 91 E. C. L. p. 16. In that case the insurance was on "master's effects, valued at £100, free from all average." Some of the effects were totally lost by a peril insured against, and others saved; and in that case the court held that the insured was entitled to recover in respect to the articles totally lost. The court in that case said:

"The word 'effects' is obviously employed to save the task of enumerating the nautical instruments, the chronometer, the clothes, books, furniture, etc. of which they happen to consist. And although it is stipulated by the warranty that these effects shall be free of all average, or, in other words, that the insurer shall not be liable for any amount of sea damage to them short of a total loss, we think, looking at the nature of the subject of insurance and the terms of the exemption, it is doing no violence to the language used to hold that he is not to be exempted from liability for a total loss of any of the articles of which the 'effects' consisted."

Nor is the conclusion that the contract of insurance involved here is severable in law in conflict with the cases of *Biays v. Insurance Co.*, 7 Cranch, 415; *Humphreys v. Insurance Co.*, 3 Mason, 429, Fed. Cas. No. 6,871, and *Guerlain v. Insurance Co.*, 7 Johns. 526, relied upon by respondent, as a brief reference to each of these cases will show.

In *Biays v. Insurance Co.*, 7 Cranch, 415, the insurance was on hides, which, by a memorandum in the policy, were "warranted by the assured free from average, unless general." Seven hundred and eighty-nine hides, out of a total of 14,565, were lost; and the question involved was whether the underwriters were liable for the number of hides which were totally lost. The court held that the insurance company was not liable; that the loss was only a partial loss. The court said:

"The proposition appears too self-evident not to command universal assent, that when only a part of a cargo, consisting all of the same kind of articles,

is lost in any way whatever, and the residue (which in this case amounts to much the greater part) arrives in safety at its port of destination, the loss cannot but be partial, and that this must forever be so, as long as a part continues to be less than the whole."

In that case it will be seen that, by the memorandum, hides were declared to be "free from average, unless general." In other words, the defendant company specifically stipulated against any liability on account of a partial loss of the hides not resulting from a general average.

In the case of *Humphreys v. Insurance Co.*, 3 Mason, 429, Fed. Cas. No. 6,871, which was an action upon a policy of marine insurance, it appeared that oranges and lemons formed a part of the cargo covered by the policy, and that there had been a total loss of the oranges, and only a partial loss of the lemons. The policy of insurance contained a memorandum clause which in express terms exempted the underwriter from particular average or partial losses on "salt, fish, fruit, grain," etc.; and the question was whether, in view of such memorandum, the plaintiff was entitled to recover the value of the oranges totally lost. It was held by the court that he could not, as the loss of the oranges alone did not constitute a total loss of the memorandum article, fruit. In that case it will be seen that fruit was specifically referred to in the memorandum as a part of the cargo for which the insurance company was only to be liable in the event of a total loss, and the court simply held that, by its express language, all fruit was included in the memorandum.

The decision in *Guerlain v. Insurance Co.*, 7 Johns. 526, was based entirely upon a clause of the policy which read: "The assurers, by this policy, take no other risk than general average, and such total loss only as may arise by the absolute destruction of the property." Manifestly, under such a policy, the court properly held that the insurance was upon the whole cargo as an integral subject.

The question in every case is one of construction. As already stated, it is to be observed—and this marks the difference between this case and those relied upon by respondent—the memorandum clause under consideration here does not in express terms say that it is to be applied to the articles insured collectively as one entire subject of insurance. On the contrary, no violence is done to its language by construing it as if intended by the parties to be applied distributively to the several articles insured. There being this ambiguity in the memorandum, it is the duty of the court to construe it distributively, unless such construction would be manifestly in conflict with other parts of the policy, or unless, thus construed, it could not be applied to the property insured. It is a general rule of law that a policy of insurance, being a contract of indemnity to the assured, is to be liberally construed in his favor; and, in accordance with that rule, it is held that an exception from the risks of the policy is to be construed strictly against the insurer:

"Such an exception is a modification of the promise of indemnity, and, as that promise is to be liberally construed, it is a necessary consequence that the exception cannot be permitted to abridge its operation to a greater extent than the terms used plainly require." 1 Duer, Ins. par. 6, p. 161.

In *Blackett v. Assurance Co.*, 2 Crompt. & J. 244, the court held that a memorandum clause in a policy of marine insurance is in the nature of an exception from certain risks covered by the general language of the policy, and therefore, in case of doubt as to its meaning, must be construed strongly in favor of the insured; and in its opinion, delivered by Lord Lyndhurst, C. B., used the following language, which is particularly applicable to the present case:

"The memorandum is in the nature of an exception. The policy is general, extending to all losses. The memorandum excepts losses where each or all, according to the construction to be put upon it, are under 3l. per cent. The rule of construction as to exceptions is that they are to be taken most strongly against the party for whose benefit they are intended. The words in which they are expressed are considered as his words, and, if he do not use words clearly to express his meaning, he is the person who ought to be the sufferer."

Indeed, the law may be considered as settled that, where the language of a policy will fairly admit of two constructions, the court should construe the provisions of the contract strictly as respects the underwriter, and liberally as regards the insured. *Grace v. Insurance Co.*, 109 U. S. 282, 3 Sup. Ct. 207; *Burkheiser v. Association*, 10 C. C. A. 94, 61 Fed. 816; *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360. Let a decree be entered in favor of the libelants, and against the respondent, for the sum of \$2,000, with interest from October 29, 1895, and costs.

HARDING v. MINNEAPOLIS NORTHERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1897.)

No. 929.

PUBLIC LANDS—OMISSION OF ISLAND FROM SURVEY—RIGHTS OF RIPARIAN OWNERS.

In 1849 the government made a survey of lands lying on the east bank of the Mississippi river, those opposite being at that time owned by the Indians. Opposite the survey, and near the east side of the river, was a small island, containing about six acres, which was not surveyed nor shown on the plat. An extension of the survey to the island would have brought the corner of four sections near its center, the remainder of two of such sections lying on the west side of the river. In 1853 the land on the west side was surveyed, together with the island, which was then divided into four lots, each included in a different section. Under this survey the island was entered in 1855, and afterwards patented. The land opposite on the east bank was patented in 1849, and no claim to the island was made by the owners thereof for more than 40 years thereafter. *Held* that, under such facts, there was no presumption that the government intended, in omitting the island from the first survey, to relinquish its title thereto, in favor of those who should become owners of the river frontage on the east bank.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Edgar Harding against the Minneapolis Northern Railway Company. A verdict was directed for the defendant, and the plaintiff brings error.

that lot 1 has a river frontage, and, while the fact is not disclosed by the plat of the original survey, yet it is nevertheless true that, at the time said survey was made and filed in the general land office, there was a small island in the Mississippi river in front of lot 1, at the place indicated on the plat by a star, which lay on the east side of the main channel of the Mississippi river, and was subsequently known as "Boom Island." The land claimed by the plaintiff in this case is a part of Boom island, and he asserts a title thereto, not because it was in terms conveyed to him by his grantor, but because he has become the owner, by mesne conveyances under Bottineau, of a part of the land originally patented to him, which abuts on the Mississippi river opposite to the south end of Boom island.

The diagram marked "Exhibit E" shows the outline of Boom island, and the part thereof which is included between the two red parallel lines indicates the portion of the island which is claimed by the plaintiff because of his river frontage. When the survey of March 25, 1849, was made, the Indian title to the lands on the west bank of the Mississippi river had not been extinguished, and the land had not been surveyed, but so much of township 29 N., of range 24 W., as is situated on the west side of the Mississippi river, was surveyed by the government in the year 1853, after the Indian title had been extinguished. On the plat of said last-mentioned survey, which completed the survey of said township, Boom island was duly outlined and platted. On March 25, 1849, Boom island was separated from the east bank of the river by a slough, through which a considerable volume of water then flowed; and on some occasions boats passed between the island and the east bank of the river, although the main channel of the river was unquestionably on the west side of the island. The east bank of the river opposite to Boom island was somewhat abrupt, and a little higher than the island, and the island was covered with a growth of small timber. Since then, however, the channel between the island and the east bank has been gradually filled up by sawdust and sediment, so that, when the river is very low, it is sometimes possible to walk from the east bank of the river to the island at its north end; but usually there is some flow of water through the slough, and, when the river is high, a considerable volume of water still flows between the island and the mainland. Moreover, between the land which is now owned by the plaintiff on the east bank of the river and the south end of the island there is a stretch of water which is usually from 75 to 80 feet wide that can only be crossed with a skiff or boat. On October 24, 1854, after the fractional part of township 29 N., of range 24 W., which lies on the west bank of the Mississippi river, had been surveyed, Herman Saunders entered the island, which was first disclosed by that survey, and is now known as "Boom Island," in the public land office, and received a patent therefor on May 3, 1859. In said patent Boom island is designated as "lot numbered two of section fourteen, lot numbered four of section fifteen, lot numbered one of section twenty-two, and lot numbered eight of section twenty-three, in township twenty-nine north, of range twenty-four west, in the district of lands formerly subject to sale at Stillwater, now Cambridge,

Minnesota, containing six acres and ninety-four hundredths of an acre, according to the official plat of the survey of said lands returned to the general land office by the surveyor general." It is under this latter patent to Saunders that the defendant company holds possession and derails its title.

The plaintiff lays claim to Boom island on the ground that the failure of the government surveyors to disclose the island by the survey made prior to March 25, 1849, to which reference was made in the patent to Bottineau, estopped the United States, after the grant to Bottineau, from thereafter surveying the island or asserting a title thereto. The plaintiff claims that the island, being undisclosed by the first survey, passed to Bottineau by virtue of his patent; that, by failing to plat the island, the government surveyors in effect declared that it was of no value, and of no more importance than an equivalent portion of the bed of the stream; and that the riparian proprietors on the east bank of the river are therefore entitled to claim such parts of the island as lie on their respective fronts, precisely as they might claim it if it was an accretion formed in front of their respective properties by the action of the currents of the river since the survey was made. It may be conceded to be the general rule that where a government survey along the banks of a navigable stream is made, and the banks of the stream are meandered, but the survey fails to disclose a small island contiguous to the shore, the riparian proprietor holding the adjacent shore land under a grant from the government is entitled to such land as appurtenant to the grant. This rule rests upon the ground that the failure to survey small islands contiguous to either shore is evidence of an intent on the part of the government to surrender all claim thereto in favor of the adjoining riparian proprietors. *Railroad Co. v. Butler*, 159 U. S. 87, 15 Sup. Ct. 991; *Butler v. Railroad Co.*, 85 Mich. 246, 48 N. W. 569; *Middleton v. Pritchard*, 3 Scam. 510, 520; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838. But as the rule last mentioned for the construction of grants is founded upon the presumed intent of the government to relinquish its title to islands which are contiguous to the bank of a stream, and are not surveyed or platted, the rule in question ought not to be applied when the circumstances are such as to rebut that presumption. If, when the bank of a stream is surveyed and meandered, good reasons exist for not indicating on the survey the existence of an island contiguous to the shore, the mere failure to indicate it ought not to be given the effect of divesting the government of its title thereto. In the case at bar we think that reasons did exist when the first survey was made for not platting Boom island, and that they are sufficient to overcome the presumption, which would otherwise arise from the survey, that the government intended to relinquish its title to the island. It has already been shown that the survey to which reference was made in the Bottineau patent was neither a complete survey of the river nor a complete survey of township 29 N., of range 24 W., because a considerable portion of the township was on the west bank of the river, in what was then Indian country. Furthermore, it will be observed by reference to "Exhibit E" that four of the sections of the township,

to wit, sections 14, 15, 22, and 23, cornered on the island about in the center thereof, two of which sections were in the fractional part of township 29, which was surveyed in the year 1853, after the Indian title thereto had been extinguished. When the survey of the township was completed, Boom island was duly surveyed and platted, and shortly thereafter the land forming the island was exposed for sale, and was sold to Hiram Saunders, under whom the defendant claims. It is fair to infer from these facts that the surveyors who made the first survey of a fractional part of the township on the east bank of the river omitted Boom island from the plat of that survey, because a part of the island lay in sections of the township which could not at that time be surveyed. It is most probable that they did not survey and plat the island, because they did not deem it expedient to do so until the residue of the township lying west of the river was surveyed and platted: In view of all the circumstances of the case, and in view of the fact that the government, as early as 1853, caused the island to be surveyed, it is most likely, we think, that the government surveyors omitted to note the location, contour, and area of the island on the first plat, for the reasons last suggested, rather than for the reason that they deemed the island of no importance, and properly appurtenant to shore land which fronted the island.

In further support of the view that the facts in the case do not warrant an inference that the government intended to relinquish its title to Boom island when it made the first survey, it may be said that the evidence contained in this record fails to show that Bottineau or any of those claiming under him, except the plaintiff, ever took possession of Boom island as appurtenant to the grant, or asserted a title thereto under the patent of March 25, 1849. They appear to have recognized the government's right to survey the island as a part of the public domain subsequent to the date of that patent, as well as its right to sell the land to Saunders; for, so far as the evidence shows, they never took any steps, until the present suit was filed, to challenge the survey or patent, or to prevent a sale. The conduct of Bottineau, and those claiming under him, for more than 40 years, has been in the nature of an admission that the claim made by the government in 1853, that Boom island was still a part of the public domain, was a lawful claim. In this latter respect the case at bar differs essentially from the case of *Railroad Co. v. Butler*, *supra*, on which much reliance was placed on the argument by the plaintiff's counsel. In that case a survey of land on the river bank which failed, as in this case, to disclose an island contiguous to the shore, was made in 1831; and the land on the bank was entered by those under whom the plaintiffs claimed, in the following year,—1832. In the year 1837 the opposite bank of the river was also surveyed, and certain islands in the river were disclosed and surveyed; but the one in dispute was not then surveyed or disclosed, and no survey of said island was made until 1855. When the government patented the island in controversy to a third party under the survey made in 1855, and the grantee filed his patent for record, the plaintiffs, opposite to whose land the island lay, immediately commenced a suit to cancel and annul the patent as a cloud upon their title. In that case

there was no pretense that the riparian proprietors ever acquiesced in the claim made by the government that the island remained public property, notwithstanding the first survey; while in the case at bar the evidence indicates such acquiescence for at least 36 years,—that is to say, since the island was patented to Saunders, on May 3, 1859. Without pursuing the subject at any greater length, it is sufficient to say that, upon the state of facts disclosed by the evidence, we think that the circuit court did right in instructing the jury, at the close of all the evidence, to return a verdict for the defendant company; and the judgment entered upon said verdict is therefore affirmed.

JOHN V. FARWELL CO. v. HILTON et al.

(Circuit Court, E. D. Wisconsin. December 24, 1897.)

SALE—RESCISSION BY SELLER—TENDER OF PARTIAL PAYMENT RECEIVED.

Where a fraudulent purchaser of goods has made a partial payment thereon, but has sold a part of the goods exceeding in value the payment made, and has thus rendered it impossible for the seller to rescind as to the entire purchase, such seller is not bound to return or tender back the payment received as a condition precedent to the maintaining of replevin for the goods remaining unsold.

This was an action of replevin by the John V. Farwell Company against George Hilton, assignee, and others, to recover goods purchased by defendant's assignor under fraudulent representations. Heard on motion by plaintiff for judgment non obstante veredicto or for new trial.

Thompson, Harshaw & Thompson, for plaintiff.

F. W. Houghton, for defendants.

SEAMAN, District Judge. The action is replevin for goods purchased by the assignor under fraudulent representations which induced the sale, and the verdict is special, rendered by direction of the court, finding in favor of the defendants for the value of all goods purchased on and prior to March 23, 1897, and in favor of the plaintiff for all the goods which were purchased after that date. The direction of a verdict in favor of the defendants for the value of the goods covered by the earlier purchases was founded wholly upon the view that replevin could not be maintained because payments had been made and accepted by the plaintiff to the amount of \$1,411,—which were made generally upon account and were clearly applicable to the first purchase of goods, embracing the invoices down to and including March 23, 1897,—and there was neither return nor tender of the amount so paid; and this, notwithstanding the undisputed fact that goods had been sold from such purchases by the assignor prior to his assignment in excess of the amount so paid. If this view of the law was correct, or even if it appears to be supported by the weight of authority, the verdict should not be disturbed, as I should deem it proper to leave it for determination on writ of error, if I entertained serious doubt as to the doctrine applicable in such case. But an examination

of the authorities cited for and against the proposition, and consideration of the grounds which lie at the foundation of the general and well-settled rule that the statu quo must be restored before rescission of the contract can be made operative, convince me that the case in that regard is within one of the recognized exceptions to the rule; and that tender of the amount paid on account of the purchases was not essential to rescission, the condition precedent for replevin of the goods remaining on hand, because it appears beyond dispute that goods included in the same purchase, and not found, had been sold by the vendee exceeding the aggregate of such payments, both in the invoice value and in the amount realized from such sales.

The general doctrine clearly prevails that a voidable contract cannot be rescinded in part while affirmed as to the residue; that the right to treat the transaction as though no contract were entered into does not allow the retention of any advantages derived under the contract relation. The authorities recognize exceptions to this rule, although the broad exception stated in *Parsons on Contracts* as to all cases in which fraud constitutes the ground for rescission does not appear to have found acceptance. But the transaction in question is, in my opinion, entitled to exception as a whole by reason of the sales by the vendee out of his fraudulent purchase, as the severance is his act, depriving the defrauded vendor of any opportunity to exercise his election to rescind as to such goods; and the remittances sent to the vendor, being received before discovery of the fraud and within the invoice value, are justly applicable to the conversion by way of indemnity, and its retention will not, under the circumstances, be treated as ratification of the contract. Assuming, as it must be assumed here, that the purchase was effected through the fraudulent representations of the vendee, he made these sales in perpetuation of that fraud. To return to him the amount so paid over would operate as a premium upon fraud, giving him all the benefits at the expense of the defrauded party. Instead of restoring the statu quo, such requirement would aggravate the injury and contravene the purposes of the rule. In *Sisson v. Hill*, 18 R. I. 212, 26 Atl. 196; *Sloane v. Shiffer*, 156 Pa. St. 59, 27 Atl. 67; *Schofield v. Shiffer*, 156 Pa. St. 65, 27 Atl. 69; *Shoe Co. v. Trentman*, 34 Fed. 620; and other cases cited on behalf of the plaintiff,—similar questions were clearly presented, and repayment or tender was held unnecessary to effect rescission; and I am of opinion that the conclusions there reached are within, and not opposed to, the current of authority, notwithstanding the note to that effect appended to *Sisson v. Hill* (R. I.) in 21 *Lawy. Rep. Ann.* 207 (s. c. 26 Atl. 196). The case of *Thompson v. Peck*, 115 Ind. 512, 18 N. E. 16, cited as holding contra, is clearly distinguishable in the fact that the entire consideration which was paid or received upon two separate contracts was retained (the notes being held prima facie payment in that state), while the verdict gave recovery for goods derived under all the contracts of purchase indiscriminately. Clearly, no ground was established for the exception of such transactions from the rule. Neither *Stuart v. Hayden*, 36 U. S. App. 462, 18 C. C. A. 618, and 72 Fed. 402, nor the other authorities cited by defendants, seem to me applicable upon the state of facts shown in this case. I am con-

strained, therefore, to the opinion that the verdict must be set aside; and it is so ordered.

The motion for judgment non obstante veredicto must be denied, as the case is not, in my opinion, within the line to which such action is applicable. Neither is the verdict in such shape that the finding in question can be disregarded, and judgment be entered for the plaintiff as to the value of the goods in the first purchase. Let orders be entered accordingly.

KAVANAGH v. OMAHA LIFE ASS'N.

(Circuit Court, N. D. Illinois, N. D. December 13, 1897.)

1. CORPORATIONS—CONSOLIDATION—LIABILITY FOR CONTRACTS.

A foreign corporation which has attempted to consolidate with an Illinois corporation does not thereby become liable at law for the latter's debts, since there is no statutory authority for such consolidation.

2. SAME.

Rev. St. Ill. 1897, c. 32, § 65, which provides that, in case of consolidation of corporations, the consolidated company shall be liable for the debts of the original companies, does not itself authorize consolidations, and only applies to cases of consolidation otherwise authorized. *American Loan & Trust Co. v. Minnesota & N. W. R. Co.*, 42 N. E. 153, 157 Ill. 641, followed.

At Law. On demurrer to declaration.

Assumpsit by Nellie Kavanagh against the Omaha Life Association.

K. M. Landis, for plaintiff.

Wm. A. Ball, for defendant.

GROSSCUP, District Judge (orally). The action is to recover on a policy of \$2,000, issued by the Life Mutual Association, a corporation of Illinois, upon the life of Kavanagh. The declaration, in effect, sets forth the issuance of the policy, its performance by the insured during his lifetime, his death, and the consequent maturing of the policy as against the Mutual Association of Illinois. It further charges that, subsequent to the death of the defendant, the Omaha Life Association, a corporation under the laws of Minnesota, consolidated with the Illinois corporation. The second count of the declaration, averring all the other particulars, except the fact of consolidation, avers the obtaining of amended articles of incorporation by the Minnesota corporation, whereby it was authorized to assume the risks and reinsurance of other life insurance companies, corporations, associations, etc., and avers also the transference, in pursuance of the amended articles, of the membership of the Illinois Association to the Minnesota Association.

There is no statute of the state of Illinois expressly authorizing the consolidation of a domestic corporation with a foreign corporation. On the contrary, in those provisions of the statute relating expressly to consolidation there is a prohibition against the consolidation of a domestic with a foreign corporation. Section 65, c. 32, Rev. St. Ill. 1897 (passed in 1867), provides that, in all cases when

any company or corporation chartered or organized under the laws of this state shall consolidate its property, stock, or franchises with any other company, such consolidated company shall be liable for all the debts of each company included in the consolidation. The supreme court of Illinois, in construing this section (*American Loan & Trust Co. v. Minnesota & N. W. R. Co.*, 157 Ill. 641, 42 N. E. 153), ruled that this section does not, either expressly or impliedly, authorize consolidations, and is meant only to fix liability in case of consolidations otherwise authorized. There is therefore in this state no law authorizing the consolidation of the two insurance companies. But the defendant in this case is not liable to the complainant except by virtue of its own contract, assuming liability, or by virtue of some law of the land imposing the same. There is no averment of a contract in the declaration, and there can be no statutory liability unless there has been a legal consolidation. Manifestly, section 65 relates only to lawful consolidations. Inasmuch as there can be no legal consolidation without statutory authority so to do, and there is no statutory authority to consolidate a domestic with a foreign corporation, there is, by virtue of section 65, no legal liability imposed upon the defendant. In a court of law, therefore, the declaration makes out no case against the defendant. It is true that associations of this character have no assets, except the membership, upon whom assessments can be levied; and that the transfer of such membership, after the maturing of a policy, is, in effect, the transference of the source out of which the policy alone can be paid. The plaintiff, having recovered judgment against the Illinois corporation, may have a remedy in equity against the transferred asset or assessable membership; but that, on the motion under consideration, is not pertinent. The demurrer to the declaration will be sustained.

DEXTER, HORTON & CO. v. SAYWARD et al.

(Circuit Court, D. Washington, N. D. December 20, 1897.)

1. SUPERSEDEAS BOND—LIABILITY OF SURETIES—JUDGMENT IN REM.

The liability of sureties on a supersedeas bond given by a defendant for deterioration of attached property, taxes accruing thereon, and the expense of keeping pending proceedings for review of the judgment, is not affected by the fact that there was no personal judgment against the defendants, where there is a deficiency remaining on the amount found due the plaintiff after sale of the property.

2. SAME—DEFENSE—FAILURE TO PERFECT APPEAL.

That a plaintiff in error failed to take the proper steps to give the appellate court jurisdiction is no defense to liability on his supersedeas bond.

3. JUDGMENT—RES JUDICATA—ACTION ON SUPERSEDEAS BOND.

An order denying a motion for judgment against the sureties for the penalty named in a supersedeas bond is not a bar to an original action on such bond as to the damages held by the opinion rendered to be within its terms.

4. SAME—VALIDITY—FAILURE OF RECORD TO SHOW JURISDICTION ON REMOVAL.

When a circuit court of the United States retains a cause removed from a state court, and it proceeds to judgment, the parties appearing, and the case is carried to the circuit court of appeals, which renders a decision on the

merits, and issues a mandate directing the manner of further proceedings by the circuit court, the judgment of the appellate court is binding on the parties and the circuit court unless it is impossible to give it effect without violating the constitution, and the circuit court cannot declare it void in a collateral action, though the record fails to show the facts necessary to warrant the removal.

This is an action by Dexter, Horton & Co., a corporation, against W. P. Sayward, Malcolm McDougall, and Mary McDougall, on a supersedeas bond. Heard on demurrer to the answer.

Blaine & De Vries, for plaintiff.

Alfred Battle and Donworth & Howe, for defendants.

HANFORD, District Judge. This action is ancillary to the case of Dexter Horton & Co. v. Sayward (No. 135, in this court), and is founded upon a supersedeas bond executed by the defendants, and filed in the original case, to stay execution upon the judgment pending a hearing of the cause in the circuit court of appeals. This court has heretofore ruled, upon a motion in the original case, that the obligors did not, by said bond, become liable for the judgment, but only for costs and damages, including any loss to the plaintiff by deterioration in value of the property under attachment in the original case, and accumulation of taxes on said property during the time execution was stayed. 79 Fed. 237. As the damages could not be properly ascertained in a proceeding by motion in the original case, the plaintiff commenced this action, alleging in its complaint that, after the judgment of this court had been affirmed by the circuit court of appeals (19 C. C. A. 176, 72 Fed. 758), and the issuance of its mandate by the appellate court, the property theretofore held under attachment was sold for the sum of \$38,817.11, under a writ of execution, leaving a deficiency upon the judgment exceeding the amount of the penalty of the bond sued on herein; that during the pendency of the case in the appellate court the costs and expenses of keeping the attached property in the custody of the marshal amounted to the sum of \$3,834, and the market value of the property depreciated in the sum of \$100,000, and there was depreciation in value for want of repairs to an amount exceeding \$30,000, and taxes accrued to the amount of \$11,000; and that the costs taxed in plaintiff's favor in the circuit court of appeals, amounting to \$20, have not been paid. By their answer, the defendants Malcolm McDougall and Mary McDougall, who executed the supersedeas bond as sureties, have set up four separate affirmative defenses as follows: (1) That the defendant Sayward is, and was during the pendency of the original action, nonresident of, and absent from, the state of Washington; that the summons in said cause was not served upon him personally, and that his appearance in said action was special, and only for the purpose of protecting his property in this state, which was attached in said action; and that the court did not acquire jurisdiction to render a personal judgment against said defendant. (2) That the circuit court of appeals never acquired jurisdiction of said action, for the reason that the writ of error therein was not filed in the office of the clerk of this court. (3) That the issues tendered by the complaint in this

action were fully adjudicated and finally determined by the ruling of this court upon the motion made in the original action for a deficiency judgment against the obligors upon the bond sued on herein. (4) That the original action by the plaintiff against the defendant Sayward was commenced in the superior court of the state of Washington for King county; that said defendant filed a petition and bond for removal of said action into this court; that said superior court made an order denying the prayer of said petition, and refused to surrender its jurisdiction; that said defendant then procured a certified transcript of the record, and filed the same in this court; that writs of attachment were issued out of said superior court, and property of the defendant was levied upon by the sheriff, to whom said writs were directed, which property was, after the filing of said transcript in this court, delivered by said sheriff into the custody of the United States marshal; that the debt for the recovery of which said action was brought accrued in favor of the firm of Harrington & Smith, composed of William A. Harrington, a citizen of the state of Washington, and Andrew Smith, a citizen of the state of California, of which state the defendant William P. Sayward was also a citizen at the time of the commencement of said action; that the right of action to recover said debt was assigned by Harrington & Smith to the plaintiff; that said original action was not removable from said superior court into this court for the reason that this court would not have had original jurisdiction, if no assignment of the right of action had been made, because one of the assignors and said defendant Sayward were, at the time of the commencement of said action, citizens of the same state; that the records in the superior court show that the plaintiff commenced said action as assignee, and that it does not appear by the petition for removal of said action into this court, nor in any part of the record of the superior court, that there was any diversity of citizenship between the assignors of said right of action and the defendant Sayward; and that said superior court was never divested of its jurisdiction, and this court never acquired jurisdiction of said action. To each of these affirmative defenses the plaintiff has demurred.

The first three defenses appear to me to be without merit. The first questions the validity of the judgment in the original action, regarding it merely as a personal judgment against the defendant Sayward. But the judgment is in rem against the attached property, as well as in personam. Without having jurisdiction to render a personal judgment, a court within this state, having superior and general jurisdiction, may render a valid judgment in an attachment suit which will be binding upon nonresident and absent defendants, so far as to subject property of such defendants situated within this state to the process of the court, and direct a sale thereof for the payment of debts. The liability of the defendants is created by the bond which they signed, and is not dependent upon the validity of the judgment as creating a personal liability of the defendant Sayward. Even though he might not be, by force of the judgment, liable for any deficiency remaining after a sale of the attached property and appli-

cation of the proceeds to the payment of the judgment, still, if the plaintiff sustained loss by the deterioration or destruction of the attached property, or the accumulation of taxes thereon, the obligors are, by the terms of their bond, liable to the plaintiff for such losses.

But few words are required to dispose of the second defense. If the defendant Sayward failed to cause everything to be done necessary to lodge the case in the circuit court of appeals, then he did not prosecute his writ of error to effect, and that failure constitutes a breach of the obligation which the defendants entered into, and renders them liable.

The ruling upon the motion in the original case for a deficiency judgment against the obligors on this bond is certainly no bar to the prosecution of this action for the recovery of such damages as, by the opinion rendered upon the hearing of that motion, this court held to be within the indemnity of the bond. The plaintiff may be claiming too much. But the complaint is not, for that reason, obnoxious to a general demurrer.

The argument to sustain the fourth defense is that the superior court did have undoubted jurisdiction of the original case; that said court could not be divested of its jurisdiction by removal of the cause into the federal court in any manner other than as provided by the statute; that no inquiry into or ascertainment of facts not shown by the record at the time of removal of the cause can be presumed, for the transfer of jurisdiction from one court to the other cannot take place until the record shows that the steps necessary to effect the transfer have been taken in accordance with law, and, as two courts cannot have jurisdiction of the same cause at the same time, no act of the parties, or proceedings in the federal court, can create federal jurisdiction until the state court has been divested of its jurisdiction. The defendants are fortified in their position by decisions of the supreme court holding that in cases removed from state courts into United States circuit courts the facts essential to the right of removal must be shown affirmatively by the record, before the removal takes place; that a defective record deprives a United States circuit court of jurisdiction of a case removed from a state court, even though the necessary facts do exist; and its final judgment, although rendered after the parties have voluntarily submitted their cause to its determination, is *coram non judice*. *Amory v. Amory*, 95 U. S. 186; *Insurance Co. v. Pechner*, *Id.* 183; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799; *Carson v. Hyatt*, 118 U. S. 279, 6 Sup. Ct. 1050; *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518; *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692; *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9; *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. 196. The argument for the defense also assumes that all removed cases, where the record does not show affirmatively that the United States court did have jurisdiction, are in the same situation as cases wherein the record does show affirmatively that the court did not have jurisdiction. It is insisted that there is a wide distinction to be observed between causes commenced originally in a United States

circuit court and cases which were originally commenced in a state court; that in the former, if the record is silent, jurisdictional facts may be presumed to exist, but in the latter the federal jurisdiction depends entirely upon a sufficient record showing affirmatively the facts necessary to warrant removal of the cause from the state court into the federal court. And it is shown by the decisions of the supreme court that, where it appears affirmatively by its own record that a court did not have jurisdiction of the cause, its judgment is not merely voidable, but is an absolute nullity. *Galpin v. Page*, 18 Wall. 350; *Windsor v. McVeigh*, 93 U. S. 277; *Pennoyer v. Neff*, 95 U. S. 714; *Settlemyer v. Sullivan*, 97 U. S. 444; *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164; *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482; *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841. It is also shown by the decisions of the supreme court that, where the plaintiff sues as assignee of a chose in action, if the federal jurisdiction depends upon diversity of citizenship of the parties, it is necessary to show the citizenship of the assignors as well as the parties to the suit, and, unless it appears by the record that the suit might have been prosecuted in the federal court if no assignment or transfer of the cause of action had been made, the record is insufficient to show jurisdiction in a federal court. *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173; *Parker v. Ormsby*, 141 U. S. 81, 11 Sup. Ct. 912; *Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 152 U. S. 71, 14 Sup. Ct. 483. In the case of *Elliott v. Peirsol*, 1 Pet. 328-342, the supreme court gave this rule:

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought even prior to a reversal in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers."

That decision has been cited many times in the subsequent decisions of the supreme court, and the rule in the same words has been repeated and approved in *Hickey v. Stewart*, 3 How. 750-763; *Williamson v. Berry*, 8 How. 495-565; *Thompson v. Whitman*, 18 Wall. 457-471; *Re Sawyer*, 124 U. S. 200-225, 8 Sup. Ct. 482. The rule, as quoted and as applied in the cases referred to, is a mandatory declaration of the law by the highest court in the country, and is broad enough to sweep every judgment of every court of every rank assuming to act without lawful jurisdiction of the parties whose rights are involved or of the subject-matter of the controversy, whether the defect of jurisdiction appears affirmatively on the face of the record or is shown in a collateral proceeding by proof aliunde. In the recent decision of the supreme court in the case of *Guarantee Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137-151, 11 Sup. Ct. 516, Mr. Justice Brown, in the opinion of the court, quotes with approval from the opinion in *Williamson v. Berry* as follows:

"It is an equally settled rule of jurisprudence that the jurisdiction of any court exercising authority over a subject may be inquired into in every other

court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law."

The foregoing propositions, and the decisions of the supreme court supporting the same, come very near to closing up every way of escape from the conclusion that the judgment of this court, notwithstanding its affirmance by the circuit court of appeals, is an absolute nullity; and, if so, the defense is good, for, if the judgment is a nullity, then the plaintiff cannot be heard to say that it has been damaged by delay in execution of the judgment, or by deterioration of the attached property during the time of such delay.

Some of the decisions of the supreme court in which judgments rendered without jurisdiction are treated as nullities are based upon the fundamental principle of jurisprudence that no person can be deprived of his possessions or rights by legal process until after notice to him of the proceedings against him, and reasonable time and opportunity for him to be heard upon the merits of his case has been allowed. In a case where, by the record of the court, it appears that a party not actually appearing, nor within the territorial limits of its jurisdiction, and not served personally with notice of the pendency of the action, and the procedure prescribed by statute for obtaining jurisdiction of the person by constructive service has not been strictly followed, a judgment against such party is a nullity, because no effect can be given to it without violating the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law. This is the doctrine of the decisions in *Galpin v. Page*, *Pennoyer v. Neff*, and *Settlemyer v. Sullivan*. For the same reason, when a party against whom proceedings have been instituted, or whose property has been seized in a suit in rem, appears for the purpose of defending himself or his property, and the court refuses to permit him to answer, or be heard upon the merits of his cause, a judgment of the court in such proceeding, after such denial of a hearing, is void, and not entitled to respect under any circumstances. This is the doctrine of the decisions in *Windsor v. McVeigh* and in *Hovey v. Elliott*. Other decisions seem to have been shaped by other express provisions of the constitution. For instance, the case of *In re Ayers* is a case in which the supreme court held a judgment of the United States circuit court for the Eastern district of Virginia, granting an injunction against the attorney general of the state of Virginia to restrain the bringing of certain suits for the collection of taxes, to be absolutely void for the reason that the suit in which the injunction was granted was in fact and in law a suit against the state of Virginia, "jurisdiction to entertain which is denied by the eleventh amendment to the constitution, which declares that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The case did not turn upon a mere question of practice, but the supreme court felt called upon to give effect to the amendment by declaring a judgment to be void, because the court at

tempted to exercise jurisdiction contrary to the express declaration of the constitution.

There is room to distinguish the case at bar from the cases in which, on constitutional grounds, judgments of courts of superior jurisdiction have been held to be void when assailed collaterally; but I am unable to decide that the fourth defense pleaded in the defendants' answer is not, in law, a bar to the present action, and claim that the decision can be squared with the severe rule given by the supreme court in *Elliott v. Peirsol*; nor can I find in the decisions of the supreme court any good reason to assign for excepting this case from that rule. Yet I feel compelled, by consideration of other decisions of the supreme court, to sustain the demurrer. I can only say that in *Elliott v. Peirsol*, and the cases which follow it, the analogy to the case under consideration is not so close or perfect, as I find in the cases hereafter referred to, which are decisions of the supreme court, not overruled, and as binding upon this court as any of the decisions of that court. The case of *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552-559, 8 Sup. Ct. 217, was a suit brought by the Iowa Homestead Company against the Des Moines Navigation & Railway Company to recover certain taxes which formed part of the subject-matter of the litigation in a case between the same parties which had proceeded to a final decree in the United States circuit court for the district of Iowa, and to a hearing in the supreme court of the United States, resulting in affirmance of said decree. *Homestead Co. v. Valley R. R.*, 17 Wall. 153. The railroad company set up the decree in its favor in the first suit as a bar to the action, and to that defense the homestead company replied "that the decree or judgment referred to is null and void, for the reason that the courts of the United States had no jurisdiction of said suit, and no legal power or authority to render said decree or judgment." The following extracts from the opinion of the court, by Chief Justice Waite, present the exact question in the case, the decision thereof, the grounds upon which it rested, and the authorities relied upon:

"The precise question we have now to determine is whether the adjudication by this court, under such circumstances, of the matters then and now at issue between the homestead company and the navigation and railroad company was absolutely void for want of jurisdiction. The point is not whether it was error in the circuit court to take jurisdiction of the suit, or of so much of it as related to the navigation and railroad company originally, but as to the binding effect of the decree of this court so long as it remains in force, and is not judicially annulled, vacated, or set aside. * * * It was settled by this court at a very early day that, although the judgments and decrees of the circuit courts might be erroneous, if the records failed to show the facts on which the jurisdiction of the court rested, such as that the plaintiffs were citizens of different states from the defendants, yet that they were not nullities, and would bind the parties until reversed, or otherwise set aside. In *Skilern's Ex'rs v. May's Ex'rs*, 6 Cranch, 267, the circuit court had taken jurisdiction of a suit, and rendered a decree. The decree was reversed by this court on appeal, and the cause remanded, with directions to proceed in a particular way. When the case got back, it was discovered that the cause was 'not within the jurisdiction of the court,' and the judges of the circuit court certified to this court that they were opposed in opinion on the question whether it could be dismissed for want of jurisdiction after this court had acted thereon. To that question the following answer was certified back: 'It appearing that the merits of the cause had been finally decided in this court, and that its mandate

required only the execution of its decree, it is the opinion of this court that the circuit court is bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings.' That was in 1810. In 1825. *McCormick v. Sullivan*, 10 Wheat. 192, was decided by this court. There a decree in a former suit was pleaded in bar of the action. To this a replication was filed, alleging that the proceedings in the former suit were coram non iudice, the record not showing that the complainants and defendants in that suit were citizens of different states; but this court held on appeal that: 'The courts of the United States are courts of limited, but not inferior, jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees may be reversed for that cause on a writ of error or appeal, but, until reversed, they are conclusive between the parties and their privies. But they are not nullities.' There has never been any departure from this rule. It is said, however, that these decisions apply only to cases where the record simply fails to show jurisdiction. Here it is claimed that the record shows there could be no jurisdiction, because it appears affirmatively that the navigation and railroad company, one of the defendants, was a citizen of the same state with the plaintiff. But the record shows with equal distinctness that all the parties were actually before the court, and made no objection to its jurisdiction. The act of 1867, under which the removal was had, provided that, when a suit was pending in a state court, 'in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, * * * such citizen of another state, * * * if he will make and file an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may * * * file a petition in such state court for the removal of the suit' into the circuit court of the United States; and, when all things have been done that the act requires, 'it shall be * * * the duty of the state court to * * * proceed no further with the suit'; and, after the record is entered in the circuit court, 'the suit shall then proceed in the same manner as if it had been brought there by original process.' In the suit now under consideration there was a separate and distinct controversy between the plaintiff, a citizen of Iowa, and each of the citizens of New York, who were defendants. Each controversy related to the several tracts of land claimed by each defendant individually, and not as joint owner with the other defendants. Three of the citizens of New York caused to be made and filed the necessary affidavit and petition for removal, and thereupon—by common consent, apparently—the suit as an entirety was transferred to the circuit court for final adjudication as to all the parties. The plaintiff, as well as the defendants, appeared in the circuit court without objection, and that court proceeded as if its authority in the matter was complete. Whether, in such a case, the suit could be removed, was a question for the circuit court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous; but the decree could not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the circuit court. The decision of that question was the exercise, and the rightful exercise, of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal. As the circuit court entertained the suit, and this court, on appeal, impliedly recognized its right to do so, and proceeded to dispose of the case finally on its merits, certainly our decree cannot, in the light of prior adjudications on the same general question, be deemed a nullity. It was, at the time of the trial in the present case in the court below, a valid and subsisting prior adjudication of the matters in controversy, binding on these parties, and a bar to this action."

In *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, and *Evers v. Watson*, 156 U. S. 531, 15 Sup. Ct. 430, the decision in the case of *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, and the earlier de-

cisions of the supreme court therein cited, have been reaffirmed. Here is a continuous line of decisions of the supreme court extending from the days of Marshall to the present time, from which we may fairly deduce the following rules: The circuit courts of the United States have jurisdiction to decide questions as to their own jurisdiction in cases removed from state courts, and the decision of such questions by a court which has jurisdiction of the parties, if erroneous, is nevertheless binding upon the parties until set aside or reversed by an appellate court, or by an order in a proper proceeding in the same court. The judgment of a circuit court of the United States in a case removed from a state court is binding upon the parties to the same extent as it would be if the case had been commenced therein by original process; and after a circuit court in such a case has entertained jurisdiction, and proceeded to a final judgment, and the case has been carried to an appellate court, and a decision rendered therein upon the merits of the controversy, and after a mandate has been issued, directing the manner of further proceedings in the circuit court, the decision of the appellate court is binding and conclusive upon the parties and upon the circuit court. While it is true that a court may not, by its own judgment, create jurisdiction in its favor which the law has not conferred, and while the parties cannot, by their consent, confer jurisdiction upon a court, it is nevertheless true that, after parties have voluntarily submitted a cause for determination upon its merits, to a court of superior, although limited, jurisdiction, the submission of the cause, and the final judgment of the court, together, do estop the parties from denying in a collateral proceeding that it had jurisdiction, except in cases where it is impossible to give effect to the judgment without violating the constitution. In an opinion of the supreme court by Chief Justice Waite, not found in the official reports, it was held that a party on whose application a case was removed into a United States circuit court could not raise objections to such removal. *Seward v. Comeau*, 26 Lawy. Co. Ed. 438. This rule of estoppel is also supported by the decision of the supreme court in an opinion by Chief Justice Chase in the case of *Bushnell v. Kennedy*, 9 Wall. 387-394. In the present case this court cannot deny its jurisdiction to render the judgment referred to in plaintiff's complaint without treating as a nullity the mandate of the circuit court of appeals for the Ninth circuit. An inferior court cannot presume to declare the judgment of an appellate court upon the merits of the cause to be void for want of jurisdiction, and on that ground disregard its mandate, without bringing the administration of justice into utter disrepute. *Skillern's Ex'rs v. May's Ex'rs*, 6 Cranch, 267; *Livingston v. Story*, 12 Pet. 339; *Chaires v. U. S.*, 3 How. 511; *Whyte v. Gibbes*, 20 How. 541. For these reasons, I hold the facts set forth in the fourth defense to be insufficient to constitute a bar to this action. The demurrer to all of the affirmative defenses in the answer is sustained.

TEXAS & P. RY. CO. v. CLAYTON et al.

(Circuit Court of Appeals, Second Circuit. December 8, 1897.)

1. CARRIER OF FREIGHT—LOSS OF GOODS—DELIVERY TO CONNECTING CARRIER.

A railroad company received certain cotton for shipment over its road and a connecting steamship line. It owned a wharf at the point of connection, on which it deposited the cotton, and from which, according to usage between the two carriers, the steamship company loaded freight into its vessels, being notified when goods were received for transfer to its line, and such goods being checked out by a clerk of the railroad company, after which a receipt was taken for the same. The steamship company was notified of the arrival of the cotton, and requested to remove it as soon as practicable; but, before it had done so, the cotton was burned, without fault or negligence on the part of the railroad company. *Held*, that there had been no delivery from the railroad to the steamship company, which had acquired no right of control over the cotton.

2. SAME—LIABILITY AS WAREHOUSEMAN.

Under such circumstances, the railroad company cannot be considered as having ceased to hold the cotton as a carrier, and to have become a warehouseman, it having done nothing evidencing such an intention.

In Error to Circuit Court of the United States for the Southern District of New York.

Action by Clayton and another against the Texas & Pacific Railway Company to recover the value of cotton destroyed after its delivery to the defendant as a carrier. There was a judgment for plaintiffs on a verdict directed by the court, and defendant brings error.

Rush Taggart and Arthur H. Masten, for plaintiff in error.

Evarts, Choate & Beaman and Treadwell Cleveland, for defendants in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment which was entered upon a verdict directed in favor of the plaintiffs upon the trial. The action was brought to recover damages alleged to have been sustained by the plaintiffs by the burning of 467 bales of cotton on the 12th of November, 1894, at Westwego, in the state of Louisiana.

The facts established upon the trial were that the plaintiffs, co-partners, at Liverpool, England, by the style of Newall & Clayton, through their agents, Castner & Co., at Bonham, Tex., delivered in October, 1894, to the defendant, four lots of cotton for transportation; the contract being evidenced by four bills of lading, identical in form except as to the number of bales, the marks on the cotton, and the numbers of the bills of lading. The material parts of the bills of lading were as follows:

"Received by the Texas & Pacific Railway Co., * * * of Castner & Co., for delivery to shippers' orders, or their assigns, at Liverpool, England, he or they paying freight and charges as per margin, bales of cotton [here follow the number of bales and the marks]. From Bonham, Texas, to Liverpool, England. Route via New Orleans and the Elder & Demster & Co. Steamship Line [here follow the amount of freight and advance charges], upon the following terms and conditions, which are fully assented to and accepted by the owner, viz.: (1) That the liability of the Texas & Pacific Railway Company in respect to said

cotton, and under this contract, is limited to its own line of railway, and will cease and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment, or damage done to or sustained by said cotton before its arrival or delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment, or loss. * * * (6) That the said cotton shall be transported from the port of New Orleans to the port of Liverpool, England, by the Elder, Demster & Co. Steamship Line, and with liberty to ship by any other steamship or steamship line; and that, upon delivery of said cotton to said ocean carrier at the aforesaid port, this contract is accomplished; and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported; and, upon delivery of said cotton at usual place of delivery of the steamship or steamship line carrying the same at the port of destination, the responsibility of the carriers shall cease."

Two of the bills of lading were dated October 10th; one was dated October 15th; and one was dated October 23d. There was an existing arrangement at the time between the defendant and the Elder, Demster & Co. Steamship Line, by which the former was to forward the latter, during the months of October, November, and December, 1894, 20,000 bales of cotton for transportation by the steamship line to Liverpool; and it was understood between them that the cotton was to be received by the steamship line at the defendant's wharf at Westwego. This wharf was at the terminus of a branch of the defendant's line of railway, on the bank of the Mississippi river, and was built out over the river far enough so that cars could be run upon the tracks in the rear of the wharf and unloaded, and vessels come to the front of the wharf and receive the freight thus unloaded. It was controlled exclusively by the defendant, and used by it for the temporary storage of freight of all kinds brought over its railway, and awaiting delivery to the consignees or for transportation by vessels. The course of business between the defendant and the steamship line was as follows: Upon the shipment of the cotton in Texas, bills of lading would be issued to the shipper. Thereupon the cotton would be loaded in cars of the defendant, and a waybill giving the number and initial of the car, the number and date of the bill of lading, the date of the shipment, the names of consignor and consignee, the number of bales forwarded on that particular waybill, the marks on the cotton, the weight, etc., would be given to the conductor of the train bringing the car to Westwego. Upon the receipt of the waybill and car at Westwego, a skeleton would be made out by the defendant's clerks at Westwego, for the purpose of unloading the car property, containing the essential items of information covered by the waybill and the date of the making of the skeleton. When this skeleton had been made out and the car had been side tracked at the rear of the wharf, the skeleton would be taken by the defendant's check clerk, and he would proceed with a gang of laborers to open the car. The cotton would then be taken from the car, examined to see that the marks corresponded with the items upon the skeleton, and deposited in one of the sheds upon the wharf designated by the check clerk, and the check clerk would mark upon the skeleton the location of the cotton. The sheds were subdivided into 15 sections, and the location of the

cotton was left to the check clerk. The skeleton would then be transmitted to the general office of the defendant, and the defendant would make out a "transfer sheet," containing substantially the information contained in the waybill, and transmit the transfer sheet to the steamship line. The steamship line, upon receiving the transfer sheet understood that cotton for their vessels was on the wharf at Westwego, and would collate the transfers relating to such cotton as was destined by them for a particular vessel, return the transfer sheet to the defendant, and advise defendant what vessel would take the cotton. Thereafter the steamship company, when it was ready to take the cotton, would send the vessel with their stevedores to the wharf. The defendant's clerk would go with the master of the vessel, and identify and count out the particular lots of cotton designated for his vessel. The master would "O. K." them, and the stevedores would thereupon take the cotton, and put it on board the ship. Before the cotton left the wharf, the defendant would obtain a receipt for it from the master of the ship.

The particular cotton involved in this suit had arrived and been unloaded upon the wharf at Westwego prior to November 5th. The transfer sheets had been transmitted by the defendant to the steamship line prior to November 10th; and prior to November 12th the steamship line had returned the transfer sheets to the defendant. The fire occurred upon the evening of November 12th. In the forenoon of that day the defendant gave notice to the steamship line that the cotton was upon the wharf, and requested the latter to come and remove it as soon as practicable. The fire took place without any fault or negligence on the part of the defendant.

Upon the facts thus established, the defendant requested the trial judge to instruct the jury to find a verdict in its favor, upon two grounds: First, that the evidence showed a delivery to the steamship line, the connecting carrier; and, second, that, if there had not been a delivery to the steamship line, there had been a tender of the cotton to the connecting carrier, and therefore the defendant held the cotton simply as a warehouseman, and, there being no proof of negligence, was not responsible for the loss. The plaintiffs also requested the trial judge to instruct the jury to find a verdict in their favor. The trial judge refused the instructions asked for by the defendant, and directed the jury to find a verdict for the plaintiffs in a sum which had been stipulated as the amount of the loss. In directing a verdict, the trial judge made the following observations:

"As I understand the testimony, the steamship company had no business to come there to move the goods from one part of the dock to another, nor to change the way in which they were placed upon the dock. They could come there during business hours, and ask to have their goods pointed out to them; and could then, by their employés, during business hours, at a time when the railroad company was willing that they should come, move the goods from a particular location to the steamer, giving a receipt for them. But, aside from that, I do not understand that they had any control over the goods. They certainly had no control over the dock as a dock. They had nothing to do as to determining whereabouts on the dock their goods were to be placed. If they were placed by post 29 when they arrived on Monday, they might be moved by the railroad company to post 43 on Tuesday, without the permission of the steamship company, and without consulting the steamship company. On the

other hand, the steamship company could not move one bale on the dock from where it had been put to another place on the dock. It could only move the goods from the dock to its ship, and then with the permission of the railroad company."

The only question presented by the assignments of error is whether the trial judge correctly ruled that, upon the whole case, plaintiffs were entitled to recover. It was assumed by both parties, each having moved that a verdict be directed, that there was no disputed question of fact for the jury.

In the absence of a special contract qualifying the ordinary obligations of a common carrier, when goods are delivered to a railway company for transportation to a destination beyond its own line through the intervention of a connecting carrier, it is liable as an insurer of the goods until it has delivered them to the connecting carrier, or unless, by the refusal or inability of the connecting carrier to receive them, it is justified in storing them, and has taken the necessary steps to occupy the relation of a warehouseman. Although the second carrier, after notice and a request to do so, has neglected for an unreasonable time to receive the goods, the first carrier must, to exonerate himself as an insurer, in some way clearly indicate his renunciation of the relation of carrier. *Goold v. Chapin*, 20 N. Y. 259. It was said by the court in *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, that:

"The rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivering or attempting to deliver to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation, and not as changing the end of the bailment. It is very clear that the simple depositing of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them; but, if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot, by storing them, change his relation towards them."

What constitutes a sufficient delivery to the connecting carrier is sometimes a doubtful question. A manual transfer of possession is not essential. A constructive change of possession from the first to the second carrier may amount to a delivery. It may be safely affirmed, as a proposition applicable to all cases, that a deposit of the goods with notice, express or implied, at any place where the second carrier has control of them, conformably with usage created by the course of the business between the two carriers, is a sufficient delivery, and discharges the first carrier. The liability of the second carrier begins when that of the first ends. *Van Santvoord v. St. John*, 6 Hill, 157; *Mills v. Railroad Co.*, 45 N. Y. 622. In *Insurance Co. v. Wheeler*, 49 N. Y. 616, where connecting carriers had, at the point of connection, a warehouse used in common for the transfer of goods from one line to the other, the expenses of handling being paid in common, it was held that the delivery of goods there by one carrier, with notice

to the other of their arrival and ultimate destination, placed them in the possession of the latter, and subjected him to responsibility as a carrier. In *Converse v. Transportation Co.*, 33 Conn. 166, a railroad company and a steamboat company had a covered wharf in common, at their common terminus; and it was the established usage for the steamboat company to land goods for the railroad on the arrival of its boats at night upon a particular place on the wharf, whence they were taken by the railroad company at its convenience, for further transportation. There was no evidence of an actual agreement that the goods thus deposited were in the possession of the railroad company, but the court was of opinion that there was a tacit understanding that the steamboat company should deposit its freight at that particular place, and that the railroad should take it thence at their convenience. It was held that a deposit of goods accordingly by the steamboat company was a sufficient delivery to the railroad company, and a recovery against the former for the loss of the goods was reversed. In *Pratt v. Railway Co.*, 95 U. S. 43, the Michigan Central Railroad Company and the Grand Trunk Railroad Company used a freight depot of the former, and when goods were deposited by the latter in a certain part of the depot, destined over the road of the former, they were set apart by the employes of the latter; and, after they were so placed, the employes of the Grand Trunk Railway did not further handle them. After being so set apart, the Michigan Central Railroad Company would obtain from the Grand Trunk Railway Company a list describing the goods and their ultimate destination, and make out a waybill for their transportation over its own road. Certain goods which had been thus set apart for transportation over the line of the Michigan Central Railroad Company were burned before they were loaded into its cars, but after it had obtained the descriptive list. It was held that there had been a delivery by the Grand Trunk Railway Company to the Michigan Central Railroad Company. The court said:

"No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company, and forwarded without further action of the Grand Trunk Company."

In the present case the cotton had never been placed within the control of the steamship line by the defendant. It was not set apart from the other cotton on the wharf, awaiting transportation by other steamship lines or vessels, further than by placing it, when unloaded from the cars, near certain numbered posts in the shed, where it might remain until called for, or might be removed by the defendant to some other location, to suit its own convenience. Before the steamship line could have identified it for the purpose of removal, and after that, before they could have exercised any control over it, the co-operation and assistance of the defendant were necessary.

There is no room for the contention that the defendant had ceased to be a carrier and become a warehouseman. It had done no act evidencing its intention to renounce the one capacity, and assume the other. Although it had requested the steamship line to remove the cotton, it had not specified any particular time within which compli-

ance was insisted on, and had not given notice that the cotton would be kept or stored at the risk of the steamship line upon failure to comply with the request. The request to come and remove it "as soon as practicable" was, in effect, one to remove it at the earliest convenience of the steamship line. There is nothing in the case to indicate that the defendant had not acquiesced in the delay which intervened between the request and the fire.

The bills of lading did not restrict the ordinary liability of a carrier who receives goods for a destination beyond its own line, for transportation by a connecting carrier. On the contrary, the contract between the parties was carefully framed to adjust the liability of the carriers as between themselves, and to protect the shipper, in the event of a disputable custody of the goods. By its terms, the carrier, and that carrier only, "in whose actual custody" the cotton should be, was to be liable for any loss or damage to it whereby any legal liability might be incurred. It was the manifest purpose of this provision to define the rights of the parties to the contract in the event of doubt or dispute, and to make that carrier liable only who was in actual custody of the goods at the time of the loss, irrespective of the question whether there had been any constructive change of possession between the two carriers previously.

A verdict for the plaintiffs was properly directed. The judgment is therefore affirmed.

In re HO QUAI SIN.

(District Court, N. D. California. January 7, 1898.)

No. 11,401.

CREDIBILITY OF WITNESSES—EXCLUSION OF CHINESE.

The fact that a Chinese person told the customs officers that she was born in China, but had been told to say that she was born in San Francisco, is sufficient ground for rejecting her testimony to the contrary in habeas corpus proceedings, and may also be considered in determining the credibility of other witnesses who testified that she was born in San Francisco.

This was a petition by Ho Quai Sin for a writ of habeas corpus.

Thos. D. Riordan, for petitioner.

H. S. Foote, U. S. Atty.

DE HAVEN, District Judge. The special referee was justified in rejecting the positive testimony of the petitioner and the other witnesses, given in her behalf, under the principle of law declared in *Quock Ting v. U. S.*, 140 U. S. 417, 11 Sup. Ct. 733, 851, and the cases referred to in that opinion. When first examined by the customs officers, on board the steamer *Coptic*, the petitioner stated that she was born in China, but had been told to report her birthplace as San Francisco, Cal. The fact that such statement was made is sufficiently shown by a credible witness, who acted as interpreter on that occasion, and may be considered in determining the credibility of the other witnesses, who testified that the petitioner was born here.

In the face of the petitioner's former statement that she was born in China, the court is not bound to give credit to her present testimony, nor to the evidence of other witnesses who testify that she was born in this country. If there was any reason to believe the statement which she in fact made to the customs officers when examined by them in relation to her right to land at the port of San Francisco was not properly interpreted, or that she did not upon that occasion fully understand the questions to which she gave answers, the question presented would be entirely different. Petitioner remanded to the custody whence she was taken, for the purpose of deportation to China.

In re EBANKS.

(District Court, N. D. California. December 2, 1897.)

No. 11,400.

1. HABEAS CORPUS—APPEAL.

Under Rev. St. § 766, providing that, pending an appeal in habeas corpus proceedings, any order or proceeding against a person restrained of his liberty under state authority shall be void, an order of the state court directing the infliction of the death penalty, pending an appeal from an order of the district court denying a writ of habeas corpus, is invalid.

2. SAME—JURISDICTION.

The district court has the power in habeas corpus proceedings to make any order necessary to protect a person brought before it from proceedings and orders of a state court which are beyond its jurisdiction.

3. COURTS—STAY OF PROCEEDINGS.

A writ of habeas corpus issued from a federal court to protect a person against invalid proceedings of a state court will not be continued in force after such proceedings have been stayed by an order of the state supreme court.

Joseph Jepheth Ebanks was convicted of murder, and sentenced to death, and his application to the United States district court for a writ of habeas corpus was denied, whereupon he appealed to the United States supreme court. Pending such appeal, the state court ordered that its sentence be carried out, and Ebanks brings this proceeding upon a writ of habeas corpus. Prior to the hearing herein, the state supreme court made an order staying the proceedings of the state court.

Eugene N. Deuprey and Louis P. Boardman, for petitioner.

Henry E. Carter, for Warden of State Prison at San Quentin, California.

DE HAVEN, District Judge. It appears that prior to October 8, 1897, the petitioner herein was convicted in the superior court of the county of San Diego, Cal., of the crime of murder, and thereupon adjudged by said court to suffer the penalty of death. On the said 8th day of October, application was made by the petitioner to this court for a writ of habeas corpus; and in the petition therefor it was alleged, among other things, that the said judgment of conviction was not based upon any indictment charging the petitioner with the commission of the crime of which he was thereby adjudged to have been

guilty, but that he had been proceeded against by information, made and filed by the district attorney of the county of San Diego, Cal., charging him with the commission of the said crime of murder; and it was claimed by the petitioner that for this, among other reasons, his trial for said alleged crime and the said judgment of conviction were in violation of the fourteenth amendment to the constitution of the United States. The application for the writ of habeas corpus was denied by this court, and thereupon, upon said date, the petitioner duly perfected an appeal from such decision to the supreme court of the United States. That appeal is still pending, and is to be heard by said court on the 6th of the present month.

The application for the writ of habeas corpus filed in this court on October 8, 1897, presented a federal question, namely, whether, under the constitution of the United States, the petitioner could lawfully be put upon his trial for a capital crime, in the absence of an indictment by a grand jury charging him with such crime; and, upon the filing of such application, this court was called upon, in the exercise of its jurisdiction, to render such decision thereon as it deemed proper in the premises; and, the judgment so rendered by the court being in effect one denying the petitioner the relief claimed by him, he duly perfected an appeal from such judgment to the supreme court of the United States. The effect of this appeal stayed all further proceedings in the state court for the execution of the judgment, the validity of which had been drawn in question by the petitioner's application for a writ of habeas corpus. That such was the effect of the appeal referred to is plainly declared by section 766 of the Revised Statutes of the United States, in the following language:

"Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceedings against the person so imprisoned or confined or restrained of his liberty, in any state court, or by or under the authority of any state, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void."

And, in construing this section, the supreme court of the United States, in *Re Shibuya Jugiro*, 140 U. S. 295, 11 Sup. Ct. 772, said:

"Of the object of the statute there can be no doubt. It was, in cases where the applicant was held in custody under the authority of a state court or by the authority of a state, to stay the hands of such court or state while the question as to whether his detention was in violation of the constitution, laws, or treaties of the United States was being examined by the courts of the Union having jurisdiction in the premises. But the jurisdiction of the state court in the cases specified is restrained only pending the proceedings in the courts of the United States, and until final judgment therein."

See, also, the late case of *Craemer v. State* (decided October 25, 1897) 18 Sup. Ct. 1, in which the supreme court of the United States again announced the same rule as to the effect of an appeal to that court from the judgment of a United States circuit or district court, in habeas corpus proceedings; and this, without regard to the merits of such appeal, the court saying:

"Such being the law, it has happened in numerous instances that applications for the writ have been made and appeals taken from refusals to grant

it, quite destitute of meritorious grounds, and operating only to delay the administration of justice."

The supreme court of this state, in the recent cases of *People v. Durrant*, 50 Pac. 1070, and *In re Edgar*, 51 Pac. 29, has given substantially the same construction to the section of the United States Revised Statutes above quoted.

Notwithstanding the pendency of the petitioner's appeal, the superior court of the county of San Diego, on the 5th day of November of the present year, made an order directing the sheriff of that county to deliver the petitioner to W. E. Hale, warden of the state prison at San Quentin, and directing the said warden to carry into execution the said judgment convicting the petitioner of murder, by inflicting upon him, on the 3d day of December, 1897, and within the walls of said prison, the penalty of death. The validity of this last order only is assailed by the present proceeding, in which the petitioner seeks, by habeas corpus, to be discharged from the imprisonment and other punishment directed by such order. The writ having been issued as prayed for, the petitioner is now before the court, and held under the protection of said writ; and I proceed to consider the question presented by the foregoing facts.

As already stated, the effect of petitioner's appeal from the decision of this court upon his former application for a writ of habeas corpus was to stay all proceedings in the state court upon the judgment theretofore rendered by it, until the matter involved in that appeal was disposed of by the final judgment of the supreme court of the United States; and it necessarily follows therefrom that the order of the superior court of the county of San Diego, directing the execution of the petitioner while said appeal was still pending in the supreme court of the United States, was given without jurisdiction, and is absolutely void, and, if carried into effect, would deprive the petitioner of the right to have the judgment of this court in the matter of his former petition for a writ of habeas corpus reviewed by the supreme court of the United States,—a right which is guarantied to him by the laws of the United States. The order directing the execution of the petitioner on the 3d instant having been made without jurisdiction, and therefore void, this court properly issued its writ of habeas corpus in this case, for the purpose of bringing the petitioner into the custody of the court, so that it might, in the exercise of its undoubted jurisdiction, in proceedings under the writ, fully protect him against the execution of such illegal order. The court would be authorized in its discretion to continue to hold the petitioner under the protection of its writ, and for this purpose might remand him to the custody of the warden of the state prison, to be safely kept by such warden until the further order of this court, or might remand him to such custody, with directions to safely keep and again produce the body of the petitioner before the court at some future day. In short, the jurisdiction of this court in proceedings under the writ of habeas corpus is as broad as that exercised by the court of king's bench at common law, in relation to which it is said in *Bac. Abr. "Habeas Corpus,"* B, par. 13:

"Also, it hath been ruled that the court of king's bench may, after the return of the habeas corpus is filed, remand the prisoner to the same gaol from whence he came, and order him to be brought up from time to time, till they shall have determined whether it is proper to bail, discharge, or remand him absolutely."

The effect of an order remanding a petitioner to the custody whence he was taken, with instructions that he be again produced before the court, is thus stated by Mr. Justice Nelson, in *Re Kaine*, 14 How. 134:

"The efficacy of the original commitment is superseded by this writ while the proceedings under it are pending, and the safe-keeping of the prisoner is entirely under the authority and direction of the court issuing it, or to which the return is made."

See, also, *Barth v. Clise*, 12 Wall. 401.

It thus appears clear that this court has ample authority to protect the petitioner from illegal execution, under the order of the superior court of San Diego, before referred to; but, in view of the facts appearing before the court at this time, it is not deemed necessary to make any further order for the safety of the petitioner.

It is admitted by the attorney for the petitioner that, since the issuance of the writ of habeas corpus herein, the supreme court of this state, which, equally with this court, is charged with the duty of guarding and protecting all rights secured to the citizen by the constitution of the United States, has made an order staying for the present all proceedings under the order of the superior court of the county of San Diego, directing the execution of the petitioner on the 3d instant. This, in effect, operates to nullify the order under which the petitioner's life was put in jeopardy, and secures to him all the protection which this court would, upon the facts alleged in the petition, be authorized to give in the present proceeding. The petitioner is not entitled to be restored to his liberty, and the action of the supreme court of the state just referred to makes it unnecessary for this court to make any further order in the premises, or longer continue in force the writ of habeas corpus under which the petitioner has been brought before the court. The writ will be discharged, and petitioner remanded to the custody whence he came.

In re DURRANT.

Circuit Court, N. D. California. November 11, 1897.)

No. 12,530.

1. APPEAL IN HABEAS CORPUS—AFFIRMANCE—STATE AND FEDERAL COURTS.

Where an order of a federal court denying a writ of habeas corpus to release one convicted of a capital crime by a state court has been in fact affirmed on appeal by the United States supreme court, the state court is not required, before proceeding to order the execution, to await the filing in the federal court of the supreme court's mandate.

2. JUDICIAL NOTICE—AFFIRMANCE OF DECREE.

The circuit court will, in a collateral proceeding, take judicial notice of the affirmance of its judgment by the supreme court of the United States, when the fact that such judgment of affirmance has been rendered is one

of general notoriety in the state where such circuit court is held, and has been telegraphed to, and published in, the leading newspapers of the state.

8. **HABEAS CORPUS—CRIMINAL CONVICTED BY STATE COURT.**

The fixing by a state court of a date for the execution of a murderer at so early a date as to be in violation of rights secured by the state statutes is not a violation of any provisions of the federal constitution or any acts of congress, so as to authorize a federal court to interfere therewith by writ of habeas corpus.

4. **SAME—ALLOWANCE OF APPEAL IN HABEAS CORPUS.**

A federal court will not allow an appeal from its decision refusing an application for a writ of habeas corpus to release one convicted of murder by a state court, when, on a previous appeal from a like order, the supreme court has already decided that no rights secured to the accused by the federal laws or constitution were violated by his conviction, and the only ground of the second application is an alleged irregularity of the state court in fixing a date for the execution.

This was an application for a writ of habeas corpus in behalf of W. H. T. Durrant, who was convicted by a state court of California of murder in the first degree, and adjudged to suffer the penalty of death.

The petition for the writ in this case alleged, among other things, that prior to June 2, 1897, said Durrant was convicted in the superior court of the city and county of San Francisco, state of California, of the crime of murder in the first degree, for the alleged killing of one Blanche Lamont, and adjudged to suffer the penalty of death; that on the 2d day of June, 1897, application was made by said Durrant to the circuit court of the United States for the Ninth judicial circuit in and for the Northern district of California for a writ of habeas corpus, alleging in his petition therefor that said judgment of conviction was made and rendered without jurisdiction or authority of law, and in violation of rights secured to him by the fourteenth amendment to the constitution of the United States. The application for the issuance of such writ was denied by said circuit court, and thereupon an appeal from such decision of the circuit court to the supreme court of the United States was duly taken. The petition in the present proceeding further alleged: "That said action of habeas corpus and appeal was duly docketed as number 429 on the calendar of the said supreme court of the United States, at the October term thereof, 1897, and that no mandate showing the determination of the said appeal by the said supreme court of the United States was, on the 10th day of November, A. D. 1897, nor has yet been, filed in the said circuit court of the United States;" but that, nevertheless, the said superior court of the city and county of San Francisco did, on the 10th day of November, 1897, make an order directing that its judgment convicting the said Durrant of the crime of murder be carried into execution by the infliction of the death penalty upon said Durrant on the 12th day of November, 1897. The petition further alleges that said order so made on the 10th day of November, 1897, "was had and taken without authentic or official information that said proceeding of habeas corpus had been considered or determined in the supreme court of the United States," and that such order was "without power, authority, or jurisdiction in the said superior court of the city and county of San Francisco," and was in violation of the laws of the state of California, and "contrary to and in violation of the constitution and laws of the United States of America, and particularly in violation of article fourteenth of the amendments to the said constitution of the United States." The petition for the writ of habeas corpus in this proceeding, was filed on the 11th day of November, 1897, and upon the hearing of the application therefor it was not shown by mandate from the supreme court of the United States, or other record evidence, that such court had rendered its judgment upon the appeal from the order of said circuit court, denying the former application of said Durrant for the issuance of a writ of habeas corpus; but the fact that said judgment of the circuit court was affirmed on the 8th day of November, 1897, had been telegraphed to and published in all the leading papers of the state of California on the 9th day of November, 1897, and the text of the opinion affirming such

judgment also published, and by reason thereof it was a matter of general notoriety in the state of California that such judgment of the circuit court had been affirmed, and the fact was not denied in the petition filed in this proceeding.

L. P. Boardman and J. H. Dickinson, for petitioner.

Before MORROW, Circuit Judge, and DE HAVEN, District Judge.

DE HAVEN, District Judge. The application for the writ in this proceeding does not present any federal question. It is not claimed by the petitioner that the supreme court of the United States did not, prior to November 18th of this year, in point of fact, affirm the former order of this court refusing to issue a writ of habeas corpus in behalf of W. H. T. Durrant; and, indeed, we take judicial notice that such former order of this court was affirmed by the supreme court of the United States prior to the 10th instant. 18 Sup. Ct. —. That order having been affirmed, the superior court of the city and county of San Francisco was not required to wait until the filing in this court of the mandate of the supreme court of the United States, showing the fact of such affirmance. In *re Jugiro*, 140 U. S. 291, 11 Sup. Ct. 770. If no judgment had been given by the supreme court of the United States upon the former appeal, an entirely different question would be presented. The order of the superior court of the city and county of San Francisco made on the 10th instant, for the execution of Durrant on the 12th instant, may be, as suggested by counsel for petitioner, without precedent, and it certainly is in violation of rights secured to the defendant by the statutes of this state, in so far as it fixes a date so near at hand as the time for such execution; but such order does not, in this respect, and under the circumstances disclosed in this petition, violate any provision of the United States constitution, or any law of congress made in pursuance thereof; and this court is without authority to reverse or set aside the order of the superior court, because, in our judgment, it may be in conflict with the laws of the state. "While the writ of habeas corpus is one of the remedies for the enforcement of the right to personal freedom, it will not issue, as a matter of course, and it should be cautiously used by the federal courts in reference to state prisoners. Being a civil process, it cannot be converted into a remedy for the correction of mere errors of judgment or of procedure in the court having cognizance of the criminal offense. Under the writ of habeas corpus, this court can exercise no appellate jurisdiction over the proceedings of the trial court or courts of the state, nor review their conclusions of law or fact, and pronounce them erroneous. The writ of habeas corpus is not a proceeding for the correction of errors." In *re Fredrich*, 149 U. S. 70, 13 Sup. Ct. 793. The supreme court of the state of California is the tribunal to which application must be made for the correction of any error of procedure committed by the superior court of the city and county of San Francisco in fixing the date of the 12th of this month as the time for the execution of Durrant. The judgment given upon the verdict convicting him of the crime of murder has been affirmed by the highest court of the state, and the supreme court of the United States, in affirming the former order of this court

refusing the application of said Durrant for his release from such judgment upon his petition for a writ of habeas corpus, necessarily determined that such judgment is not in violation of any rights secured to him by the constitution of the United States. The question as presented here is not the same as would arise upon a judgment directing that a defendant therein should be hanged within 48 hours after the rendition of a verdict finding him guilty of a capital offense. The matter of which the petitioner complains at this time relates only to alleged errors of procedure upon the part of the superior court, in making an order for carrying into effect a valid judgment. This does not present any question of which this court can take cognizance. The application for the writ is refused.

Mr. Boardman: If your honor please, I ask leave to present a petition for order allowing an appeal.

Judge Morrow: The court, having determined that there is no federal question involved in this application for habeas corpus, declines to allow an appeal.

Mr. Boardman: I ask leave to file assignment of errors.

Judge Morrow: The court declines to receive the assignment of errors.

Mr. Boardman: They are both in due form of law. We also ask your honor to fix the time and return day as per blank in the form of citation now presented.

Judge Morrow: The court refuses to fix the time for the return of the citation.

Mr. Boardman: We now offer the notice of appeal which was heretofore offered for filing, and take your honor's ruling.

Judge Morrow: The clerk is directed not to file the notice of appeal.

Mr. Boardman: We take an exception to the ruling. We now offer a bond in due form of law in the sum of \$500, conditioned for the payment of all costs and damages upon the appeal which is here sought to be taken.

Judge Morrow: The court declines to approve the bond.

Mr. Boardman: We take an exception to the ruling, and offer to file with the clerk the bond just referred to.

Judge Morrow: The clerk is directed not to receive or file the bond.

In re DURRANT.

(Circuit Court, N. D. California. January 5, 1898.)

No. 12,549.

1. CONSTITUTIONAL LAW—APPEAL—STAY OF EXECUTION.

A state statute (Pen. Code Cal. §§ 1227, 1243) is not in violation of the federal constitution merely because it does not provide that an appeal from an order directing execution, made after a final judgment of conviction, shall of itself operate to stay the execution of such judgment.

2. APPEAL IN HABEAS CORPUS.

Under Rev. St. §§ 751, 753, 754, and under section 5 of the judiciary act of March 3, 1891, and rules 35 and 36 of the supreme court (46 Fed. Ill.), promulgated May 11, 1891, the allowance of an appeal by the circuit or district court, or by some judge thereof or of the supreme court, is necessary to the perfection of an appeal; and, if an order of allowance is denied by the court, the party desiring to appeal must apply either to some of the other judges named for such allowance, or to the supreme court for a writ of mandamus in aid of its appellate jurisdiction.

2. DISCRETION OF COURT.

Where a judgment of conviction of murder in the first degree with sentence of death has been affirmed by a state supreme court, and an order of a federal court denying a writ of habeas corpus has afterwards been affirmed by the supreme court of the United States, it is within the discretion of a federal circuit court, on denying a subsequent application for another writ of habeas corpus, to refuse to allow an appeal to the supreme court from its order, when the only ground for the application is an alleged irregularity of the state court in fixing a date for the execution, and when the only result would be to obstruct the execution of the state laws.

This was an application by William A. Durrant for a writ of habeas corpus in behalf of W. H. T. Durrant.

E. N. Deuprey, J. H. Dickinson, and L. P. Boardman, for petitioner.

Before MORROW, Circuit Judge, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This is a proceeding upon an application for the issuance of a writ of habeas corpus in behalf of W. H. T. Durrant. It sufficiently appears from the petition that prior to November 10, 1897, the said Durrant had been convicted in the superior court of the city and county of San Francisco of the crime of murder in the first degree for the killing of one Blanche Lamont, and thereupon adjudged to suffer the penalty of death, and that such judgment had been affirmed by the supreme court of this state. 48 Pac. 75. On the 10th day of November, 1897, the said superior court entered an order directing that said judgment be carried into effect by the execution of Durrant on the 12th day of the same month. On the day after the entry of this order an application was made to this court for a writ of habeas corpus on behalf of said Durrant, upon grounds not necessary to be here stated. The court, being of the opinion that, upon the facts alleged in the petition, the writ of habeas corpus ought not to be awarded, denied the application (84 Fed. 314), and thereupon there was presented to the court a petition for an order allowing an appeal to the supreme court of the United States from the judgment refusing to issue the writ applied for. The court declined to make such order, or to fix the amount of the bond to be given on appeal from its said judgment, or to approve any bond on appeal, and further directed its clerk not to file the petition for the allowance of an appeal, or the appeal bond, tendered by such petitioner. Thereafter, on the 15th day of December, 1897, the superior court of the city and county of San Francisco made a further order that the judgment above referred to, convicting the said Durrant of murder in the first degree, and adjudging that he suffer the death penalty therefor, should be carried into effect by the warden of the state's prison at San Quentin, state of California, on the 7th day of January, 1898; and that, pending the infliction of the

said death penalty, the said Durrant be kept by said warden in close confinement in said state's prison. An appeal from this last order is now pending in the supreme court of the state of California, but, as neither the judge of the superior court nor any justice of the supreme court has filed with the clerk of said superior court a certificate of probable cause for such appeal, the execution of said judgment of conviction is not stayed by such appeal.

It is claimed by the petitioner:

First. That sections 1227 and 1243 of the Penal Code of the state of California are in violation of the constitution of the United States, because they do not provide that an appeal from the order directing its execution, made after a final judgment of conviction, shall of itself operate to stay the execution of such judgment. This contention is manifestly untenable, and nothing further need be said upon that point.

Second. It is next urged by the petitioner that Durrant had an absolute right of appeal from the order of this court made on the 11th day of November, A. D. 1897, refusing to issue the writ of habeas corpus then applied for, and that he was not, and could not be, deprived of such right by the refusal of this court to allow such appeal, and that by reason of his petition for an order allowing him to appeal, and the tender of a bond on appeal, "an appeal was duly taken and perfected, and is now pending in the supreme court of the United States, from the said judgment or order of said circuit court," and further, that as the application for the writ then made to the court presented a case wherein it was shown that the said Durrant was in custody in violation of the constitution of the United States, the appeal from the order refusing to issue the writ prayed for operated as a stay of all further proceedings in the superior court of the city and county of San Francisco in the matter of carrying into execution the judgment theretofore rendered against him. In regard to this contention, it might be sufficient to say that the order of the superior court then challenged as being in violation of the constitutional rights of said Durrant ceased to have any effect after the 12th day of November, 1897, by its own limitation, and the present order directing his execution is not based upon anything contained in such prior order; but we do not propose to rest our decision solely on this ground, and we therefore proceed to consider the question whether an appeal was in fact perfected from the judgment of this court made November 11, 1897, refusing to issue the writ then prayed for on behalf of Durrant.

The question whether a petitioner in this class of cases has an absolute right of appeal, which he can perfect without any order allowing the same, is important, in view of the rule, which is well settled, that an appeal duly taken in such proceedings operates, when the petitioner is in custody under the judgment of a state court, "to stay the hands of such court while the question whether his detention was in violation of the constitution, laws, or treaties of the United States" is pending in the supreme court. *In re Jugiro*, 140 U. S. 291, 11 Sup. Ct. 770; *McKane v. Durston*, 153 U. S. 684, 14 Sup. Ct. 913; *Craemer v. State of Washington* (decided Oct. 25, 1897) 18 Sup. Ct. 1; *In re Ebanks*, 84 Fed. 311. Sections 751 and 753 of the United States Revised Stat-

utes confer upon circuit and district courts the power to issue the writ of habeas corpus in behalf of any one claiming to be restrained of his liberty in violation of the constitution of the United States or of any law or treaty of the United States, and it is the duty of each of such courts to hear any application which is properly presented to it for the issuance of such writ, and to determine whether the allegations of the petition are such as to entitle the petitioner to the relief claimed by him, and thereupon to make such order as law and justice shall require. The right to present the petition for the writ is absolute, and the duty of the court to either grant or refuse the writ is one which the court has no lawful right to refuse to discharge; and by section 754 of the United States Revised Statutes an appeal may be taken to the supreme court from the final decision of a circuit court in such a proceeding, and section 5 of the act establishing a court of appeals, approved March 3, 1891 (26 Stat. 826), also provides that an appeal may be taken from the district courts or circuit courts direct to the supreme court of the United States "in any case that involves the construction or application of the constitution of the United States," and "in any case in which the constitution or laws of a state is claimed to be in contravention of the constitution of the United States." It is under this statute that an appeal may be taken directly to the supreme court from the final judgment of a district court in a habeas corpus case, but the statute is equally applicable to appeals from the judgments of circuit courts in the same class of cases, and the supreme court of the United States, by rules 35 and 36 (46 Fed. iii.) promulgated May 11, 1891 (see 139 U. S. 705, 11 Sup. Ct. iii.), has prescribed the practice to be followed in prosecuting such an appeal. By the first of these rules, the appellant is required to file with the clerk of the court from which the appeal is to be taken his petition therefor, accompanied by a proper assignment of errors; and rule 36 provides that an appeal in such cases "may be allowed in term time or in vacation by any justice of this court or by any circuit judge within his circuit or by any district judge within his district, and the proper security to be taken and the citations signed by him," etc.

Under the practice thus prescribed, it is our opinion that an order allowing an appeal is an essential requirement, and without which no appeal can be perfected in the cases provided for in the rule just referred to; and, if an order allowing such appeal is denied by the judge of the court in which the case was heard, the appeal cannot be perfected without an order, allowing the same, made by some one of the other judges named in the rule, or unless the supreme court, by a writ of mandamus issued in aid of its appellate jurisdiction, directs the inferior court to allow the appeal. It follows from what has been said that in our opinion no appeal was taken from the order of this court made on November 11, 1897, refusing the application then made for the issuance of a writ of habeas corpus in behalf of said Durrant.

It is proper, in view of the allegations contained in the present petition, to consider the further question whether the court may in any case rightfully refuse to allow an appeal in this class of cases, or, in other words, when application is made to it for such an order, is the court clothed with authority to exercise any discretion whatever, in either

granting or refusing such appeal? It was held by the late Judge Sawyer, in the case of *In re Sun Hung*, 24 Fed. 723, that the right of appeal to the supreme court in habeas corpus cases is absolute, and not dependent upon the discretion of the judge of the inferior court to allow or deny. That, however, was a case clearly involving questions arising under the constitution and treaties of the United States, and in which the good faith of the proceedings was not doubted, and the proceeding itself not one in any way obstructing the execution of the criminal laws of the state. In such a case it is clear that the denial of an order allowing the appeal would be a gross abuse of discretion, and the question of the power of the court to refuse an appeal, in a case where it was clearly apparent that the process of appeal was being used solely for the purpose of obstructing the execution of the judgment of a state court, the validity of which had already been sustained by the supreme court of the United States, was not presented to or in the mind of the judge delivering that opinion. But in *Ex parte Jugiro*, 44 Fed. 754, it was held by the circuit court of the Southern district of New York that in a case like this the right of appeal to the supreme court of the United States is an absolute one, and that the court from which the appeal is to be taken has no discretion in the matter, and must grant the petition for an appeal. Notwithstanding our respect for the learning and ability of the judge delivering the opinion in that case, we are not able to agree with the conclusion thus reached by him. When it manifestly appears to the court that the application for the writ is entirely destitute of merit, and that the effect of allowing an appeal from its final judgment in the proceeding will only result in obstructing the execution of the laws of the state, then the court may properly refuse to enter an order giving its consent to such appeal. The case, however, must be an extreme one,—one in which it clearly appears no unsettled federal question is presented,—to justify the court in such action. In the former proceeding, in which this court refused to allow an appeal from its judgment refusing to issue the writ then applied for, it appeared from the petition that the judgment condemning the defendant to death had been affirmed by the highest court of this state, and we also took judicial notice of the fact that the supreme court of the United States, on an appeal from a prior order of this court refusing to grant the said Durrant a writ of habeas corpus, had also held that such judgment did not violate any rights guaranteed to him by the constitution of the United States. Under these circumstances it certainly was within the legal discretion of the court to withhold its consent to an appeal, the only effect of which would have been to obstruct the execution of the criminal laws of the state, and bring the administration of justice into contempt.

We have given careful consideration to the questions presented by this petition, and have reached the conclusion that the facts alleged therein are not sufficient to justify the court in awarding the writ of habeas corpus applied for. Application for issuance of writ denied.

Mr. Deuprey: If your honors please, seeing that there is a difference of opinion between your honors and the supreme court as presented in the *Jugiro Case*, we are certainly in a position to ask your

honors, on merit, to allow us an order upon our petition for an appeal. We have the assignments of errors properly presented and carefully made up, so far as the law demands; and where this serious question—not involved in this case alone, but the liberties of every citizen of the United States—is concerned, I ask your honors to pause and consider our application as one based on merit, and not upon any frivolous ground. I now present our petition and file our assignment of errors.

Judge Morrow: Mr. Deuprey, you are in error. There is no difference of opinion between this court in this case and the supreme court of the United States in the Jugiroy Case.

Mr. Deuprey: I so understood the decision, as read by his honor, Judge De Haven.

Judge Morrow: The case referred to by Judge De Haven is the one decided by Circuit Judge Lacombe in New York, reported in 44 Fed. There is no conflict or difference of opinion between this court and the supreme court of the United States. The question whether an appeal is an absolute right appears to have been decided in the affirmative by the circuit judge in New York. We do not follow that opinion in this case.

Mr. Deuprey: I file my assignment of errors, and present my petition for an order allowing an appeal.

Judge Morrow: In view of the opinion expressed by this court, as rendered by Judge De Haven, the petition will be denied.

Mr. Deuprey: May I have it in the form I have presented here, and allow it to be according to your honors' ideas?

Judge Morrow: You are entitled to your exception, but we make no further order.

Mr. Deuprey: Do not your honors make a specific order dismissing the application?

Judge Morrow: We do not propose to make the order in the form in which you present it. We deny the petition.

Mr. Deuprey: That is, upon the application for an order allowing an appeal?

Judge Morrow: Yes.

Mr. Deuprey: I have a citation which I desire to submit to your honors, directed to the warden of the state's prison, Marin county, state of California, which I ask to have issued pending the pendency of the appeal which we will take to the supreme court of the United States.

Judge Morrow: In view of what we have already said in the matter, we will not issue the citation.

Mr. Deuprey: We will take an exception. Also, at this time we offer our bond upon appeal.

Judge Morrow: For the same reason the bond will not be approved.

In re GUT LUN.

(District Court, N. D. California. December 28, 1897.)

No. 11,405.

HABEAS CORPUS—DEPORTATION OF CHINESE.

Where, on habeas corpus in behalf of a Chinese person held for deportation, it appears that the judgment of deportation which was rendered by another federal court has been set aside, and a new trial granted, but without the issuance of any warrant for the apprehension and return of the petitioner, the court will, nevertheless, not discharge her, but will order her delivery to the marshal for the district where the judgment of deportation was rendered.

This was an application for a writ of habeas corpus in behalf of Gut Lun, a Chinese woman, held for deportation under the exclusion laws.

Lyman I. Mowry, for petitioner.

Bert Schlesinger, Asst. U. S. Atty.

DE HAVEN, District Judge. This is the second time that application has been made to this court to restore the said Gut Lun to her liberty by proceedings under the writ of habeas corpus. Upon the hearing had upon the former application, it appeared that she had been brought within this jurisdiction, to be thence deported to the Empire of China, under and by virtue of a judgment of the district court of the First judicial district of the territory of Arizona, and that she was at the date of the issuance of that writ on board of the steamship Rio de Janeiro, and in the custody of its master, for the purpose of deportation under said judgment. Thereupon this court discharged the writ which had been issued in her behalf, and further ordered that she be remanded to the custody whence she was taken, to be deported to China, in accordance with the said judgment of the district court of the First judicial district of the territory of Arizona. In re Gut Lun, 83 Fed. 141. Thereafter, the district court of the First judicial district of the territory of Arizona entered an order setting aside its former judgment, and granting to the said Gut Lun a new trial, but issued no warrant for her apprehension and return to that territory for such trial.

It is now claimed that the judgment under which Gut Lun was brought within this jurisdiction having been vacated, and no other warrant or authority for her detention having been issued by the court in which it was rendered, she is entitled to be discharged. It is clear to me, however, that such order should not be made. The proceeding relating to her right to remain in the United States is now pending in the district court of the territory of Arizona, and she should be returned to that territory for trial. The district court of the territory of Arizona, having jurisdiction of the proceeding, would undoubtedly have the authority to issue a warrant or writ under which the said Gut Lun could be legally returned to the territory of Arizona for trial. In re Christian, 82 Fed. 885. For some reason, however, that court has not exercised its authority in this respect, but its failure

so to do is not equivalent to a dismissal of the proceeding in which its former judgment, directing her deportation, was rendered, and would not justify her discharge upon the present writ.

Under section 761 of the United States Revised Statutes, the court is required, in any proceeding where a party seeks release under a writ of habeas corpus, "to dispose of the party as law and justice require"; and, as incident to this jurisdiction, it has authority to make all orders necessary to carry out this command of the statute. I have no doubt whatever that this court, having determined that "law and justice require" such action, has ample authority, in the exercise of its jurisdiction in this proceeding, to make an order requiring the United States marshal of this district to deliver the said Gut Lun into the custody of the marshal of the territory of Arizona for trial under the proceeding there pending against her. Ordered that the writ be discharged, and the said Gut Lun be remanded to the custody of the United States marshal for this district; and said marshal is further ordered to deliver the said Gut Lun into the custody of the United States marshal for the territory of Arizona, for the purpose of trial in the proceeding now pending against her in the district court of the First judicial district of the territory of Arizona.

In re BENNETT.

(District Court, N. D. California. December 13, 1897.)

No. 11,393.

1. CRIMINAL LAW—FORMER JEOPARDY—CONVICTION OF LESSER OFFENSE—NECESSITY OF PLEA.

On the trial of a defendant charged with assault with intent to commit murder, a verdict finding him guilty of assault with a deadly weapon is, in legal effect, an acquittal of the higher offense; and, on a new trial being awarded, the court has no jurisdiction to again place him on trial for such offense, under the same information or indictment, or to require him to enter any further plea thereto in order to preserve his constitutional right not to be placed twice in jeopardy. The verdict is a part of the court's record of its proceedings on such information, of which it is bound to take judicial notice.

2. SAME—VOID JUDGMENT—WANT OF JURISDICTION SHOWN BY RECORD.

A judgment of conviction against a defendant is void for want of jurisdiction where the records of the court rendering it show that the defendant was previously tried on the same information, and a verdict was returned finding him guilty of a lesser offense.

3. HABEAS CORPUS—RULE IN FEDERAL COURTS—ILLEGAL CONVICTION BY STATE COURT.

Though the judgment of a state court, under which a petitioner is imprisoned, is void, and rendered in violation of the petitioner's rights under the constitution of the United States, a federal court will not release him on habeas corpus where, on the setting aside of such illegal conviction, there remain other charges in the information, on which he has not been tried; his remedy in such case being confined to a writ of error from the United States supreme court, which has the power to remand him to the state authorities.

Application by C. R. Bennett for writ of habeas corpus.

D. M. Conner, for petitioner.

DE HAVEN, District Judge. The application for the issuance of a writ of habeas corpus herein was ably presented by the attorney for the petitioner in his argument upon the hearing, and I have given to the case stated in the petition careful consideration. It appears from the petition that there was filed in the superior court of Alameda county, in this state, an information charging the petitioner with the crime of an assault with an intent to commit murder. Thereafter, on the 8th day of January, 1895, he was placed on trial in department 4 of that court, upon such information; and a verdict finding him guilty of the lesser offense of an assault with a deadly weapon was returned by the jury. The petitioner then moved for a new trial, which was granted; and the petition charges that thereafter "without any new or other information, indictment, charge, or accusation, and without any new arraignment of your petitioner or new or other plea on his part, he was again put upon trial in said superior court, before the same department and judge, upon the said information and charge of assault with intent to commit murder." This trial resulted in a verdict of guilty as charged, and thereafter the said superior court, on motion of the petitioner, granted him a new trial, on the sole ground that he had been twice put in jeopardy for the higher offense of which he had been convicted. This order was reversed by the supreme court of the state of California (45 Pac. 1013), and the cause remanded to the superior court of Alameda county, which then, in obedience to the judgment of the supreme court, sentenced the petitioner to serve one year in the penitentiary, as punishment for the crime of an assault with intent to commit murder, and this latter judgment has been affirmed by the supreme court of the state. 50 Pac. 703.

It is proper in this connection to say that the petitioner did not interpose, in bar of his second trial for the greater offense charged against him in the information, a special plea of former acquittal of such offense; and it was for the failure so to do that the supreme court held that under the Penal Code of the state, as construed by it, he was properly convicted of such higher offense, notwithstanding his prior acquittal, and in its discussion of the general question that court said:

"The fact that the first trial was had in the same court and before the same judge as the second trial in no way excused the necessity of the plea of once in jeopardy." *People v. Bennett*, 114 Cal. 56, 45 Pac. 1013.

The petitioner is now imprisoned under the judgment of conviction above referred to, and he claims that his conviction of the crime of assault with intent to commit murder, under the circumstances above stated, deprives him of rights guarantied to him by the fourteenth amendment to the constitution of the United States. There can be no doubt that the verdict of the jury rendered upon the first trial of the petitioner, finding him guilty of the lesser offense, of an assault with a deadly weapon, was, in legal effect, an acquittal of the higher offense charged in the information filed against him, and of which the defendant at present stands convicted. That such is the legal effect of that verdict may now be considered as settled beyond

all question. *People v. Gilmore*, 4 Cal. 376; *People v. Gordon*, 99 Cal. 227, 33 Pac. 901; *Com. v. Herty*, 109 Mass. 348; *State v. Belden*, 33 Wis. 121; *State v. Martin*, 30 Wis. 216; *State v. Hill*, Id. 416; *State v. Kattlemann*, 35 Mo. 105; *State v. Ross*, 29 Mo. 32; *Johnson v. State (Fla.)* 9 South. 208; *Golding v. State (Fla.)* 12 South. 525. Such being the law, it is clear that the petitioner is now under conviction and suffering imprisonment for an offense of which he was acquitted by the verdict of a jury; and the further fact, alleged in the petition, that such conviction occurred in the same court and upon the same information upon which the former verdict of acquittal was rendered, at once raises the question whether such conviction is in violation of that provision of the fourteenth amendment to the constitution of the United States which declares that no state shall deprive any person of life, liberty, or property without due process of law.

In speaking of what is meant by the phrase "due process of law," the supreme court of Mississippi, in *Brown v. Levee Com'rs*, 50 Miss. 468, used this language:

"It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due process of law.'"

The right of a person, after acquittal by a jury, to be exempt from the jeopardy of being again placed on trial in the same court, and upon the same indictment, for the identical offense of which he has been acquitted, is certainly one of the fundamental rights which has always been recognized by our system of jurisprudence as belonging to the citizen; and, unquestionably, the guaranty of due process of law, found in the fourteenth amendment to the constitution of the United States, was intended, among other things, to secure to the citizen this right, and deprives the state of authority to convict and punish a person for a crime of which he has been duly acquitted by a jury, when the fact of such former acquittal is made to appear to the court before which he is again put in jeopardy for the same offense. *Ex parte Ulrich*, 42 Fed. 587. See, also, *Ex parte Lange*, 18 Wall. 163.

The judgment of the court under which the petitioner is now imprisoned is in violation of the constitutional rights of the petitioner as thus defined, and, in my opinion, is void in the extreme sense. After the petitioner was acquitted of the higher offense charged in the information, the superior court of the county of Alameda had no jurisdiction to again place him upon trial for such offense, upon the same information, or to require him to enter any further plea in order to preserve his constitutional right of protection against a second trial for that offense; and, if there is any statute of the state which attempts to confer upon the courts of the state such a jurisdiction, it is, in so far as it attempts so to do, clearly repugnant to the provision of the fourteenth amendment to the constitution of the United States, before referred to, and therefore void. If his acquittal had taken place in some other court, or upon another infor-

mation or indictment in the same court, it would have been incumbent upon the petitioner, in order to avail himself of his constitutional right of protection against being twice placed in jeopardy, to have specially pleaded such defense, and upon the trial to have exhibited evidence in support thereof, for in no other way could the court have been judicially informed of the facts, constituting a bar to a second trial; but, in the proceeding in which the petitioner was convicted, no such plea or evidence was necessary, because the court itself was bound to take judicial notice of every step shown by its own record to have been taken in the prosecution of the case before it,—notice not only of the petitioner's arraignment, and of his plea upon such arraignment, but also of the verdict rendered upon the former trial of the same case, and entered upon the record of the court as a perpetual memorial of its rendition; and, having judicial knowledge of such facts, the court was bound to know that, under the constitution, it no longer had jurisdiction to retry the petitioner for the offense of which he had been acquitted by such former verdict.

It was stated by Mr. Justice Miller, in delivering the opinion of the court in *Ex parte Bigelow*, 113 U. S. 328, 5 Sup. Ct. 544, "that it is not always very easy to determine what matters go to the jurisdiction of the court, so as to make its action when erroneous a nullity"; and certainly, in a case where a court has, by law, jurisdiction of the offense charged, and of the defendant on trial, a ruling made during the course of the trial, and which might on appeal be held to have deprived such defendant of a constitutional right claimed by him, would not make a judgment of conviction given by such court void in the extreme sense, and so subject to collateral attack, if the error could only be made to appear by a bill of exceptions, which would not, except for the purposes of an appeal, form any part of the judgment record; but the verdict of a jury in a criminal case constitutes a part of the record of the case in which it is rendered. In so far as it acquits a defendant of any offense embraced in the indictment, it cannot be set aside or disregarded by the court, in its final judgment. "A record is substantially a written history of the proceedings, from the beginning to the end of the case." *U. S. v. Taylor*, 147 U. S. 698, 13 Sup. Ct. 480. And so important a matter as the verdict of a jury, which finally determines any of the issues involved, necessarily forms a part of the judicial record or history of the case in which it is rendered. It follows from what has just been said that the verdict acquitting the petitioner of the crime of assault with intent to commit murder forms a part of the record of the subsequent judgment under which the petitioner is now imprisoned (*Golding v. State* [Fla.] 13 South. 525), and may be looked at even in a collateral proceeding, for the purpose of determining the validity of that judgment. The invalidity of the judgment under which the petitioner is imprisoned is thus made to appear upon the face of the record of that judgment. In any case where it appears from the record that the court had no authority to render judgment against a defendant, such judgment is void; and, where the record shows a second prosecution, trial, and conviction of an offense of which the defendant has once been acquitted or convicted, such judgment is void. In *re Nielsen*, 131

U. S. 176, 9 Sup. Ct. 672; *In re Snow*, 120 U. S. 274, 7 Sup. Ct. 556. The superior court of Alameda county was without jurisdiction to give the judgment against the petitioner convicting him of the offense of which he had once been acquitted, "because it was against an express provision of the constitution, which bounds and limits all jurisdiction." *In re Nielsen*, 131 U. S. 185, 9 Sup. Ct. 675.

The only question that remains is whether the petitioner is entitled to be discharged from his present imprisonment by proceedings under a writ of habeas corpus. The case of *In re Friedrich*, 51 Fed. 747, was one in which the petitioner therein was convicted by verdict of a jury in a superior court of one of the counties of the state of Washington of the crime of murder in the first degree, and upon his appeal from the judgment thereon, to the supreme court of the state, that court reversed the judgment of the trial court, with the direction to vacate the judgment imposing a sentence of death, and to enter a new judgment upon the verdict, for murder in the second degree (29 Pac. 1055, 30 Pac. 328, and 31 Pac. 332); and, in pursuance of such order, the trial court adjudged the petitioner therein to be guilty of murder in the second degree, and sentenced him to imprisonment therefor. He then filed a petition in the United States circuit court for the district of Washington, asking to be released from such imprisonment, by proceedings under a writ of habeas corpus; and, in the petition so filed by him, he claimed that the judgment of the supreme court was without jurisdiction; that it could not direct a judgment against him for the crime of murder in the second degree, without the finding of a jury that he was guilty of such crime. This action of the supreme court of the state of Washington was based upon a statute which that court construed as giving it the authority to modify the judgment of the trial court without directing a new trial. It was claimed by the petitioner that the supreme court of the state erred in thus construing the statute, and, in addition thereto, that, if such was its proper construction, then the statute was in violation of the fourteenth amendment to the constitution of the United States, and for that reason void. The United States circuit court, in an elaborate opinion by Hanford, district judge, reached the conclusion that the imprisonment of the petitioner was without due process of law, and in violation of the fourteenth amendment to the constitution of the United States; but at the same time it refused to discharge the petitioner, upon the ground that his remedy was to obtain a writ of error from the supreme court of the United States. This ruling of the circuit court was on appeal affirmed by the supreme court of the United States (13 Sup. Ct. 793); and, in affirming such order, that court declined to consider whether the supreme court of the state was right in its construction of the statute under which it had assumed to proceed, or whether such statute, if correctly construed, was in violation of the fourteenth amendment to the federal constitution. In passing upon the questions presented, the court said:

"It is certainly the better practice, in cases of this kind, to put the prisoner to his remedy by writ of error from this court, under section 709 of the Revised Statutes, than to award him a writ of habeas corpus; for, under proceedings by writ of error, the validity of the judgment against him can be called in question, and the federal court left in a position to correct the wrong,

If any, done the petitioner, and at the same time leave the state authorities in a position to deal with him thereafter, within the limits of proper authority, instead of discharging him by habeas corpus proceedings, and thereby depriving the state of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged. * * * Without passing, therefore, upon the merits of the question as to the constitutionality of the provision of the Code under which the supreme court proceeded in disposing of the case, when it was before it, or upon the question of the validity of the judgment rendered by the state courts in the case, we are of opinion, for the reasons stated, that the order of the circuit court refusing the application for the writ of habeas corpus was correct, and is accordingly affirmed."

Following the rule laid down in the case just cited, I am compelled to deny the application for the writ asked for by the petitioner. He is not entitled to be set at liberty, because he has not been acquitted of either of the minor offenses charged in the information; and this court has no authority to remand the petitioner to the custody of the state court, with instructions to proceed to try him for such minor offenses. Such direction, however, could be given by the supreme court of the state after a reversal of its judgment by the supreme court of the United States upon a writ of error.

It may be that the petitioner would not be entitled to a writ of error, for the reason that he did not distinctly claim before the supreme court of the state that his conviction deprived him of rights guaranteed by the constitution of the United States; but, if so, that fact would not enlarge the remedy, or give to him any greater rights than he would otherwise be entitled to obtain under a writ of habeas corpus.

Ex parte Ulrich, 42 Fed. 587, relied on by the petitioner, is not authority for the discharge of the petitioner. In that case, it appeared that the petitioner therein had been placed in former jeopardy before a jury, and, after trial begun, the jury was discharged, without his consent, and without legal cause therefor. Such discharge of the jury was, in effect, equivalent to a general verdict of not guilty, and therefore operated as an acquittal of the entire charge contained in the indictment; and, for this reason, it was held that the petitioner was entitled to his discharge. It will thus be seen that that case, on its facts, is widely different from this, and the principle of law upon which the decision in that case rests is not applicable here. Application for the writ asked for in the petition is refused.

UNITED STATES v. MOSES.

(Circuit Court of Appeals, Second Circuit. December 1, 1897.)

No. 12.

CUSTOMS DUTIES—CLASSIFICATION—PAPER.

A very light paper, soft, semitransparent, long-fibered, and dull-finished, which is highly absorbent, and therefore much used by dentists, and which is also used for making paper napkins, held to have been dutiable, under paragraph 422 of the act of October 1, 1890, as "paper not specially provided for," and not to have been "tissue paper," so as to be dutiable under paragraph 419.

This is an appeal from a decision of the circuit court, Southern district of New York, which affirmed a decision of the board of

general appraisers, reversing a decision of the collector of the port of New York in regard to the classification for customs duties of certain merchandise.

The merchandise in question is a very light paper, soft, semitransparent, long-fibered, and dull-finished. It is highly absorbent, and for that reason is much used by dentists. It is also used for making paper napkins, and in connection with a machine called the "cyclostyle" for duplicating impressions. It weighs under 10 pounds per ream of 500 sheets, size 20x30. The collector classified it for duty under paragraph 419 of the tariff act of October 1, 1890: "(419) Papers known commercially as copying paper, filtering paper, silver paper, and all tissue paper, white or coloured, made up in copying books, reams, or in any other form, eight cents per pound," etc. The importer claimed, and the board found, that it was dutiable under paragraph 422 of the same act, which reads: "(422) Paper hangings and paper for screens or fireboards, writing paper, drawing paper, and all other paper not specially provided for in this act, 25 per centum ad valorem." The protest referred to this paragraph with sufficient definiteness, although it gave the wrong paragraph number.

H. D. Sedgwick, for the United States.

W. B. Coughtry, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. It is not disputed that, unless the merchandise be tissue paper, it is properly included in paragraph 422. There is no other paragraph specially providing for it. The sole question presented, therefore, is whether it is "tissue paper." We do not find in the phraseology of paragraph 419 any reason for holding that the words "tissue paper," as used therein, are not to be interpreted in accordance with the general rule; or that congress intended them to have any other or different meaning from that which they had in trade and commerce. The testimony before the board of general appraisers upon the question whether this importation was one variety of the "tissue paper" of commerce was very conflicting, and the additional evidence taken in the circuit court presents a like conflict. Under the circumstances we see no reason for reversing the decisions below. Decision of circuit court affirmed.

UNITED STATES v. KEANE.

(Circuit Court, D. South Carolina. December 24, 1897.)

CUSTOMS DUTIES—GINGER BEER—DUTIABLE VALUE—BOTTLES, CORKS, AND WIRING.

Under paragraph 248 of the act of 1894, which imposes on ginger ale or ginger beer a duty of 20 per cent. ad valorem, but provides that "no separate or additional duty shall be assessed on the bottles," the cost of corking and wiring is not to be deducted in ascertaining dutiable value, on the theory that this is a part of the cost of the bottles, and that the bottles are free; but, as ginger beer is always sold in bottles, corked and wired, the duty should be assessed on the whole value of the goods as thus bought and sold, in the place from which they were imported.

This was an appeal by the United States from a decision of the board of general appraisers reversing the action of the collector of

the port of Charleston, S. C., in respect to the assessment of duty on an importation of ginger beer.

Walter A. Donaldson and Edward W. Hughes, for the United States.

SIMONTON, Circuit Judge. This case comes up in this way: J. M. Keane imported into the port of Charleston, S. C., from Belfast, Ireland, certain packages, containing ginger ale. The invoice contained, among other articles, which were not dutiable, 50 cases (250 dozen) ginger ale, in Crown cork bottles, 1s. 2d.,—£14 11s. 8d.; 250 dozen bottles, 1s.,—£12 10s.; 50 cases, including packing, 1s. 6d.,—£3 15s.; 250 dozen (corking with Crown corks), including 10 openers in each, £4 3s. 4d. The collector of the port of Charleston, estimating the duty payable on this importation, excluded the 250 dozen bottles, and assessed the duty on the remainder of the invoice 22s. 10d., at the rate of 20 per cent. ad valorem; that is, £22 10s., reduced to \$110, at 20 per cent., \$22. The importer, dissatisfied with this action of the collector, duly filed his protest under the provisions of section 14, Act June 10, 1890, setting forth objection as follows: "That corking and wiring is a part of the cost of the bottles, and should not be assessed for duty under section 1, act of 10th of June, 1890." In due course this protest was heard by the board of United States general appraisers, who sustained the protest, and reversed the action of the collector, holding that the cost of corking and wiring is part of the cost of the bottles, and that, as ginger ale bottles are free of duty, the action of the collector was erroneous; following in this respect a former decision of their own in a similar case. G. A., 3,728, (S. S. 17,742.) From this decision of this board the collector of customs filed a petition for review under the provisions of section 15, Act June, 1890. This petition was filed, and a hearing was fixed for 15th of December, 1897, due notice to all parties having been given. The protestant did not appear, and counsel on the part of the government were heard.

The question is made under the tariff act of 1894, § 248 (28 Stat. 526). The language of the section is:

"248. Ginger ale or ginger beer, 20 per cent. ad valorem, but no separate or additional duty shall be assessed on the bottles."

In the same act there is a duty prescribed for bottles in other cases.

Taking up first the point decided by the board of appraisers. They say that wiring and corking ginger ale bottles are a part of the cost of the bottles. Why is the wiring with the corking used? Not because the bottles are used, for in very many cases—in every case where ordinary liquid is put in bottles—no wiring is needed or is used. The wiring with the corking in the case before us is used because of the peculiar character of the contents of the bottle, and only because of this peculiar character. The liquid, to obtain a commercial character, must be charged with gas; the charge perhaps increased for the purpose of exportation. This gas must be kept under restraint. Without this wiring with the corking it could not be manufactured, put on the market, sold, or imported. As liquid

ginger beer is never prepared for market, sold, or exported in any other way, this wiring with the corking is an essential part of its preparation for market sale and exportation. So the conclusion is clear that the wiring with the corking is not an incident to—a part of—the cost of the bottle, but an incident—an inseparable incident—to the commercial article known as ginger beer, and the cost must be set down as a part of the cost of the commercial article. In the opinion of the court the ruling of the collector was correct, and the decision of the board of appraisers is overruled.

There is another point of view from which this matter can be treated. How should the duty be estimated on ginger ale or ginger beer under the act of 1894? The words of the act are:

“Ginger ale or ginger beer, 20 per cent. ad valorem, but no separate or additional duty shall be assessed on the bottles.”

In the same act there is a duty prescribed for bottles, empty or filled. What is the ad valorem? In 1890 congress passed a customs administration act, in which is the definition of the term “ad valorem,” or rather which prescribes the mode in which ad valorem duties shall be assessed (26 Stat. 131, § 19), as follows:

“Sec. 19. That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale, including the value of all cartons, cases, crates, boxes, sacks and covering of any kind, and all other costs, charges and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subject if separately imported. That the words ‘value’ or ‘actual market value,’ whenever used in this act or in any law relating to the appraisement of imported merchandise, shall be construed to mean the actual market value or wholesale price as defined in this section.”

“Ginger ale or ginger beer,” when the term is used in the trade or the article is sold, always means such ale or beer put up in bottles. The liquid ginger ale or ginger beer is never sold otherwise than in bottles. And when the liquid is manufactured, the component parts put together, and then aerated, it is put up at the factory in bottles, and never leaves the factory in any other way. So, when the buyer purchases from the factory, he pays not only the value of the liquid in the bottles, but the cost of the bottles and the bottling. And when he sells it he sells it as he purchased and received it. So, when we speak of the actual market value of this merchandise, known as ginger ale or ginger beer, as bought and sold at the time of exportation to the United States in the country from whence imported, and in the condition in which such merchandise is thus bought and sold, we mean its value as put up in bottles, corked and wired, for it is never sold in any other way. And in this value necessarily

is included the cost of the bottles, corking, and wiring. For this reason, when the act of 1894 puts an ad valorem duty on ginger ale or ginger beer, it expressly provides that no separate or additional duty shall be assessed on the bottles, because the value of these bottles has already been estimated and provided for in getting at the value of the merchandise. The decision of the supreme court in *De Bary v. Arthur*, 93 U. S. 423, throws some light on this question. The case arose under the tariff act of 1870, upon duty payable on champagne. The importer contended that, as champagne could only be imported in bottles, the specific duty of six dollars per dozen of quart bottles, and other sums specified for smaller bottles, covered the duty on the bottles also. The court recognizes the argument, but decides that it is answered by the express language of the act, which declares that wines of all kinds, imported in bottles, must pay an additional duty of three cents per bottle. In the present case the invoice contained, among others, two items: One for 25 barrels ginger ale in Crown system, 250 dozen, against which the value at place of exportation was given. The next item is 250 dozen bottles containing above, against which was their value. The collector omitted this last item in fixing the duty, evidently supposing that, the bottles having already been estimated in the ad valorem of the ginger ale, separate or additional duty could not be imposed on the bottles. From this point of view there is nothing in conflict with this conclusion in *Dickson v. U. S.*, 68 Fed. 534, or in the same case on appeal, 19 C. C. A. 428, 73 Fed. 195.

The importer should pay the duties on the whole ad valorem value of the imported merchandise, as bought and sold in the place whence it was exported, and in the condition in which such merchandise is then bought and sold for exportation.

HOSTETTER CO. v. SOMMERS et al.

(Circuit Court, S. D. New York. December 21, 1897.)

TRADE-MARKS—UNFAIR COMPETITION.

Complainant had long sold "Hostetter's Bitters" in bottles of a peculiar form and size, and established a large business therein. Defendants sold in demijohns spurious bitters, closely resembling the real article, labeling them "Hostetter's Bitters," with intent that they should be sold by the drink at the bar as "Hostetter's Bitters." *Held*, that this was unfair competition, and should be enjoined.

This was a bill in equity by the Hostetter Company against Isaac Sommers and Louis Joseph to restrain alleged unfair competition in trade.

A. H. Clarke, for complainant.
Wm. J. Townsend, for defendants.

TOWNSEND, District Judge. The following allegations of the bill herein are admitted, namely, that complainant corporation is the compounder of a medical preparation which has been sold by it for

more than 30 years in square amber-colored bottles only, marked and labeled as "Dr. J. H. B. Hostetter's Stomach Bitters"; that said bitters are known to the trade and to the public as "Hostetter's Bitters," and have been extensively sold; and that the good will of said business is of great value to complainant. The bill charges the defendants with fraud and unfair dealing in selling as its bitters another, counterfeit stomach bitters, in bulk, so compounded as to resemble in color, taste, and smell the bitters of complainant, and in suggesting to and advising intending purchasers to procure the empty bottles of complainant, with its labels thereon, and to refill them with said imitation bitters, and sell them as complainant's bitters. The answer of defendants is a general denial. Their witnesses deny most of the material statements of complainant's witnesses. From the mass of testimony, given for the most part by interested witnesses, some of whom are discredited by inconsistencies and others by improbabilities, I find the following facts: On several occasions the agents of complainant called at defendants' place of business, and, representing themselves as liquor dealers or their agents, stated that they wished to purchase liquors and various kinds of bitters, including Hostetter's Bitters, which they wished to purchase by the gallon. Defendant Joseph, who is a partner of defendant Sommers, on four occasions sold to complainant's agent demi-johns, each containing a half gallon of counterfeit bitters, labeled them "Hostetter's Bitters," described them in the invoices as "Hostetter's Bitters," and so entered them in the sales book. After the second or third purchase complainant's agent asked the defendant Joseph "which was the best way to sell Hostetter's Bitters to make the most money." Joseph told him to put them in Hostetter bottles, and sell them over the bar, the same as his other customers did. After all of said purchases had been made, complainant's agent asked Joseph for empty Hostetter bottles. Joseph told him they did not have any, but directed him to two or more dealers in bottlers' supplies, where he said he (complainant's agent) could get a general supply of labels and bottles. One of these dealers (Westermann) admitted that, if he had second-hand bottles, he guessed he would sell them with old labels on, if people wanted them, but denied that he ever sold Hostetter bottles. In view of the fact that Joseph's testimony as to said conversation is unsupported by other evidence, and, as to various material statements, is contradicted by four witnesses, it must be considered as discredited. It is unnecessary, however, to rest the decision of this case upon any uncertain testimony. Upon the facts clearly proved, a case of infringement is shown, within the rule laid down in *Hostetter Co. v. Brueggeman-Reinert Distilling Co.*, 46 Fed. 188, and *Hostetter Co. v. Van Vorst*, 62 Fed. 600. It is established that defendants sold to complainant's agents, under the name "Hostetter's Bitters," a spurious article, so closely resembling the real article as to deceive an ordinary customer, with the intent that it should be resold by the drink, over the bar, in the usual way, as Hostetter's Bitters, in fraud of the rights of complainant and of the public. The law is not, as claimed by defendants' counsel in his brief, that "under complainant's trademark it is entitled to no protection in the sale of bitters, unless such

bitters are sold in bottles resembling the bottles of complainant, and under its labels and trade-mark, or imitations thereof." The complainant is entitled to protection against the appropriation of its trade-mark by any and all unfair and dishonorable means, and a court of equity has power to grant such protection whenever it is satisfied that an attempt has been made by ingenious subterfuges to invade the rights of an owner of a trade-mark, either by a conspiracy with others to deprive him of such rights, or by misrepresentation in the sale of a spurious article so manufactured as to deceive the public. In the sharp contest between the individual manufacturer, who strives to acquire and retain the fruits of industry and honesty, and the field of keen rivals, seeking to wrest from him the prize of the public good will, the inventive ingenuity of the infringer has conceived a great variety of devices for evading the established rules of fair dealing. Among the later of these devices are acts professedly within legal limitations, but manifestly designed to be afterwards so made available by other acts as to deceive the public. In such cases courts of equity, looking beyond the original acts, and finding that their ultimate object and effect were to enable and induce the retail seller of a fraudulent imitation to palm it off on an unsuspecting public for the genuine article, and thus to contribute to the infringement upon the rights of the original owner, have not hesitated to apply the remedy. The scheme in the present case, according to the testimony of defendants, appears to have been that the manufacturer of the bogus bitters should sell them to the wholesaler in demijohns labeled "Stomach Bitters"; that the wholesaler should change the labels to "Hostetter's Bitters," and invoice and ship them under said latter name to the retail dealer, and that the retail dealer should sell them by the drink as "Hostetter's Bitters" when "Hostetter's Bitters" were called for at the bar, from bogus bottles or otherwise, as he chose. The claim of defendant Joseph that he stated to complainant's agent that the bogus bitters were stomach bitters, and that he could not buy Hostetter's Bitters in bulk, is immaterial in view of his admission that he marked and invoiced them to the purchaser as "Hostetter's Bitters," because complainant's agent told him "his brother-in-law up there didn't know anything about the business, and there was a call up there for Hostetter Bitters," and further said, "In the country they didn't know the difference, and they are more salable as Hostetter Bitters." Therefore, upon defendants' admissions, they sold as Hostetter's Bitters a bogus compound which looked, tasted, and smelled like Hostetter's Bitters to the unwary purchaser of a drink at the bar. Defendant Joseph said he marked the demijohn "Hostetter's Bitters" because they were for the country, and in order that the purchaser might thereby "make all the money he could out of them." According to complainant's contention, sufficiently supported by the proofs, said sale was accompanied by the suggestion that, in order to make the most money, said bitters should be sold in Hostetter bottles. In either view of the case, there was an illegal appropriation of complainant's right of property, which should be enjoined. Let a decree be entered for an injunction and accounting.

D. S. MORGAN & CO. v. MAUL.

(Circuit Court, N. D. New York. January 12, 1898.)

PATENTS—ANTICIPATION AND INFRINGEMENT—HARROWS.

The La Dow patent, No. 415,113, for an improvement in harrows, consisting in the use of rotary spring-teeth, whether concave or not, in gangs angled relatively to the draft-line, was not anticipated by the Clark patent, No. 369,163, and is infringed by a harrow having similar spring-teeth, though the spring action therein is less in degree than in the teeth of the patented harrow.

This was a suit in equity by D. S. Morgan & Co. against Christian Maul for alleged infringement of a patent for an improvement in harrows.

George B. Selden, for complainant.
Josiah Sullivan, for defendant.

COXE, District Judge (orally). This action is brought for the infringement of letters patent, No. 415,113, granted November 12, 1889, to Charles La Dow for a new and useful improvement in harrows. The inventor in the specification says:

"So far as I am aware I am the first to use rotary spring-teeth, whether they be concave or not, in gangs which may be angled relatively to the draft-line."

The claims alleged to be infringed are as follows:

"(2) The combination of a gang-shaft set at an angle to the line of draft, and plate-spring harrow-teeth mounted thereon with their edges towards the soil, so as to constitute a rotary gang of spring harrow-teeth which cut through the soil edgewise and turn the earth. (3) The combination of a gang-shaft, spools, and concave spring harrow-teeth clamped between the spools and adapted to be set at an angle to the line of draft. (4) The combination of concave plate-spring harrow-teeth and a rotatable support upon which they are mounted, said support being set at an angle to the line of draft, substantially as set forth." "(6) A revolving harrow-tooth composed of a bar or bars of spring metal adapted to vibrate laterally as the implement proceeds, said vibration being caused by the pressure of the earth against the concave side of the tooth, in combination with a support for maintaining said revolving tooth at an angle to the line of draft."

The defenses are lack of novelty and invention and noninfringement. Twenty-nine patents have been introduced by the defendant, but it is unnecessary to consider any of them except No. 369,163, granted to George M. Clark, August 30, 1887, for a disk harrow. This is unquestionably the best reference offered by the defendant. If the Clark patent does not anticipate or limit the claims in question, no other reference does. It shows every feature of the invention in controversy, with the single exception of the rotary spring-tooth; so that unless patentability can be found in this feature it can be found nowhere. Clark shows an ordinary disk harrow with the outer periphery of the disk cut away or notched in the form of teeth, one figure of the drawing showing the disk with a series of teeth bolted on its outer periphery. There is nothing either in the specification or drawings to indicate that the Clark structure possessed the feature of which novelty is predicated in the La Dow patent, viz.: the spring

action feature. The proof is clear that this feature is useful and that it produces results never produced before. I am convinced that the statement of the specification above quoted, that La Dow was the first to use rotary spring-teeth, whether concave or not, in gangs angled relatively to the draft-line, is substantiated by the proof.

The remaining question relates to infringement. The only controversy here is whether or not the defendant's teeth have the spring action of the patent? That they are dissimilar in shape and in the manner of attachment, and that the blades are shorter and somewhat wider than the blades shown in the La Dow patent, is unquestionably true, but that they have a spring action is also true. The defendant, himself, swears that he applied the identical test to the two structures and with a 30-pound strain his blade showed a yield of one-fourth of an inch and the complainant's three-eighths of an inch. The difference is one of degree only. The defendant cannot escape infringement by showing simply that his teeth have less spring action than those of the complainant. The undisputed fact that he uses teeth having spring action is sufficient to establish infringement. The complainant is not limited to the exact yield of the teeth described. If he were, any one who used a fraction more or less could escape. The complainant is entitled to the usual decree.

GARDINER et al. v. WISE, Collector of Customs.

(Circuit Court of Appeals, Ninth Circuit. January 3, 1898.)

No. 299.

CUSTOMS DUTIES—CLASSIFICATION—GROUND BONE.

Bones which have been submitted to a process of crushing or grinding, producing an article known commercially as crushed or ground bone, which is fit for other than fertilizing purposes, was dutiable as "manufactures of bone," under paragraph 460 of the act of 1890, and was not free as "bones crude, or not burned, calcined, ground, steamed, or otherwise manufactured, * * * fit only for fertilizing purposes."

Appeal from the Circuit Court of the United States for the Northern District of California.

This was an appeal by James H. Gardiner and William H. Thornley from a decision of the board of general appraisers affirming the action of the collector of customs at San Francisco as to the classification for duty of certain imported merchandise. The circuit court affirmed the decision of the board, and the importers have appealed.

Thos. D. Riordan, for appellants.

Samuel Knight, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. This appeal is taken from the decision of the circuit court of the United States for the Northern district of California, affirming the ruling of the collector of customs for the port

of San Francisco and the board of general appraisers sitting at New York, holding dutiable, at the rate of 30 per cent. ad valorem, 4,480 bags of imported bone meal, under the provisions of paragraph 460 of the tariff act of congress approved October 1, 1890, which reads as follows:

"Manufactures of bone, chip, grass, horn, India-rubber, palm-leaf, straw, weeds, or whalebone, or of which these substances or either of them is the component material of chief value, not specially provided for in this act, thirty per cent. ad valorem."

It is the contention of the appellants that the merchandise so imported is not included among the articles made dutiable in paragraph 460, but that it was free, under paragraph 511 of the said tariff act, which provides:

"Bones crude, or not burned, calcined, ground, steamed, or otherwise manufactured, and bone dust or animal carbon, and bone ash, fit only for fertilizing purposes, are admitted free."

The findings of the lower court are that the merchandise is not "bones crude, not burned or otherwise manufactured," and is not bone dust, but is commercially known as crushed or ground bone, produced by submitting crude bones to a process of crushing or grinding, and that the merchandise in question is fit for other than fertilizing purposes. On the hearing before the board of appraisers and before the circuit court, there was conflict in the testimony concerning the extent to which the bones were crushed and broken, and the purpose to be served by the process to which they had been submitted. In such a case, we cannot disturb the findings of the court below. They must be taken as conclusive. *White v. U. S.*, 18 C. C. A. 541, 72 Fed. 251.

There is presented for our consideration, therefore, only the question of the construction to be given to the paragraphs of the tariff act which have been quoted above. On behalf of the appellants it is urged that bone meal, or ground bone, is not a manufacture of bone, as the term is used in section 460; that to crush crude bone is not to manufacture it; and that, after being so crushed, the material remains, notwithstanding its change of form, substantially as it was before, and is in fact, as well as under commercial usage, crude bone. Paragraphs 460 and 511 must be construed together, and in order to determine whether the merchandise in question is crude bone, notwithstanding the fact that it has been crushed or ground, it is only necessary to note the plain language of the latter paragraph. In specifying, as free, crude bones, not burned, calcined, ground, steamed, "or otherwise manufactured," it is clear that burning, calcining, grinding, and steaming are regarded as methods of manufacture, and that bones in their natural condition, not subjected to any such process, are what is meant by crude bones. Any other construction renders senseless and nugatory the words "or otherwise manufactured." That this is the true meaning is further made evident by the remainder of the paragraph, "and bone dust, or animal carbon, and bone ash, fit only for fertilizing purposes." Here exception is made in behalf of manufactured bone which is in the form

of bone dust, or bone ash, or animal carbon, and is fit only for fertilizing purposes. The product in question in this case does not come within this last clause of the paragraph, for the finding of the court below is that it is fit for other than fertilizing purposes. It does not come under the first clause, as we have seen, because it is not "crude bones, not burned, calcined, ground, steamed, or otherwise manufactured."

It is urged that, in case of doubt, the doubt should be resolved in favor of the importer, and that duties are never imposed upon doubtful interpretation. But this is not a case of doubt. The statute is clear, and its meaning is not uncertain or ambiguous. It is so plain that to read it is to construe it. The judgment of the circuit court will be affirmed.

PILLSBURY-WASHBURN FLOUR-MILLS CO., Limited, et al., v. AMERICAN WIRED-HOOP CO.

(Circuit Court, D. Minnesota. November 30, 1897.)

1. PATENTS—INVENTION—MACHINE FOR PRINTING BARREL HEADS.

The Hooper patent, No. 557,582, for a printing press designed especially for printing on barrel heads, is void for want of invention, in view of the prior state of the art.

2. SAME—MACHINE FOR PRINTING ON BOARDS.

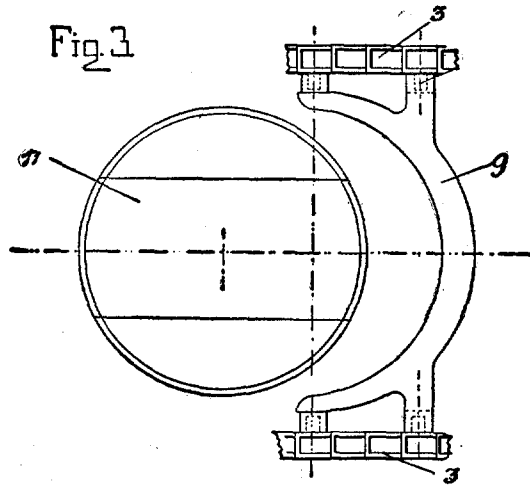
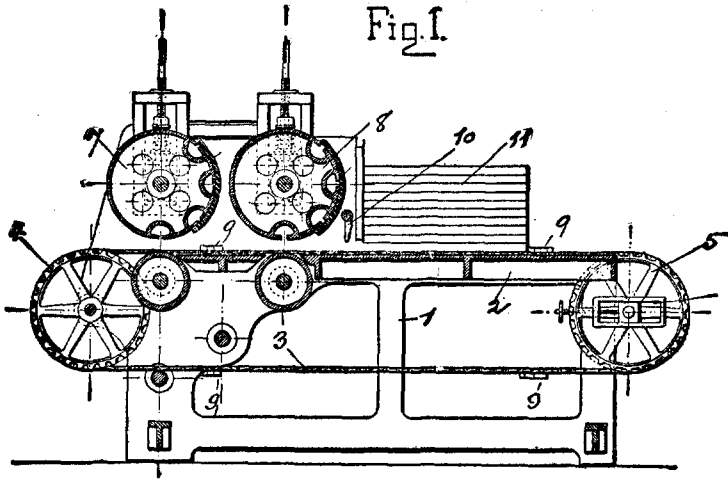
The Hooper & Hollingsworth patent, No. 359,972, for a machine for printing on boards, and which is especially designed for printing in two colors at one operation, by a combination of two type cylinders, and elastic-face feed rollers between them, construed, and held infringed as to the first, second, and third claims, and not infringed as to the sixth claim.

This was a suit in equity by the Pillsbury-Washburn Flour-Mills Company, Limited, and Francis X. Hooper, against the American Wired-Hoop Company, for alleged infringement of letters patent No. 359,972, issued March 22, 1887, to F. X. Hooper and W. Hollingsworth, for a machine for printing on boards, and also No. 557,582, issued April 7, 1896, for a printing press designed especially for printing barrel heads. The patent of 1887 is adapted for printing upon boards with two colors in one continuous operation. In the specifications the patentees say:

"One description of boards which are to be printed by this machine are used for the ends of boxes; such boxes as are employed for packing goods of various kinds,—notably, canned goods, such as oysters, fruits, etc. Instead of stenciling upon the end of the ready-made box, to denote its contents, the board designed for the box end is printed previous to being made up into the box. Where boxes are made up in large numbers for packing special articles, this plan is found more economical, besides producing neater and better work. Another kind of boards which may be printed to advantage are those used for advertising signs."

Fig. 1 is a vertical, longitudinal section of this machine. In his description the patentee says:

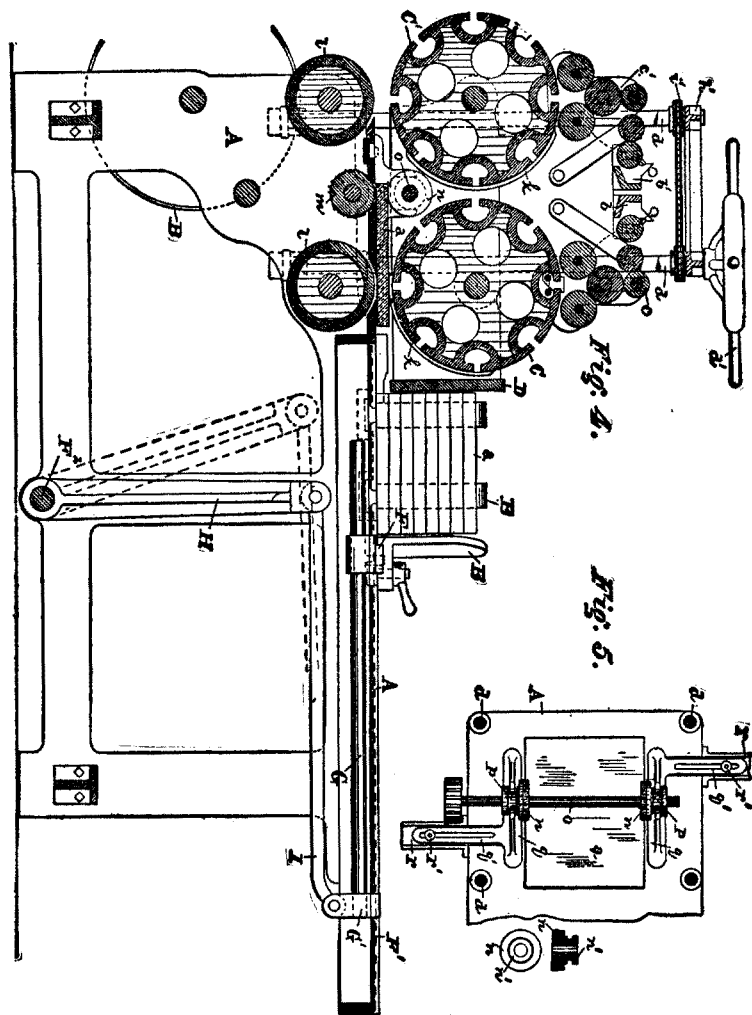
"Referring to Fig. 1, 1 is the frame of the machine. 2 is the bed. 3 is a feed chain. 4 and 5 are sprocket wheels mounted in a frame, by which the feed chain is driven. 7 and 8 are two printing rollers suitably geared with the driving mechanism, so as to turn in the proper order in relation to the



feed. 9, 9, 9, 9, are feed knockers secured upon the feed chain in the manner shown in Figs. 3 and 4; and, as shown in those figures, the knocker is approximately semicircular in shape, and conforms in outline to a barrel head which is divided into several pieces. In order to feed a barrel head or other board divided into several parts on the feed belt, it is necessary to provide a knocker of peculiar form, conforming in shape to the barrel head or other board, and this feed of an irregular shape presses all the pieces of the board forward at the same time."

The claims read as follows:

"(1) In a machine for printing barrel heads consisting of several pieces, the combination of printing rollers, a curved barrel-head holder, being of the same radius as the barrel head, and opening in a direction away from the direction of the feed, and a feed belt carrying an oppositely curved knocker, also of the same radius as the barrel head,—the curved knocker being arranged to engage the ends of the boards forming the barrel head to be printed, and to hold them in a circular form while being carried to the print-



ing rollers,—as and for the purpose specified. (2) In a machine for printing barrel heads consisting of several pieces, the combination of printing rollers, a curved barrel-head holder, semicircular in form, being of the same radius as the barrel head, and opening in a direction away from the direction of the feed, and a feed belt carrying an oppositely curved knocker, semicircular in form, also of the same radius as the barrel head,—the curved knocker being arranged to engage the ends of the boards forming the barrel head to be printed, and to hold them in a circular form while being carried to the printing rollers, as and for the purpose specified."

Fig. 4 is a vertical, longitudinal section of this machine.

"The letter A designates the frame and table; B, the drive pulley. This machine has two type cylinders, C, C', both mounted in a movable frame, D, above the table. Each cylinder is designed to work a different colored ink, so that a board, a, passing below the cylinders, will receive an imprint of

two colors. Two ink receptacles, b, b', are provided above the cylinders, and two sets of ink-distributing rollers, c, c', of suitable or well-known construction in printing machines, are also provided. * * * Two feed rollers, each having an elastic face, n, bear down on the upper side of the board, a, so that the board is between the lower roller, m, and the two upper ones, n. The two upper rollers, n (see Fig. 5), are narrow, and each bears on the surface of the board, a, along one edge. These rollers are made of metal, n', and have a rubber ring, n, around the metal part. The rubber-ring part comes in contact with the board, and as it has a good grip thereon the feed movement of the board is insured, and the rollers avoid defacing the imprint made by the first cylinder."

Claim 6 of this patent reads as follows:

"In a machine for printing boards in two colors at one operation, the combination of two type cylinders, and elastic-face feed rollers between the said two cylinders, for the purpose set forth."

In patent No. 557,582 the patentee says:

"The primary object of this invention is to print any desired matter upon a barrel head composed of several pieces, and maintain the barrel head in circular form or alignment while being printed, so as to cause the printed matter to register when the head is put in a barrel. To accomplish this result, the barrel heads are placed in the receiver, one upon the other, with the divisions between the parts forming each head parallel to the feed. This is an essential feature in the mode of operation. The holder, containing a number of barrel heads, is curved so as to fit the circle of the barrel head, and the boards are pressed into it when placed in the machine so as to bring them into circular alignment, and force the edges of the several pieces together closely. When the bottom barrel head, consisting of several pieces, drops onto the table between the feed chains, the pieces are, in consequence of the alignment produced by the holder, in circular form. While thus lying upon the table, they are struck by the curved knocker [Fig. 3], which is of the same radius as the curve of the barrel head, and fed forward by it, still being retained in circular alignment, and the edges of the pieces pressed closely together by the curve of the knocker, and are thus held by the curved knocker in circular alignment while being carried to the printing and feed rollers, by which they are caught, and printed in this position. It will be seen that the position of the boards, and the maintenance of that position in a divided barrel head, is of the utmost importance."

Paul & Hawley, for complainants.

Walter H. Chamberlain, for defendant.

LOCHREN, District Judge. I shall have to pass upon this question at the present time, as, owing to pressure of business, I am unable to take the case under consideration. My impression is that the patent of 1896 is not valid, and that, in view of the state of the art at that time, it contains no feature that was novel. It appears that, before that time, conveyors had been made to correspond in shape with the article of wood to be printed, so as to move it directly forward in the movable frame. They generally printed parts of boxes, which were rectangular pieces of wood, using a hopper which was square in shape; and the use of the square hopper showed that it was obviously necessary to have something which would keep these pieces of wood in proper place to be taken by the conveyor under the printing press. The changes in the conveyors previously used show that it was understood to be necessary that they should be so fashioned as to convey the articles to be printed without moving to one side or the other under the roller that was to do the printing. It

would be obvious to anybody who was engaged in that business that it would be necessary to carry the boards forward directly under the portion of the roller that was to make the impression upon them. So, I think, as long as a hopper was necessary there, and was used to insure the placing of those barrel heads under the right portion of the roller, the use of a circular form of hopper would occur to any one as the kind necessary to be used for that purpose.

With reference to the sixth specification of the patent of 1887, I think it is obvious that there is no infringement of that. That is for a feed roller between two cylinders for the purpose set forth, which was to carry, or assist in carrying forward, from one cylinder to the other, the wood to be printed, as this endless conveyor was used in the machine. Although it did at the same time perform the service that is performed by the defendant's roller, still that is not what it was made for, nor the purpose set forth. The defendant's roller does not operate as a feed roller. It is simply an idle roller, and does not press particularly upon the wood to be moved, as it rests in the slots, although it may, and practically does, serve to keep the wood from moving from one side to the other.

The most serious question is with reference to the first, second, and third specifications of complainants' patent, which are really one, as far as they need be considered in this case, and is as to whether there is in the defendant's machine an infringement of these specifications of the patent owned by the complainants. It seems that, before that patent, printing in two colors was done, as shown by the Hinds machine, but by virtually separate machines; and this machine in question purposes to print boards in two colors at one operation, with one machine, by a combination of two type cylinders, each for a different color,—both cylinders and their inking devices being mounted in the same yielding frame. The cylinders in these machines of complainants and defendant are substantially alike, but the claim on the part of the defendant is that its cylinders are not mounted on the same yielding frame, and therefore do not come within the specification. Although the complainants' machine has the yielding portion in the upper part, containing the type cylinders and the inking devices, while the defendant's machine has it in the lower portion, containing the other cylinders, it seems to be admitted that, if that lower portion of the defendant's machine was so bound together that the yielding would be the same in both cylinders at once, there would be an infringement. Under the authority and the rules cited in the *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958, as it is called, it does not occur to me that the fact that those cylinders are made to yield, not rigidly together, but one at a time, or only partially together, as they may be pressed upon by that portion of the wood that is moving forward, necessarily makes any special difference, as long as the cylinders are mounted in a frame, and there is a yielding, which, if not the same, is at least an equivalent, practically and mechanically, of that part of the complainants' patent. I am inclined to think that there is an infringement of the complainants' patent in that respect, and for that reason, and to that extent, I think complainants are entitled to judgment.

McDONALD et al. v. MILLER et al.

(Circuit Court, E. D. Wisconsin. January 7, 1898.)

PATENT INFRINGEMENT SUITS—EQUITY JURISDICTION.

A bill in equity for infringement of a patent is not maintainable when it is filed only a few days before the patent expires, and when there is no showing of special circumstances requiring the issuance of an injunction for the time the patent has to run. The mere formal right to an injunction without the actual need or intention to exercise it is not sufficient in such a case.

This was a suit in equity by James S. McDonald, trading under the name of J. S. McDonald & Co., and the Samuel Hano Company against Henry C. Miller and others, for alleged infringement of a patent. The cause was heard on demurrer to the bill.

Elliott & Hopkins, for complainants.
Benedict & Morsell, for defendants.

SEAMAN, District Judge. Upon the facts stated in the bill of complaint, even after allowing the amendment tendered at the hearing, I am of opinion that equitable interference is neither necessary nor proper for protecting any rights the complainants may have in the matters charged, and that the demurrer must be sustained. The bill alleges infringement of letters patent No. 224,529, issued February 17, 1880, to Samuel Hano, for an improvement in copying books, assigned to the complainant August, 1893. It was filed January 26, 1897, only 22 days before the expiration of the patent, and the subpoena was not returnable until after the expiration. No special circumstances are alleged to call for equitable relief, aside from the ordinary case of infringement. It is true that an injunction *pendente lite* is one of the forms of relief prayed for, but there was no actual application to that end, and apparently no intention to invoke such relief, as there was no allegation in the bill as filed of a state of facts upon which to found it, under the rule clearly established in this circuit in *Standard Elevator Co. v. Crane Elevator Co.*, 9 U. S. App. 556, 6 C. C. A. 100, and 56 Fed. 718, and subsequent cases. Unless a right existed to present injunctive relief when the action was commenced, I can find no allegation of wrong for which there may not be adequate legal remedy. The right to such injunction may not depend wholly upon the allegations of the bill, but may appear by supplemental showing when application is made, so that the absence of apt allegations in the former would not necessarily bar the application. Neither would the failure to apply for an injunction within the life of the patent operate of itself to deprive the case of equitable cognizance, even when the jurisdiction was acquired through the right to such relief. But the doors of equity are open only to those who come with clear showing of right, for which no adequate redress can be afforded at law, and the jurisdiction over causes for patent infringement is not excepted from this requirement. The need of injunctive relief—temporary or permanent, one or both—generally constitutes the main ground, and is often the sole ground for entertaining the cause. The

claim and the need must be bona fide, not a mere technical right or assertion, but of the essence of relief sought. In this case, as the patent was within a few days of expiration, there could, of course, be no permanent injunction, and the only basis for its support in equity is the possible right to a temporary injunction for this brief period. If that right exists, and the immediate acts of infringement appear liable to produce serious injury, I have no doubt such state of facts, properly alleged, would sustain a bill for complete redress in equity. But it seems to me equally clear, upon the principles of equity, and under the authorities as well, that to obtain recognition for this extreme case special equities must be set forth in the bill; that both the right to the present injunction, upon which jurisdiction hinges, and the necessity for enforcement, must clearly appear; that the right which runs with the grant of a patent, and which may be sufficient for the ordinary case, where a considerable period of the promised monopoly remains, is insufficient here without a showing of substantial benefit to be obtained through this strong arm of equity, and that the injunction is earnestly sought and intended as a primary object of the action; that such relief must be the purpose, and not the mere excuse or makeshift, for resort to the forum of equity; that a formal right alone, without the actual need or intention of its exercise, will not suffice; and that the bill in question fails to make the showing of special circumstances requisite in that view to call for the interference of equity. The following authorities support the general proposition, at least, and seem to me decisive: *Root v. Railway Co.*, 105 U. S. 189; *Hayward v. Andrews*, 106 U. S. 672, 1 Sup. Ct. 544; *Keyes v. Mining Co.*, 158 U. S. 150, 15 Sup. Ct. 772; *Russell v. Kern*, 34 U. S. App. 90, 16 C. C. A. 154, and 69 Fed. 94. The case of *Beedle v. Bennett*, 122 U. S. 71, 7 Sup. Ct. 1090, upon which counsel for complainant relies for maintaining the bill, is distinguishable upon the facts, and does not appear to intend modification of the rule held in the cases above cited. In *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. 217, the trial court having proceeded to a decree without objection by the defendant, it was held that, jurisdiction appearing "at the inception of the suit, even though upon a narrow ground,"—namely, the present right to an injunction,—retention of the bill, under the circumstances, was so far discretionary that the decree would not be reversed; but the opinion clearly recognizes the general doctrine as above indicated.

The amendment which complainant tendered at the hearing, by an allegation of public acquiescence in the validity of the patent, etc., and which was then allowed, must now be treated as purely formal, and not designed to accomplish the actual issuance of preliminary injunction, and, so viewed, does not furnish the allegation of special equity which is deemed essential. I further incline to the opinion that the bill is insufficient in failure to show proper diligence upon the part of complainant, or that the infringement by defendant was recently discovered. The demurrer is sustained.

MOORE v. NATIONAL WATER-TUBE BOILER CO.

(Circuit Court, D. New Jersey. November 29, 1897.)

1. PATENTS—LICENSES—ESTOPPEL OF LICENSEE.

One who has manufactured and used a patented device under a license cannot, in an action for royalties, set up the invalidity of the patent.

2. SAME.

A licensee who agrees to manufacture only machines containing the patented improvement is not liable for royalties on machines which, in violation of this stipulation, do not contain the improvement of the patent. Nor, in an action by the licensor to recover royalties, can there be a recovery of damages for this breach of the contract.

3. SAME—ACTION FOR ROYALTIES—SET-OFF.

In an action to recover royalties under a license, the defendant cannot set off a claim for damages for alleged failure of the licensor to make a formal transfer of patents subsequently obtained, which he had agreed to assign to the licensee.

This was a suit in equity by Edward J. Moore against the National Water-Tube Boiler Company for an accounting of royalties alleged to be due under a patent.

Alan H. Strong, for complainant.

John S. Voorhees, for defendant.

KIRKPATRICK, District Judge. The record in this case discloses that Edward J. Moore, the complainant, being the owner of certain patent rights particularly set out in the bill of complaint, entered into an agreement with William E. Kelley, in and by which he assigned, transferred, and set over to said Kelley the sole and exclusive right, during the life of said patents, to manufacture and sell, in a certain territory, sectional steam boilers and steam generators, containing the improvements referred to in all or any of the claims of said letters patent, the said rights to include all styles and kinds of sectional steam boilers and steam generators embodying the improvements referred to in any or all of the claims of said letters patent, and all improvements relating thereto that the complainant might devise or acquire during the continuance of the agreement. The complainant also agreed that, whatever improvements or inventions he might make during the continuance of the agreement which would improve the efficiency or reduce the cost of manufacturing said steam boilers, he would inform the party of the second part of the same, and, if patentable, and patents obtained therefor, assign the right to use the same to the party of the second part. In consideration of the transfer of this exclusive right, the defendant stipulated that during the continuance of said agreement he would not engage in the manufacture of any other water-tube sectional boilers than those covered by said agreement, and agreed to pay the sum of one dollar per horse power on each complete steam boiler or steam generator made and sold under said agreement. Kelley assigned the contract entered into between him and the complainant, with complainant's assent, to the defendant corporation, who accepted the same, and continued the manufacture and sale of water-tube boilers, and paid com-

plainant royalties thereon. The agreement, among other things, provided for its termination at the option of the party of the second part thereto, or his assigns, upon giving three months' notice to the party of the first part. In accordance therewith, the defendant company, on the 14th day of May, 1894, gave notice to the complainant that, at the expiration of three months from the date thereof, it would cease building steam boilers and generators under said agreement, and that it would then surrender said agreement, and pay the royalty due, which notice was accepted by the complainant. The complainant claims that the defendant has not paid him all the royalties to which, under the agreement, he is entitled. The bill is filed for an accounting, and the prayer is for a decree directing the payment of such sum or sums of money as may be found due. The defendant's answer admits the execution of the agreement by the complainant and Kelley, and the assignment by Kelley to the defendant, and the termination of the same pursuant to notice, and admits that there is due the complainant, for royalties on water-tube boilers sold by it, the sum of \$682, and sets out in detail the specific boilers made and sold by it upon which said royalty was due, and which it is willing to pay. It is not disputed that other water-tube boilers than those so specified have been manufactured and sold by the defendant during the continuance of the agreement; and it is admitted that contracts were made by the defendant during the same period for the manufacture and sale of still other water-tube boilers, which were not completed until after the expiration of the contract. The controversy between the parties relates to these two classes of boilers, and the question to be determined is whether, under the circumstances, they are within the terms of the agreement, and the defendant liable for royalties thereon.

As has been said, it is admitted that water-tube boilers were manufactured and sold by the defendant during the continuance of the agreement, and, further, that they contained at least one of the devices of the complainant for which a patent had been obtained after the execution of the agreement, and which the defendant was entitled and permitted to use. No formal transfer of the patented device had been made, but it was used by the defendant under a claim of right, and royalties had been paid by the defendant for the manufacture and sale of boilers in which it had been incorporated. The defendant now insists that the complainant is not entitled to royalty on these boilers, because the patent for the device was invalid and void. The patented device was used by the defendant under the license acquired by the contract, and it cannot, when asked to pay the royalty provided therein, set up the invalidity of the claim of the patent. The validity of a patent cannot be determined in a suit against licensee for royalties, nor can the holder of a license deny the validity of a patent which he enjoys under it. 3 Rob. Pat. § 1252. In *Lawes v. Purser*, 6 El. & Bl. 932, the plaintiff, a patentee, had licensed the defendant to manufacture the article covered by the patent. The licensee refused to pay the royalties, and, being sued for the same, pleaded that the patent was void. The plaintiff demurred. The court, in giving judgment for plaintiff, said: "It would be monstrous if the defendant, after such an agreement acted upon, could on this ground refuse

payment." To the same effect are the cases *Covell v. Bostwick*, 39 Fed. 421; *Marston v. Swett*, 82 N. Y. 528.

The remaining boilers concerning which there is dispute are those for which orders were received, and upon which work was done during the continuance of the agreement, which were not delivered, set up, or completed until after its expiration, under the term of the notice given by defendant, and which contained none of the complainant's patented devices. The contract provides that there shall be paid one dollar per horse power for each complete steam boiler or generator made and sold under the agreement; that is to say, in pursuance of its terms. The defendant agreed that he would not engage in the manufacture and sale of any other water-tube boilers than those protected by the complainant's patents. These were the boilers to the manufacture and sale of which it was limited, and for which the royalty was to be paid. A failure to manufacture and sell the boilers containing the complainant's patented device worked a forfeiture of the agreement, but did not involve the payment of royalties. The boilers which do not contain the complainant's patented device, or any of them, are not such as are manufactured and sold under the terms of the agreement, but expressly contrary thereto, and no royalty is payable thereon. It may be that the defendant derived a benefit from its control of the Moore patents, and that its failure to incorporate these devices in the boilers made and sold by him during the continuance of the agreement was an injustice, and worked an injury to the complainant; but, if so, he cannot recover damages in this action, which is brought for royalties payable under the terms of the contract. There appear to have been one or two boilers which are not included in either class above mentioned. I refer to the Zell boiler, which was "rebuilt." It was not merely repaired; it was rebuilt. It was a complete steam boiler, made and sold by the defendant under the terms of the contract, and a royalty should be paid for its 166-horse power. Order 499 was for a boiler "traded for one previously sold." It was itself a complete steam boiler, made and sold under the contract, and it, too, is subject to a payment of royalty. If the boiler which had been previously made and sold, and which was accepted as part payment, should again be sold, no royalty would be payable thereon.

As to the whole case the defendant contends that it is entitled to set off, against any royalties for which it is liable, the damages which it says it has sustained by the failure of the complainant to assign to it all the patents which he had taken out for additional improvements made in water-tube boilers during the continuance of the agreement, and for failure to protect it from infringements. The testimony discloses but one infringer (a Mr. Gill), who, upon the demand of the complainant, desisted from the use of the patent. In causing the infringer to discontinue the use of the patented device, complainant performed his full duty required by the agreement. *Foster v. Goldschmidt*, 21 Fed. 70. The defendant appears to have had the use of the complainant's improvements, and the undisturbed use of the patents relating to steam boilers granted complainant subsequent to the agreement. If entitled to damages for the failure of complainant to make a formal transfer,

they cannot in this suit be set off against the complainant's claim for royalty.

It follows from what has been said that the complainant is entitled to recover the amount of royalties admitted to be due in the defendant's answer, and the sum of one dollar per horse power for each complete steam boiler or generator containing any of his patented devices made and sold by the defendant prior to the 14th day of August, 1894, deducting therefrom such allowances as, in order to induce sales or otherwise, he has voluntarily agreed to make therefrom. Let a decree be prepared in accordance with these views.

MOLINE PLOW CO. v. PARLIN & ORENDORFF CO. et al.

(Circuit Court, N. D. Illinois, S. D. December 13, 1897.)

PATENTS FOR INVENTIONS—ANTICIPATION—CORN PLANTERS.

Letters patent No. 326,449, issued September 15, 1885, to Levi J. Odell, for an improvement in check-rower attachments for corn planters, are not void for anticipation.

Suit by the Moline Plow Company against the Parlin & Orendorff Company and others to restrain the infringement of a patent.

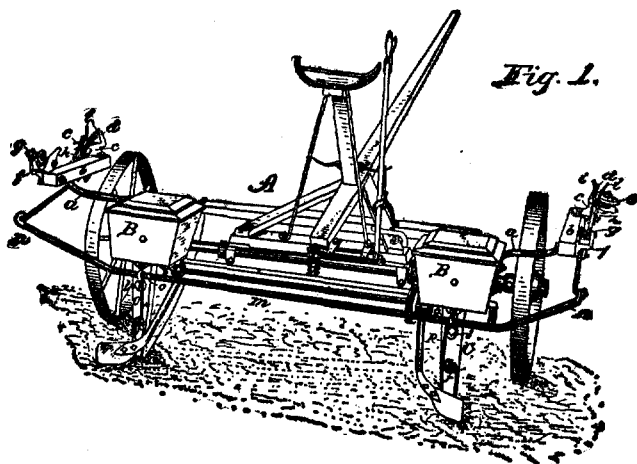
Offield, Towle & Linthicum and Paul A. Staley, for complainant.

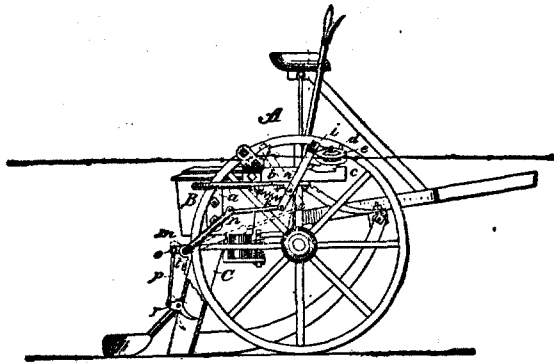
Bond, Adams, Pickard & Jackson and George B. Parkinson, for defendants.

GROSSCUP, District Judge. The bill is to restrain infringement of letters patent No. 326,449, to Levi J. Odell, dated September 15, 1885, for an improvement in check-rower attachments for corn planters. The patentee, Odell, had previously (June 16, 1885) taken out a patent for a complete corn planter. The patent under consideration refers to this previous patent, but does not, in my judgment, limit itself to being an improvement upon planters constructed under such previous patent. The patent under consideration is distinctly a check-rower attachment, and was unquestionably designed to be used in connection with any corn planter to which it could be adapted. The invention is described in the letters patent as follows:

"In the accompanying drawing [immediately following this description], Fig. 1 is a perspective view of my invention. Fig. 2 is a side elevation of the same; one of the seed tubes of the corn planter being partly broken away, so as to disclose the interior construction. A represents one of my improved corn planters, having the hoppers, B, the seed tubes, c, and mechanism for feeding seeds from the hoppers into the seed tubes; but as such mechanism may be of any preferred construction, and forms no part of this invention, it is not necessary to fully describe it here. To the outer sides of the hoppers are bolted bracket arms, a, which extend laterally out beyond, and in rear of, the supporting wheels; and to the outer ends of these arms are bolted bracket heads, b, which extend in the direction of the line of draft. To the front end of each of these heads is bolted a bracket, c, having a substantially vertical guard finger, d; and to these brackets are journaled grooved pulleys, e, which are supported in nearly a horizontal position. To the rear end of each of the heads, b, are also secured brackets, f, in which are journaled horizontal grooved wheels or rollers, g. Levers, h, are fulcrumed to the outside of the heads, b, near the centers thereof. The upper ends of these levers

are bifurcated, to leave arms or fingers, *i*, that diverge at their upper ends: and the lower ends of said levers extend below the heads, *b*, for a suitable distance. Coiled, retractile springs, *k*, are secured on the under sides of the heads, *b*, near the rear ends thereof; and the free ends of these springs are connected to the lower portions of the levers, *h*, so as to keep said levers normally in the position shown in the solid lines in the Fig. 2. In blocks, *l*, which are bolted or form with the rear sides of the seed spouts, is journaled a rock shaft, *m*, which extends transversely across the rear side of the corn planter, and has its outer ends bent upwardly, as at *n*, so as to form arms therefor. Short arms, *o*, project rearwardly from the rock shaft, in the line with the centers of the seed tubes, and are connected by rods, *p*, with seed valves, *r*, that are fulcrumed in the seed tubes, and have their short ends projecting rearwardly therefrom. These valves, when in the initial position shown in solid lines in Fig. 2, close the seed tubes, and collect the seeds that are dropped into the seed tubes by the seeding mechanism from the hoppers. A knotted cord or wire, such as is commonly used for check-row corn planters of this class, is stretched across the field, and passes on the sheaves, or grooved wheels, and between the fingers of the lever, on one side of the corn planter, and, as the planter is drawn along, the knots in the cord or wire successively catch in front of the fingers of the lever, and move the lever to the position shown in dotted lines in Fig. 2, which opens the valves, *r*, in the seed tubes, by reason of being connected to said valves, as before described, and causes the seeds collected by the valves to drop to the furrow. As the knot in the cord or wire passes beyond the lever, the springs return the lever to its natural position, and close the valves, to be again operated by the succeeding knot, and so on. The knots being equidistant from each other in the wire, it follows that the corn will be planted in the hills at regular intervals. On the return row the wire operates the lever on the opposite side of the planter."



*Fig. 2.*

Claim (1) of the patent is as follows:

"The combination, with the corn planter having seed tubes, of the valves in the tubes, the rock shaft connected to the valves, and having the bent arms, the bracket arms secured to the planter, and having the heads, the fulcrumed levers and guiding sheaves secured to the heads, the springs bearing on the levers, and said levers being connected to the arms of the rock shaft, and the knotted cord or wire passing through the sheaves for operating the levers and opening the valves, substantially as described."

The validity of the patent under consideration was considered in the case of Moline Plow Company v. Edward D. Harber et al., in the United States circuit court for the Southern district of Illinois. The bill in that case was founded upon the patent here involved, and the alleged infringing machine was similar, in nearly every respect, to the alleged infringing machine here. Both the question of the validity of the patent, and the fact of infringement, were in sharp contest, and many patents illustrative of the art were submitted to the court. I have re-examined a few of the patents said to be nearest to the one involved, and I concur in the holding of Judge Allen, that they anticipated in no material respect the invention under consideration. I have examined, also, such patents as were not submitted in the other case, but have been submitted in this, and I do not find any that constitute anticipation. I am of the opinion, also, that, if the complainant's patent is valid, the defendants' machine is clearly an infringement. Indeed, the principal question, expressly recognized as such by the counsel for the defense at the argument, arises upon an alleged fact wholly distinct from these anticipatory patents.

It is said that in the spring of 1882, and again in 1883, the George W. Brown Company, of Galesburg, Ill., successfully used in the field, planting corn, a planter containing an attachment very similar to the Odell attachment; and a machine was exhibited on the hearing, which, if the original, or a reproduction of the planter then used, would clearly constitute an anticipation. The evidence in support of this contention is impressive. I am not prepared to say that it does not embody the truth. But there are two facts, which, when taken

together, are cogent enough, in my judgment, to deprive it of the character of such convincing evidence as must, under the law, support a defense of this character. The first of these is that George W. Brown, who is said to have used this machine, was the pioneer in the field of corn-planter manufacturing and invention. His patents constitute much of the literature of this art. His litigations gave shape, largely, to the judicial decisions relating to the art. He was aggressive, both in advancing the art, and in claiming the benefit of his inventions therein. The second fact is that the Odell invention, when introduced, in 1887 or 1888, quickly supplanted the majority of its predecessors. Even the Brown Company adopted it as a part of their planter. It is confessedly, within the field it covers, the most useful and the most marketable device yet discovered. I cannot reconcile these two facts with the assumption that Brown successfully put, as early as 1882, a similar device in the field, and then abandoned it. If the experiment were successful, why did he not recognize its superior value,—a recognition that did come from him in 1890? Why was no patent applied for, or steps taken to protect his invention? Is not such inattention to his interests wholly at war with his previous history? Why should this leader in the art, with his eyes fully opened by successful experiment, relegate to a garret a device that, in the nature of things, was destined to supplant all its predecessors? An attitude such as this, to an improvement so advanced as this, by a man like Brown, is highly unnatural and improbable. In the face of these facts and circumstances, I have no such strong belief in the existence of the planter in 1882 and 1883, claimed by the defendants, as would justify a finding of anticipation. A decree may be entered as prayed for in the bill.

KELLY et al. v. CLOW et al.

(Circuit Court, N. D. Illinois, N. D. December 13, 1897.)

PATENTS—NOVELTY—WATER-CLOSETS.

The Smith patent, No. 258,144, for an improvement in water-closets, consisting of a water connection wherein the devices for operating the valve are entirely within the water way with the valve stem projecting therefrom into the hopper, and actuated from within the hopper itself, is void for want of novelty.

Suit by Thomas Kelly and others against James B. Clow & Sons to restrain the alleged infringement of a patent.

Dyrenforth & Dyrenforth, for complainants.

Gridley & Hopkins, for defendants.

GROSSCUP, District Judge. The bill is to restrain the infringement of letters patent No. 258,144, issued to Robert D. O. Smith, May 16, 1882, relating to a new and useful improvement in water-closets. The intended scope of the patent, as well as its controlling feature, is very succinctly stated in the first claim as follows:

"In a water-closet, or other similar receptacle, a water connection, wherein the devices for operating the valve are entirely within the water way, with the valve stem projecting therefrom into the hopper, and actuated from within the hopper itself."

The remaining claims are as follows:

"A valve, D, in the service pipe, combined with a controlling stem, E, entirely within the water way, and a lever, F, within the hopper, to engage with and operate said stem, and mechanism whereby said lever, F, may be actuated. In a water-closet or other receptacle, the combination of the stem entirely within the water way, and actuating mechanism within the bowl, and a water connection provided with a valve, D, and a valve, M, both mounted on and simultaneously operated by the same stem, and an intermediate reservoir to the closet. In a water-closet or other similar receptacle, a water connection provided with a valve, D, combined with a valve, M, and an intermediate reservoir, closed at its top to form an air chamber, and an air valve, which may be placed more or less near the top. In a water-closet or other similar receptacle, a service pipe provided with a valve, D, a valve, M, provided with a chamber, O, and a valve stem, E, common to both of said valves, and a lever, F, actuated by suitable mechanism. In a water-closet or other similar receptacle, a water-service pipe provided with a valve, D, and its operative stem, located entirely within the water way, combined with a compound lever, whereof one member, F, is within the hopper, A, and the other member is outside the same."

The particular advantage of this construction over other constructions has been variously stated by the patentee: First, that it affords no place where water can leak out, excepting into the hopper, where it can do no harm; second, that the valve is located so close to the bowl into which the water is discharged that the volume of water will have no space within which to dissipate or lose its force before it reaches the bowl. In both these respects, the patent under consideration may perhaps produce results different from, and superior to, those produced by any previous devices. I find nothing in the patent, however, which indicates a purpose to point out, with reference to the bowl, a location for the valve best suited to the purpose of flushing. Evidently the matter of the location of the valve close to the bowl was not among the original purposes of the inventor. His claim for a device leaves the mechanic at liberty to locate the valve even a considerable distance from the bowl. This feature, therefore, although urged with great strenuousness, I cannot find to be a part of the patentee's claim. The other feature of advantage, namely, the exemption from leakage, except into the bowl, is shared by a number of other previous devices brought to the attention of the court. It is insisted that such devices should be excluded from consideration, because they do not relate to the same art, namely, flushing closets, as distinct from slow-acting closets, or pan closets. I cannot concur in this, however. The relation between this character of closets is so close that devices relating to one may, by a mere mechanical adaptation, be applied to the other. The patent in suit is not for a closet as an entirety, but only for one of its mechanical elements, and such elements by adjustment may be adapted to any kind of closet. Rejecting this distinction, therefore, the previous art contained devices for operating the flushing entirely within the water way, so that there could be no leakage, except into the hopper. I am not at liberty to disregard the scope and breadth of the pat-

entee's claim, nor to cut it down to such particulars of construction as, in the devices actually shown, may be new. I must take the claim as stated, or reject it altogether, and, as stated, it is clearly anticipated in the prior art. For these reasons, the bill will be dismissed.

HOHORST v. HAMBURG-AMERICAN PACKET CO. et al.

(Circuit Court, S. D. New York. January 6, 1897.)

PATENTS—INFRINGEMENT—ASCERTAINMENT OF PROFITS.

Nominal damages only can be decreed where, although it appears that the defendant has infringed, and has derived some benefit therefrom, yet the evidence is so uncertain, and the knowledge of the witnesses so limited, that it is impossible to obtain any basis for calculating the amount of profits, other than mere haphazard speculation.

This was a suit in equity by Friedrich Hohorst against the Hamburg-American Packet Company and others for infringement of a patent. The cause was heard on exceptions to the master's report in respect to damages and profits.

Charles M. Demond, for complainant.

Walter D. Edmonds, for defendants.

COXE, District Judge. On the 15th day of May, 1896, the master filed his report, in which he says, *inter alia*:

"I am convinced that the complainant has not made out a case entitling him to a recovery of profits within the rule applicable to this subject. I cannot make, as complainant suggests, 'an approximate calculation.' On the evidence, I can be no better satisfied that five or ten or twenty per cent. of certain goods were handled by the nets than two-thirds were so handled. If, therefore, I should report that complainant has shown profits made by defendant on the basis of a given proportion of certain goods handled, and a given proportion of time saved in handling them, such report would be based on the merest haphazard speculation. I do not consider that I am justified in making such conjectures." Citing 3 Rob. Pat. pp. 522, 523.

Accordingly, he found that the complainant is entitled to recover nothing by way of profits, and nominal damages only.

On the 29th of July, thereafter, the circuit court of appeals announced its decision in *Tuttle v. Clafin*, 22 C. C. A. 138, 76 Fed. 227. It is agreed on all sides that this is "a closely analogous case" to the one at bar, and that the law as there enunciated is now the rule in the second circuit. The court has been considerably perplexed as to the proper disposition of the case in view of this decision. After careful consideration it is thought fair to the learned master and just to all parties concerned, to refer the accounting again to the master with the suggestion that he follow the rule of *Tuttle v. Clafin*, and take such further action in the matter as he may deem proper.

On Exceptions to Supplemental Report.

(December 23, 1897.)

TOWNSEND, District Judge. In this suit, the court, having decreed upon final hearing that complainant's patent, No. 119,765, for

improvement in slings for packages, was valid, and had been infringed by defendant, referred the matter to a master for an accounting. The master filed a report finding that complainant was entitled to no profits, and to only nominal damages. Upon the argument of complainant's exceptions to this report, Judge COXE referred the accounting back to the master in order to allow him to determine whether, in view of the decision in *Tuttle v. Clafin*, 22 C. C. A. 138, 76 Fed. 227, any further action was necessary, the decision therein having been announced after the master had filed his original report. The master thereafter filed a supplementary report, affirming the former report, in which he stated as follows: "I find nothing in the facts of the case, or in the law as laid down in the said decision in the case of *Tuttle v. Clafin*, that leads me to change the views and conclusions expressed in my former report." The complainant has duly excepted both to said original and supplementary reports, and the hearing was had upon exceptions.

It seems clear that the findings in the original report were justified by the evidence, and were in accordance with the general rule of law. Upon conflicting testimony the master found that the complainant had failed to furnish any "evidence upon which a computation of profits can be properly made." In his careful and exhaustive report he gives his reasons for this conclusion. The infringing devices were used in connection with other noninfringing devices, according to the exigencies of the business of handling mixed classes of packages constituting various kinds of cargoes of vessels under constantly varying conditions. That the defendant derived an advantage from the use of the infringing devices is expressly found, but the character of the testimony by which this fact was established was so conflicting and uncertain, and the knowledge of the witnesses was so limited in its scope, that it was manifestly impossible to obtain therefrom any basis of calculation from which to determine, with any degree of certainty, either the extent of the use of the infringing devices, or the saving effected or profits derived from such use. In the opinion of the circuit court of appeals on the rehearing in *Tuttle v. Clafin* the court reviews the facts, showing "that this case is, by reason of its history, both remarkable and unique," and adds that "no new rule of law was announced in regard to the burden of proof, or in regard to the necessity that the complainant should, in the cases which ordinarily come before the master, satisfy him by affirmative evidence of the amount of profits." The features which made the case of *Tuttle v. Clafin* unique are not present in this case. I agree with the master that the case contains no evidence upon which a computation of profits can be properly made, and the exceptions to this report are therefore overruled. Let a decree be entered accordingly.

THE TOPGALLANT.

RICHARDS et al. v. THE TOPGALLANT (BASTRUP, Intervener).

(District Court, D. Washington, N. D. January 3, 1898.)

SEAMEN—LEAVING VESSEL—ABUSIVE TREATMENT—WAGES.

Seamen are not justified in leaving the ship by reason of abusive words from the master, nor is their subsequent statement to him that they desire to leave the vessel, coupled with a demand for their wages, such insolence as will justify him in discharging them, and claiming forfeiture of their wages. And where, in such case, he tells them they may leave, but that he will not pay their wages, they are entitled to recover, not full wages, but wages only to the time of leaving.

This was a libel in rem by Eugene Richards and others against the bark Topgallant to recover seamen's wages.

P. P. Carroll, for libelants and intervener.

Metcalf & Jury, for claimant.

HANFORD, District Judge. This is a suit in rem to recover wages, commenced by part of the crew of the bark Topgallant, in which the first mate has filed an intervening libel, also claiming wages. It appears by the pleadings and proofs that the libelants and the intervener shipped at San Francisco for a voyage to Puget Sound and return, and they proceeded in the vessel from San Francisco to Port Blakely, and thence to Seattle, and, while at Seattle, engaged in taking in cargo, there was difficulty between them and the captain. The captain had given orders to the first mate to move the vessel to a different position for convenience in receiving coal, and the mate neglected to have this done until after working hours. After 7 o'clock in the evening the mate asked the men if they would then haul the ship, to which they answered that they would not, and the vessel was not moved that night, and in consequence of this neglect she was delayed in lading. The captain was absent from the ship from the time of giving the order to the mate until the next morning. On being informed by the mate that the men had refused to haul the ship when requested, he reprimanded the crew, and ordered a discontinuance of coffee and a luncheon, which, until that time, during the loading of the vessel, had been served to the men at 9 o'clock in the forenoon, as an extra in addition to the regular breakfast, dinner, and supper. There is a conflict in the testimony as to the conduct and exact words of the captain at this time, and as to threats which the men allege he made of future severity. A day or two after this occurrence, these libelants informed the captain that they wished to leave the ship, and asked him for their wages, which he refused to pay. He informed them, however, that they could leave the vessel if they wished to, but that, if they did leave, he would not pay them their wages. The libelants did leave the vessel, and, after filing their libel, one of them returned to the vessel during the absence of the captain and mate, to induce other members of the crew to desert. When the captain returned, finding the man there, and the purpose for which he came, he became angry, and, the mate having returned

about the same time, he gave expression to his anger by upbraiding the mate for permitting the man to come aboard, using expressions which were offensive, and refusing to hear the mate's explanation. After this occurrence, the mate informed the captain that he wished to leave the vessel, and the captain told him to do so at once, but refused to pay him.

It is my opinion that the libelants were not justified in leaving the vessel before termination of the voyage for which they shipped, by reason of abusive treatment at the hands of the captain; neither was their conduct disobedient or insolent to such a degree as to authorize the captain to discharge them, and claim forfeiture of their wages. The libelants, however, wished to leave the vessel, and so informed the captain; therefore they cannot claim that by telling them to go the captain discharged them unjustly, so as to entitle them to wages for the entire voyage. Upon being told by the captain that they could leave the vessel, they had a right to take him at his word, so that their contract for services in the vessel was, in effect, terminated by mutual consent. The captain seems to have acted upon a mistaken idea that the wages of seamen are forfeited by quitting the service before fulfillment of the entire contract, even when in doing so there is no disobedience. But in law seamen cannot be treated as deserters, and their wages forfeited, unless they leave the vessel, and remain absent, without leave of the commander. The rule is that, when the seamen's contract is terminated before conclusion, by mutual assent, the seamen are entitled to wages for the time of their actual service at the rate fixed by their contract. If the captain discharges them before termination of the voyage, without justifiable cause, they are entitled to wages for the entire voyage, and the amount of their expenses in returning to the port of discharge. Deserters from a vessel are not entitled to anything.

According to the statement of the captain, the following balances are due, after making all deductions for advances for the time the men actually were in the service of the ship, to wit: Henry Bastrup, \$51.50; W. Martin, \$31.90; Richard Nielson, \$6.61; W. Knispel, \$33; Askel Svendsen, \$22.05; Gustav Olinder, \$22.10; Emil Johnson, \$20.50; Eugene Richards, \$17.05. A decree will be entered in favor of the libelants and intervener, respectively, for the above sums and costs.

It appears by the testimony that Martin Anderson was convicted of breaching cargo, and the captain rightfully charged him with the value of the stolen goods, and also paid his fine, altogether amounting to more than the wages he earned; so there is nothing due to him.

THE IDLEHOUR.

NELLIGAN v. THE IDLEHOUR.

(Circuit Court of Appeals, Second Circuit. December 1, 1897.)

No. 6.

MARITIME LIENS—SUPPLIES FURNISHED TO RESTAURANT KEEPER—STATE STATUTES.

Under the New York statute giving a lien on domestic vessels for debts contracted by the "master, owner, charterer, builder, or consignee, or the agent of either of them," there is no lien for goods ordered by an independent contractor for the restaurant privileges of an excursion steamer, though, by contract, he furnishes meals to the crew, and though he represents himself to the furnisher as being the vessel's steward, when in fact he neither occupied the position of steward, nor was held out as such by the ship's officers or owners.

This is an appeal from a decree of the district court, Northern district of New York, sustaining a libel filed against the steamer Idlehour under the statutes of the state of New York providing for liens on domestic vessels for supplies, etc.

The vessel was an excursion steamer plying in and near the harbor of the city of Buffalo and Niagara river points. The owner entered into a contract with one Dewitt C. Tower, whereby, in consideration of \$600, he rented to said Tower, for the excursion season of 1896, "the restaurant and stand privileges of said steamer Idlehour, said privileges to be exclusive from the bar and stand privileges located upon the promenade deck." Tower also agreed to furnish meals to the crew at a rate of 16½ cents for each meal. On June 3, 1896, Tower came to libellant's store, and stated that he was the steward of the steamer Idlehour, and wanted to buy some groceries for her, if they could be bought cheap enough. The price being satisfactory, he ordered some, which were sent down by libellant's delivery wagon, and delivered on board "down between-decks in the galley." Libellant had never seen Tower before. Thereafter Tower sometimes ordered similar goods personally; sometimes he sent written orders with the heading, "Steamer Idlehour," sometimes with his name signed, and sometimes not. These orders were delivered by a boy "that was working for him." All the goods so ordered were delivered in the same way, viz. by the driver of the delivery wagon, who took them down into the galley, where he turned them over to a woman, whom he supposed was Tower's wife. He says that he saw Tower there quite often, and sometimes while he was delivering goods he saw the captain on the boat walking around, and sometimes up by the pilot house, where he could see the driver and the wagon (which was lettered, "D. J. Nelligan, 39 Main Street, Groceries and Ship Supplies"), but that he never spoke to the captain, nor the captain to him. The captain admits that he saw goods delivered to Tower from this wagon. The last delivery was on August 1, 1896. Libellant understood that the boat was owned by Ziegler. He knew the captain by sight. He never made any inquiries of either to find out whether Tower had any authority to order goods for the boat. He saw Tower on the deck of the Idlehour occasionally when he happened to be on the dock, but never had any talk with him as to his authority, except on the day he first called. It further appeared that Tower had also represented himself to others as the steward of the Idlehour, and obtained supplies from them; his own statements, and the mere circumstance that they subsequently found him on board, being taken by the witnesses as sufficient indication that he was in fact the steward. The evidence for the claimant showed that Tower held no certificate as steward, that he was not uniformed, that he was not represented as steward, nor held out to the passengers as such, nor called steward, nor referred to as such by the passengers, and that during the period in question there was no one on the boat employed as steward, or acting in such capacity, and that the captain and the agent of the excursion line which was running the boat ordered her supplies; that meals were not

furnished at regular hours on the boat, but that it "was run as a restaurant, where anybody that wanted anything could go up and buy it, and pay for it on the spot, the meals having nothing to do with the passenger fares"; that there were signs hanging up where they ate, such as "Dining Hall," or "Dining Room," and also "Sandwiches and Cake," "Tea or Coffee," and that Tower's name was on the bottom of the sign he had up for sandwiches. The libellant further testified that the agent of the excursion line happened in his store some time in July, and made a small purchase, for which he paid cash, and remarked incidentally, "I understand that one of our boats are trading with you, and, if you can make the prices right, we can do considerable business." This is positively denied by the agent, and we do not give much weight to the statement.

J. W. Ingram, for appellant.
Edw. M. Bassett, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We are unable, upon these facts, to concur in the conclusion of the district judge. The state statute reserves a lien in the case of debts contracted by the "master, owner, charterer, builder, or consignee, or the agent of either of them," but Tower was certainly not in fact such agent. His contract with the owner shows that the restaurant which he conducted was his own independent enterprise, and the circumstance that he agreed to feed the crew at so much per meal does not alter the situation. *Kretzmer v. The William A. Levering*, 35 Fed. 783; *Durando v. Steamboat Co.* (City Ct. N. Y.) 4 N. Y. Supp. 386. Nor is there proof sufficient to sustain the decree upon the theory that the owner of the vessel, having held Tower out to the world as the vessel's steward, is now estopped from denying that he held any such relation. The opinion in the district court thus states the ground of decision:

"It is undisputed that the libellant's goods were delivered there [on board the vessel] openly, in broad daylight, his wagons frequently coming there, with his name upon them; and I think it was the duty of the owners of the vessel, if they did not wish to have the vessel libeled, under such circumstances, to notify the persons furnishing goods to the man who occupied the position of steward, so far as the public were concerned, that they were not responsible; * * * and, not having done so, I am inclined to think that the owners are now estopped from saying that the man who was ostensibly the steward was not in fact the steward."

We do not think that the evidence supports a finding that Tower "occupied the position of steward," nor that he was "ostensibly the steward," and we know of no authority which would require the owners of an excursion steamer to hunt up all persons who may send goods aboard of the kind required by an independent contractor for the restaurant privileges, and notify them that the purchases are not being made for the ship. Reference is made to *The Sylvan Stream*, 35 Fed. 314, but in that case as appears from the opinion "the goods were sold upon the order of the uniformed and certificated steward of the Sylvan Stream, with the knowledge and consent of the master." And in *Bovard v. The Mayflower*, 39 Fed. 41, also referred to on the brief, it is stated in the opinion that the provisions for the lunch counter were "furnished under a general order given by the captain." The decree of the district court is reversed, with costs.

RURY v. McKAY.

(District Court, N. D. California. December 9, 1897.)

No. 11,392.

SEAMEN—FORFEITURE OF WAGES—DEVIATION OF VESSEL.

Under shipping articles describing the voyage as from San Francisco to Gray's Harbor, "thence to San Francisco for final discharge, either direct or via one or more ports of the Pacific Coast, either north or south of the port of discharge," the vessel is not entitled, after going to Gray's Harbor, and taking a cargo thence to San Pedro, to again return to Gray's Harbor without going to San Francisco; and a seaman who abandoned the ship at San Pedro on the announcement of the intention to return direct to Gray's Harbor, did not thereby forfeit his wages.

This was a libel by John Rury against E. A. McKay to recover seamen's wages.

H. W. Hutton, for libelant.

Allen C. Wright, for respondent.

DE HAVEN, District Judge. On the 24th day of April, 1897, the libelant agreed to serve as a seaman on board the schooner Occidental, under shipping articles signed by him, and containing the following provisions:

"It is agreed between the master and seamen or mariners of the schooner Occidental, * * * now bound from the port of San Francisco, California, to Gray's Harbor, thence to San Francisco, for final discharge, either direct or via one or more ports of the Pacific Coast, either north or south of the port of discharge, for a term of time not exceeding (6) six calendar months, * * * and that, in case any of the crew leave the vessel before the completion of the voyage aforesaid, the persons so leaving shall forfeit to the owners of the said vessel all the wages due them."

After signing the shipping articles, the libelant went immediately on board the said schooner Occidental, and proceeded on her to Gray's Harbor, where she was loaded with lumber, going thence to San Pedro, where the lumber was discharged, and the master of said vessel then informed the libelant and others of her crew that it was his intention to return to Gray's Harbor without stopping at the port of San Francisco. The libelant refused to go, and abandoned the schooner, claiming that the return to Gray's Harbor without stopping at the port of San Francisco was a deviation from the voyage described in the shipping articles signed by him.

The only question for decision here is whether the libelant forfeited his wages by leaving the vessel under the circumstances above stated, and this, of course, depends upon the construction to be given the shipping articles. The defendant insists that the shipping articles should be construed as an agreement upon the part of the libelant to serve as a seaman on board the Occidental on her voyage from San Francisco to Gray's Harbor, thence to ports either north or south of San Francisco, and thence upon other voyages up or down the coast, returning to the port of San Francisco, as the port of final discharge, within six months from the date of the signing of the shipping articles. This contention of the defendant can-

not be sustained, as such a construction of the shipping articles would entirely eliminate the port of San Francisco as the place at which the first voyage, as described in such articles, was to end. In my opinion, the return of the schooner Occidental from the port of San Pedro to Gray's Harbor without stopping at San Francisco on her way north was a deviation from the first voyage described in the shipping articles, and the libelant was justified in his refusal to make such return voyage. The conclusion here reached is in harmony with the case of *The J. M. Griffith*, 71 Fed. 317, and that of *Heinrici v. The Laura Madsen*, 84 Fed. 362, and upon the authority of those cases the libelant is entitled to a decree for the amount of wages claimed in the libel, together with the amount paid by him for passage from San Pedro to the port of San Francisco, and costs. Let such decree be entered.

THE ARKANSAS.

CROCKER et al. v. THE ARKANSAS.

(District Court, D. New Jersey. November 30, 1897.)

SALVAGE COMPENSATION—EXTINGUISHING FIRE.

\$200 awarded to each of three tugs which went to the assistance of a burning barge laden with cotton, drew her into the stream, and got the fire under control; and \$100 to each of four tugs which then rendered further assistance in extinguishing the fire; the value of the barge and cargo being about \$7,400, and the risk to the first-named tugs being considerable.

This was a libel in rem by Frank W. Crocker and others against the barge Arkansas and her cargo of cotton, to recover compensation for salvage services.

Alexander & Ash, for the Frankie.

Wilcox, Adams & Green, for the E. M. Millard, the Nettie L. Tice, and the Col. E. A. Stevens.

Ernest Luce, for the Daylight.

Foley & Wray, for the Margaret A. Lenox.

Robinson, Biddle & Ward, for the John Fuller.

Cowen, Wing, Putnam & Burlingham, for claimants.

KIRKPATRICK, District Judge. On the 11th day of February, 1897, the barge Arkansas, loaded with a cargo of 140 bales of cotton, was moored at the dock in the city of Hoboken. By some means, a fire was communicated to the cargo; and, no water facilities from the city being at hand, assistance was called for, and almost immediately the tugs Daylight, Millard, and Frankie came to her assistance. Within a few minutes all these tugs had made fast to the barge, and had a stream of water upon the cargo. The barge was towed out into the stream, when other tugs, noticing her dangerous condition, also came to her assistance, and helped extinguish the flames. It does not appear but that the tugs Daylight, Millard, and Frankie would have been able of their own efforts, unassisted, to ex-

tinguish the fire; but the services of the Lenox, Fuller, Stevens, and the Tice were rendered in good faith, and they should receive compensation. The value of the boat and cargo saved is about \$7,400. The risk of damage from fire to the tugs which first went to the assistance of the barge was considerable, and much less to those which afterwards came, when the fire was more or less under control.

I think a fair award for salvage would be \$1,000, to be divided between the tugs as follows: Daylight, \$200; Millard, \$200; Frankie, \$200; Lenox, \$100; Fuller, \$100; Stevens, \$100; Tice, \$100. In making the award to the Fuller, I make no award for the services rendered after the fire was extinguished. They seem to have been rendered at the request of the owners, and should be borne by them independent of this award for salvage from fire. Let a decree be drawn accordingly.

THE LAURA MADSEN.

HEINRICI et al. v. THE LAURA MADSEN et al.

(District Court, S. D. California. November 1, 1897.)

1. SEAMEN'S WAGES—SHIPPING ARTICLES—COMPLETION OF VOYAGE.

Shipping articles described the voyage as "from the port of San Francisco, Cal., to Port Blakeley, thence to San Francisco, for final discharge, either direct or via one or more ports of the Pacific Coast. Either north or south of the port of discharge. Voyage to be repeated one or more times." The vessel proceeded to Port Blakeley, and thence, with a cargo of lumber, to San Pedro, where, after unloading, the master announced his intention of returning to Port Blakeley. The crew thereupon demanded their pay, claiming that the voyage ended at San Pedro. *Held*, that the shipping articles did not permit a return from San Pedro to Port Blakeley before going to San Francisco, and that the seamen were entitled to their wages upon the master's announcement of his intention to return direct to Port Blakeley, and did not forfeit them by leaving the ship upon his refusal of their demand.

2. SAME—TIME OF FILING LIBEL.

The filing of a libel for wages, after the master has announced his determination to sail for a port unauthorized by the shipping articles, and after the seamen have, in consequence, demanded their wages, is not premature, although they continue at work for several hours longer, and until the vessel is about to proceed to sea.

This was a libel in rem by Ernest Heinrici and others against the schooner Laura Madsen, B. P. Rasmussen, master, to recover seamen's wages.

Jones & Newby, for libelants.

Calvin Edgerton, for claimants.

WELLBORN, District Judge. The claims of the libelants are for wages as seamen on board the schooner Laura Madsen. The case is submitted on an agreed statement of facts, as follows:

At San Francisco, Cal., on the 29th day of March, 1897, each of the said libelants entered into and duly executed articles of agreement with B. P. Rasmussen, then master of the schooner Laura Madsen, or whoever might go as master of said schooner, upon the terms and

conditions set forth in the shipping articles, produced in evidence as Exhibit A. Under said shipping articles, libelants, on said 29th day of March, 1897, as seamen, entered upon the voyage described in said articles from the port of San Francisco, and proceeded direct to Port Blakeley in the state of Washington, where she loaded with a cargo of lumber, and from thence sailed direct to the port of San Pedro, in the state of California. Said schooner arrived at said port of San Pedro on the 21st day of May, 1897, and discharged her cargo on the 29th day of May, at 10 o'clock a. m. After said discharge of cargo, the said master announced to libelants his purpose of sailing with said schooner direct to Port Blakeley, and on the same day took in ballast preparatory to sailing. Said master announced his said intention to sail for Port Blakeley at noon of said day, and the libelants then and there demanded their said wages, but payment was refused. After the said discharge of cargo, said libelants continued on said schooner in the service of the said master until after said schooner had taken in ballast, and assisted in taking in the same. Thereafter, at 3:30 o'clock p. m. of said 29th day of May, said libelants again demanded their pay. The said master refused to pay the wages so demanded, claiming that the voyage had not been ended, and that the libelants were not entitled thereto. At said date and time, to wit, 3:30 p. m., libelants, and each of them, refused to continue longer in the service of said master under the aforesaid shipping articles, and then and there left the said vessel, against said master's consent, said libelants claiming that their voyage was completed, and they were entitled to their wages. The libel in said cause was verified, filed, and the process of the court placed in the hands of the United States marshal for service at about 1:25 p. m. on said 29th day of May, 1897, and said process was duly served at about 6 o'clock p. m. of the same day. It was the intention of the said master (known to the libelants) to clear from the port of San Pedro for Port Blakeley, in the state of Washington, on the afternoon of May 29th, or the 30th at the latest. Said schooner did sail from the port of San Pedro, bound for Port Blakeley, on the 1st day of June, 1897, and libelants each and all refused to sail on said schooner, and remained at San Pedro.

The following entry appears in the log book of the said schooner Laura Madsen:

"Sat., May 29—3/30 p. m.

"Crew refused duty, and left the vessel, claiming that their voyage was up, and demanded their pay for the time that they had been employed.

"B. P. Rasmussen, Master.

"A. Larson, Second Mate."

The libelants served the length of time mentioned in the amended libel, and each has been paid only the sums set out in paragraph 4 of said amended libel, and the several sums alleged to be due are correct, provided the respondents are held liable for any amount whatever. That part of the shipping articles, referred to as "Exhibit A" in the foregoing statement of facts, descriptive of the voyage for which libelants engaged, is as follows:

"* * * The Sch. Laura Madsen, of San Francisco, Cal., * * * now bound from the port of San Francisco, Cal., to Port Blakeley, thence to San Francisco, for final discharge, either direct or via one or more ports on the Pacific Coast. Either north or south of the port of discharge. Voyage to be repeated one or more times."

Another material provision of said articles is as follows:

"It is especially understood and agreed that the wages of the said crew shall not be due, nor any part thereof, nor shall the crew be entitled to receive any portion of their pay, except at the master's option, until the completion of the entire voyage above described; and that, in case any of the crew leave the vessel before the completion of the voyage as aforesaid, the persons so leaving shall forfeit to the owners of the said vessel all the wages due them."

Libelants contend that they had a right to leave the vessel at the time and place they did, for the reason, among others, that the voyage for which they shipped did not include a return from San Pedro to Port Blakeley; and therefore, when the announcement was made to them by the master of the vessel of his intention to return to Port Blakeley, they were justified in leaving said vessel. Respondents insist that libelants, by leaving the vessel at San Pedro, were guilty of desertion, and therefore forfeited their wages; and, further, that the suit was prematurely brought.

The decision in *Bradley v. The J. M. Griffith*, 71 Fed. 318, with the authorities there cited, I think, determines, in their favor, libelants' contention. If it be conceded (which, however, I do not decide) that the shipping articles allowed the vessel to go from Port Blakeley to San Pedro, no fair construction of the articles would permit the return from San Pedro to Port Blakeley. The voyage is expressly described as being from San Francisco to Port Blakeley, thence to San Francisco, etc. Certainly, this language does not imply that the vessel could go from Port Blakeley to some other point, as, for instance, San Pedro and return to Port Blakeley. Whatever may be the true construction of the shipping articles as to the ports at which the vessel could touch in going from Port Blakeley to San Francisco, it is clear that the articles did not permit a return to Port Blakeley from any intermediate port before San Francisco had been reached. The provision in the shipping articles, "Voyage to be repeated one or more times," does not militate against this conclusion. San Francisco was the port from which the voyage was to commence, and also the port at which the voyage was to end. There could not, of course, be any repetition of this voyage until it was ended, and it could not be ended otherwise than by a return to San Francisco. Nor is said conclusion at variance with that clause of the shipping articles which provides that the duration of the services shall be "for a term of time not exceeding (6) six calendar months." As has been elsewhere said:

"The act for the government and regulation of mariners contemplates two species of contract between owners and seamen: (1) For a voyage or voyages; (2) for a term or terms of time. The latter is undoubtedly the proper form of articles where the destination of a vessel cannot be specifically known, and where the vessel is employed on what is called a 'trading voyage,' or is in search of freight. The first, to wit, that in which the voyage or voyages are specified, applies to designated ports, or particular kinds of voyages, known

and understood to be governed in their extent and duration. The term 'voyage,' like the term 'voyage assured,' is a technical phrase, and always imports a definite commencement and end." Anonymous, 1 Fed. Cas. 1004.

The contract in the case at bar belongs to the first species, and was for a specified voyage, some of the ports designated, others generally described; and therefore the voyage, with the ports so designated and described, must be considered the service to which the libelants bound themselves, and the only effect of the six-months provision was to limit repetitions of the voyage so agreed upon,—that is to say, the voyage could not be repeated oftener than was possible within six months.

The suit, I think, was not prematurely brought. The announcement by the master to the libelants at San Pedro, after the cargo was finally discharged, that he intended to return to Port Blakeley, and the demands thereupon made by the libelants for their wages, were, so far as concerned libelants' rights, a termination of the voyage, or equivalent thereto, and libelants then became entitled to said wages. Rev. St. § 4530. The fact that the vessel was about to proceed to sea before the end of 10 days gave libelants the right to sue immediately. Rev. St. § 4547. The subsequent services of libelants from 10 o'clock a. m. to 3:30 o'clock p. m. of the same day were gratuitous, and no new contracts nor waivers will be implied therefrom.

The foregoing rulings make it unnecessary for me to pass upon any of the other questions raised in the respective briefs of the parties. A decree for libelants will be entered

THE ROCHESTER.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1893.)

No. 434.

1. COLLISION—STEAMER AND SAIL—LOOKOUTS.

Where a schooner, shortly after leaving port, collided with a steamer coming in, *held*, on conflicting evidence and the probabilities of the case, that the collision was due to the fact that all the schooner's crew, except the master at the wheel, were engaged in setting sail, and that, the master's vision being obstructed by the sails, he several times left the wheel, and went to the schooner's side, to observe the approach of the steamer, and that the constant yawing of the schooner, whereby she displayed different lights to the steamer, misled the latter, and caused her to change her course; and that, if the steamer was in error in not stopping and reversing as provided by rule 21, it was an error in extremis.

2. SAME—DUTY OF MASTER.

The master of a sailing vessel has no right to assume the duty of wheelman at a point where the commerce of the lakes converges to a port like that of Chicago. It is his duty at such a time to keep a vigilant outlook, and to be on hand on the deck, where he can observe the movements of approaching vessels, and give orders accordingly. 81 Fed. 237, affirmed.

On appeal from the District Court of the United States for the Northern District of Illinois.

A libel was filed by the owner of the schooner Amaretta Mosher against the steamer Rochester in a cause of collision civil and maritime. The owners of the steamer answered thereto, and also filed a cross bill against the owner of the schooner. The district court at the hearing dismissed the libel, and pronounced for the cross libellant. The owner of the schooner appealed. The Mosher, a three-masted schooner, sailed from the port of Chicago shortly after 8 o'clock in the evening of the 4th day of November, 1895, bound on a voyage to Ford River, in the state of Michigan. The night was fair. There was no sea, and the wind (a fresh breeze) was from the south. Her crew consisted of seven men,—master, mate, cook, and four seamen. All the crew, except the master, who was at the wheel, and possibly a man on the lookout for part of the time, were engaged from the time of leaving the port of Chicago to the time of collision in setting canvas. The schooner was light, and sailed on a course N. by W. $\frac{1}{2}$ W., at a distance of two miles from land. She collided with the Rochester near Grosse Point, six or seven miles from the port of Chicago. The Rochester was bound on a voyage from the port of Buffalo to the port of Chicago, proceeding on a course S. by E. Her master was on watch on the promenade deck, in his proper place. Her lookout was in the eyes of the boat, and her mate on the starboard side of the steamer, on the forward promenade deck, standing on lookout. The Mosher was proceeding at the rate of six or seven miles an hour; the Rochester, at the rate of eleven miles an hour. The relation of the story of the collision by the respective parties is substantially as follows: The Mosher, according to the story of her captain, saw the masthead light of the Rochester at a distance of six or seven miles away, and three or four points on her port bow, and the red light of the Rochester soon came into view. In about ten minutes the captain of the Mosher left his wheel set, and exhibited a torchlight on the after port quarter; the Rochester being then two points on the port bow of the Mosher, and three or four miles distant. The Rochester then exhibited her green light, and passed across the bows of the schooner until she was a point on the lee of the schooner. Then, after a short time, and when between a mile and a half and two miles distant, and three points on the starboard bow of the Mosher, the Rochester blew one blast of her whistle; still continuing to exhibit to the Mosher her green light. The captain of the Mosher ordered his crew to resume work of setting the canvas, which had for a moment been suspended, and thereupon, twice, at an interval of six or seven minutes, left his wheel loose, and went to the starboard side of the schooner, to look under the sails, which obscured his view, to observe the movements of the Rochester. The first time, she was a mile and a half away, exhibiting a green light. The second time, he saw the two lights of the Rochester, and then her red light alone, about four points on the Mosher's starboard bow. Very soon thereafter the collision occurred. The Mosher struck the Rochester on the bluff of the port bow, end on. The captain of the Mosher insists that she kept on her course from the time the torch was exhibited to the time of the collision, that no change was made with the wheel, and that her lookout reported the Rochester to him but once. The Rochester, according to the story of her crew, had lookout, in addition to the wheelsman, consisting of the captain, the mate, and the seaman on watch, each in his proper place, and vigilant to perform his duty. The Mosher, exhibiting her green light, was first observed when she was from $1\frac{1}{2}$ to 2 miles distant on the port bow. The captain at once ordered the wheel starboarded. In a short time the schooner suddenly shut out her green light, and exhibited her red light directly ahead of the steamer, and immediately the captain of the Rochester ordered her helm a-port, and then hard a-port to swing the vessel red to red; one blast of the whistle being sounded, to indicate to the Mosher that the vessels would pass port to port. The steamer swung to the westward; the schooner almost immediately swung, also, to the westward, exhibiting her green light; and the collision immediately followed,—the starboard bow of the schooner striking the bluff of the steamer's port bow, and the jib boom of the schooner piercing the steamer's deck about 25 or 30 feet forward.

Chas. E. Kremer, for appellant.

George S. Potter, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, delivered the opinion of the court.

We agree with the court below that, if we assumed the truth of the direct testimony of all the witnesses, we should be unable to determine which party was at fault. But a careful analysis of the evidence satisfies us that the court below arrived at a correct conclusion. The testimony on behalf of the schooner is confusing and unreliable. It is manifest that her captain and crew had no accurate notion of distance or of navigation. The Mosher was but two miles off shore, and her master and crew locate the Rochester when she was first observed so that the latter would be navigating half a mile inland from the shore. The witnesses, either ignorantly or willfully, misstate the facts. The testimony on the part of the Rochester is much more reliable and consistent. She observed the Mosher when a mile and a half or two miles distant; the latter exhibiting her green light. The Rochester immediately starboarded, going to port. Upon this course the vessels exhibited to each other their green lights, and would, confessedly, had no change of course occurred, have passed each other in safety. What then induced the change which brought about this collision? The Mosher suddenly exhibited to the Rochester both her lights, and then her red light. According to the story of the captain of the Mosher, her course was not changed at any time. The learned and astute proctor for the Mosher would therefore have us believe that this change of lights was produced by the yawing of the vessel, and claims fault on the part of the Rochester, in that she did not allow therefor, and starboard her wheel long enough or strong enough to give the Mosher a sufficiently wide berth. This notion would seem to have had being in the imagination of the proctor, for there is no suggestion of it by the schooner's witnesses; nor do we understand there was, nor can we assume there could have been, sufficient yawing of the schooner to shut out the one light exhibited, and to exhibit the other light to the Rochester, within the distance the two vessels were apart, and within the time intervening before the collision. It is true, it was the duty of the steamer to keep out of the way of the sail vessel; the latter keeping her course. This the steamer attempted to do, and undoubtedly would have accomplished but for the remarkable change of course of the schooner. That the latter should change her course seems unaccountable, and is only explicable upon the fact that the master on two occasions left the wheel loose, which brought about a change in her course. If the result would be to cause the vessel to luff up into the wind, as is insisted by the Mosher, we think the clear inference is that the change in these lights was brought about by an attempt of the master, when he resumed the wheel, to put her back on her course. If, on the contrary, the effect would be to send the schooner to starboard, that of itself would sufficiently account for the change. Whatever would result, it is clear there was this sudden change in the course of the schooner, threatening collision, and which impelled the steamer to change her course to the westward. The master of the Mosher had

charge of the wheel. The crew were engaged in setting canvas. The vessel was at a point where the commerce of the lakes converges to the port of Chicago. The master had no right to assume the duty of wheelsman, under such circumstances. His duty at that time was to keep a vigilant outlook,—to be on hand on the deck where he could observe the movements of approaching vessels, and give orders accordingly. The *City of Augusta*, 50 U. S. App. 39, 44, 25 C. C. A. 430, and 80 Fed. 297. The court was of the opinion that no one on the schooner, except the captain, was on the lookout, and that his disadvantageous situation obliged him to leave the wheel, whereby the schooner went to starboard, indicating to the steamer the change in her course. We are inclined to agree with the court below upon this proposition, notwithstanding the testimony on the part of the schooner asserts the presence of a lookout. It would seem remarkable, if a proper lookout was stationed, that the captain should have heard from him but once during the approach of the steamer, and should have appealed to the crew engaged in setting canvas, and not to the lookout, to ascertain what light the schooner was exhibiting. It is said the steamer was at fault in having no vigilant lookout. We find no foundation in fact for this objection. The captain and the mate were on watch, in addition to the usual lookout, and they all appear to have been vigilantly employed in the performance of their duty.

It is also objected that the steamer should have stopped and backed, instead of porting her helm. Rule 21 provides that every steam vessel which is directed by the rules to keep out of the way of another shall, on approaching her, if necessary, slacken her speed, or stop or reverse. The difficulty with the application of this rule here is that the steamer ported her helm and went to the starboard to avoid the schooner, and the vessels would have passed each other safely, but for the faulty action of the schooner. We think it very doubtful whether, when the schooner exhibited her red light, the Rochester could have avoided a collision by stopping and reversing. If, however, that could have been done, the course adopted was taken *in extremis*, to avoid an impending collision induced by the fault of the schooner, and for which the steamer should not be held blameworthy. The decree will be affirmed.

CONSOLIDATED WATER CO. v. CITY OF SAN DIEGO et al.

(Circuit Court, S. D. California. December 6, 1897.)

1. COURTS—JURISDICTION—FEDERAL QUESTION.

A bill to restrain the enforcement of a city ordinance fixing the rates of charge by a water company, on the ground that such rates are so unreasonably low as to amount to a taking of the property of the water company without just compensation, presents a federal question.

2. MORTGAGES—RIGHTS OF MORTGAGEE—INJUNCTION TO PROTECT MORTGAGED PROPERTY.

A mortgagee has such an interest in the mortgaged property as entitles him to bring suit to restrain injury thereto.

3. SAME—SUIT FOR INJUNCTION—PARTIES.

In a suit by the mortgagee of a water company to enjoin the enforcement of an ordinance fixing water rates, the mortgagor is a necessary party.

This is a suit in equity by the Consolidated Water Company against the city of San Diego and its municipal authorities. Heard on demurrer to the bill.

Works & Works, Trippet & Neale, and Works & Lee, for complainant.

H. E. Doolittle and T. L. Lewis, for defendants.

ROSS, Circuit Judge. The complainant, a corporation of the state of West Virginia, brings this suit against the city of San Diego and its municipal authorities. The complainant sues as the holder and owner of a mortgage upon the water and water plant with and by which the San Diego Water Company supplies the city of San Diego and its inhabitants with water for domestic and other purposes. The city, through its municipal authorities, having established an ordinance fixing the rate at which such water should be so furnished, the object of the bill is to obtain the judgment of this court declaring such ordinance null and void upon the ground that the rates thereby established are so unreasonably low as to amount to a practical taking of the property mortgaged to the complainant without just compensation, contrary to the provisions of the constitution of the United States. The ordinance thus attacked was enacted, according to the bill, in February, 1896, and, under the provisions of the constitution of the state of California and a state statute passed pursuant thereto, it took effect July 1, 1896, and expired by limitation July 1, 1897, yet the demurrer to the bill now under consideration was not submitted to this court until within the last few days, to wit, November 24, 1897. The court is not advised in respect to the cause for such delay, and, as at present advised, I do not see, after disposing of the present demurrer, what need there will be for the determination of the question raised by the bill, since, under the provisions of the state constitution and state statute, pursuant to which the ordinance was enacted, its functions have long ago ceased.

It is urged in support of the demurrer to the bill, that this court is without jurisdiction, for the reason that it appears from the bill that the title to the property involved is in the San Diego Water Company, a corporation of the state of California, whose rights therein are nec-

essarily affected by the ordinance sought to be annulled by the bill, and that that company is therefore an indispensable party to the suit, and, if made a party, whether as complainant or defendant, must, for jurisdictional purposes, be aligned with the complainant, which alignment would, by reason of the citizenship of that company, show a want of jurisdiction in this court. That would undoubtedly be so if the jurisdiction of this court depended upon the diverse citizenship of the parties. It was so held by Judge Wellborn in the case of *Water Co. v. Babcock*, 76 Fed. 243, and subsequently by me in the same case in an opinion filed August 16, 1897. In his argument upon the present demurrer the counsel for the complainant insists that those rulings are contrary to the decision in the case of *Mercantile Trust Co. v. Texas & P. Ry. Co.*, 51 Fed. 529, and in the case of *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047. What this court held in the *Babcock Case*, when under consideration by the district judge as well as by myself, was that, where the jurisdiction depends upon the diverse citizenship of the parties, and the bill shows, as it did in that case, that the complainant's cause of action depends wholly upon the fact that the property rights of the mortgagor are invaded, with whose rights the complainant's interests (as mortgagee) are so inseparably connected that there can be no adjudication thereon without passing upon the rights of the mortgagor, the mortgagor is an indispensable party, and, when made a party, must be aligned with the complainant; and that when, as in that case, the diverse citizenship of the parties is thus destroyed, the court is without jurisdiction. In neither of the cases cited by counsel for the complainant in the present as well as in the *Babcock Case* was there anything decided to the contrary of this. In *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, the question whether or not a proper alignment of the parties, according to their real interests, would fail to present a controversy wholly between citizens of different states was not suggested to the court. The only jurisdictional question there presented appears from this quotation from the opinion in that case:

"We are met at the threshold with an objection that this is, in effect, a suit against the state of Texas, brought by a citizen of another state, and therefore, under the eleventh amendment to the constitution, beyond the jurisdiction of the federal court."

In *Mercantile Trust Co. v. Texas & P. Ry. Co.*, 51 Fed. 529, the objection made to the jurisdiction of the court, as appears from the answer of the defendants *Reagan*, *McLean*, *Foster*, and *Culberson*, was that the *Texas & Pacific Railway Company* was a corporation created under the laws of the United States, and that its principal office and domicile was in the state of New York, thereby constituting that company a citizen of that commonwealth, of which state the complainant also was a citizen; wherefore it was claimed by the defendants other than the *Texas & Pacific Company* "that said complainant is not entitled to maintain its suit against the defendant railway company, because complainant and said company are citizens of the same state, and there is no real controversy between complainant and said defendant railway company, and none between them

arising under the constitution and laws of the United States; and the said suit between the said parties is believed to be collusive or feigned." In respect to this point the court said (51 Fed. 536):

"It is apparent from the whole record and the conduct of this hearing, that the controversy is not between complainants and the railways, but between the railways and the other defendants."

The court, therefore, conceding the citizenship of the Texas & Pacific Railway Company to be in New York, as claimed by the other defendants, evidently concluded that, although the company was a nominal defendant, yet a proper alignment of the parties, according to their real interests, would place that company with the complainant; thus making the controversy between citizens of different states, and therefore within the jurisdiction of the court. In the present case, however, it is a mistake to suppose that the jurisdiction depends upon diverse citizenship of the parties. The bill presents a federal question, namely, the question whether the ordinance set out in the bill violates those provisions of the constitution of the United States declaring that no person shall be deprived of his property without due process of law, and securing to every person the equal protection of the laws. *Reagan v. Trust Co.*, supra; *Central Trust Co. of New York v. Citizens' St. Ry. Co. of Indianapolis*, 82 Fed. 1. That a mortgagee has such an interest in the mortgaged property as entitles him to bring suit to restrain injury thereto is, in my opinion, beyond doubt. Such right was distinctly recognized in the cases of *Mercantile Trust Co. v. Texas & P. Ry. Co.* and *Reagan v. Trust Co.*, supra. The demurrer would, therefore, be overruled, but for the failure of the complainant to make the San Diego Water Company a party to the suit. Because of the absence of that indispensable party the demurrer is sustained, with leave to the complainant to amend the bill within 10 days, if it shall be so advised.

POST et al. v. BEACON VACUUM PUMP & ELECTRICAL CO. et al.

(Circuit Court of Appeals, First Circuit. January 19, 1898.)

No. 216.

1. EQUITY—RESCISSION—SUFFICIENCY OF ALLEGATIONS.

A bill for a rescission, which will seriously affect the interest of others, must contain clear and positive allegations showing the equitable right of the complainants to the relief asked.

2. CORPORATIONS—TRANSFER OF PROPERTY—ULTRA VIRES.

The action of a corporation in transferring its property and business to another corporation is not ultra vires except as to creditors prejudiced thereby, or nonassenting stockholders, and their right to a rescission may be waived.

3. SAME—RIGHTS OF STOCKHOLDERS—ESTOPPEL.

A majority of the stockholders of a corporation, by vote, agreed to a reorganization, and the transfer of its property and business to a new corporation, in consideration of the issuance to the stockholders of a certain amount of the stock of the new company, and the privilege to such stockholders of subscribing for the remainder at a fixed price. The plan was executed, and the transfer made. *Held*, that minority stockholders who opposed the transfer, but who subscribed for their proportion of the

stock of the new company, though under protest, and permitted such company to conduct the business for 18 months, were estopped to then ask for a rescission.

Appeal from the Circuit Court of the United States for the District of Maine.

This is a bill by Louis Post and others, as stockholders of the Beacon Vacuum Pump & Electrical Company, against such company and the Beacon Lamp Company, to rescind a transfer of the property of the former corporation to the latter.

Edward P. Payson, for appellants.

William H. Dunbar, George E. Bird, and Louis D. Brandeis, for appellees.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. The complainants are stockholders of the Beacon Vacuum Pump & Electrical Company, which, for convenience, we will call the "Pump Company." They bring this bill against that corporation and the Beacon Lamp Company, which we will call the "Lamp Company." The capital stock of the Pump Company is \$1,000,000, divided into 40,000 shares, of the par value of \$25 each, all of which are outstanding. Complainants hold 2,580 shares, being a fraction over one-sixteenth part of the entire issue. They assume to bring their bill in behalf of themselves and of all others in like interest; but, as the case stands, there are no others in like interest. It is maintained that the cause of action which the bill presents exists, if at all, only in the right of the corporation, and not in the right of the stockholders themselves; but we will not find it necessary to determine this proposition.

The bill was demurred to by both respondent corporations, assigning various grounds of demurrer, and, among the rest, a want of equity, which is the only one to which we will have occasion to refer. It shows that the Pump Company is a manufacturing corporation, and had been making electric lamps. It seeks to set aside a transfer from it to the Lamp Company, made pursuant to a scheme of reorganization, and executed in July, 1895. The bill alleges that "on or about March, 1895, the assets of" the Pump Company, "exclusive of letters patent, were shown by the corporation books to be about \$130,000"; and that the entire liabilities of that corporation, not including the capital stock, were about \$60,000, "leaving the said company with about \$70,000 worth of personal property, and said letters patent"; and, further, that, "of said \$60,000 indebtedness, over \$38,000 had been incurred upon loans for which the corporation issued bonds due and payable about 1902, thus leaving its then current indebtedness, in bills payable and accounts, some \$22,000." It also alleges that the Pump Company had in 1895 "sufficient assets to enable it to make further loans, if any such were required, and also the legal right to amend its charter to increase its capital, so as to enable it to issue

more stock"; and that it "was neither insolvent nor without power to obtain the necessary funds to continue in business." It also alleges that, in the event the Pump Company had been wound up and its assets sold to pay its debts, the value of its letters patent would have added "a large sum to the \$70,000 of property held above its indebtedness," and that the value of the letters patent appears, from the circular to the stockholders setting out the scheme of reorganization, to have been estimated at over \$400,000 for use in exchange for \$400,000 of the capital stock of the Lamp Company. There are no allegations showing that the old corporation had any existing available working capital.

It may well be questioned whether there is sufficient in these allegations to show that the Pump Company was financially capable of pursuing its business, or that its assets, if it had been wound up, would have yielded any substantial dividend to its stockholders. For example, the first, which refers to the books of the corporation for values, without any direct allegation about them, is, of course, insufficient on any rule of pleading governing the construction of a bill in equity to receive the consideration of the court. Again, the allegation to the effect that the value of the letters patent, if sold, would have added "a large sum" to the \$70,000 of property held above its indebtedness by the corporation, is equally ineffectual, because it is based on the defective statement of values which refers to the books of the corporation. So, also, the allegations that the Pump Company had sufficient assets to enable it "to make further loans," meaning thereby to borrow money, and that it might obtain power to issue more stock, without some definite statement as to its available resources, result in what is purely problematical. The allegation that the corporation was not insolvent, nor without power to obtain the necessary funds to continue in business, might properly, as the bill is framed, be regarded as a mere deduction from the other matters stated in the bill to which we have referred, and not at all as a positive, distinct allegation; and, in view of the insufficient character of the allegations with reference to the assets of the corporation to which we have called attention, it might well be held too general.

A bill seeking a result which may be so disastrous to the interests of other stockholders as this might be if its principal prayer were granted should support itself by decisive allegations. The general rule is that the essential parts of a bill in equity should be stated positively and with precision. Story, Eq. Pl. (10th Ed.) §§ 255, 256. This is especially insisted on where a remedy is sought by an injunction or a rescission, the result of which may not only compensate the party injured, which is all the common law ordinarily gives, but may impair the interests of the adverse party to a vastly disproportionate extent. The underlying principle is stated in the following cases, although applied there from an aspect different from that at bar: *Grymes v. Sanders*, 93 U. S. 55, 62; *U. S. v. American Bell Tel. Co.*, 167 U. S. 224, 241, 17 Sup. Ct. 809. The common law gives relief on a mere preponderance of proofs; but it is certain that, in cases of the class we are considering, equi-

ty does not act unless the proofs are clear. The underlying reasons which require this require also that the allegations which the proofs are to sustain be clear to the effect that the complainant has suffered, or is threatened with, an injury so substantial as to demand, not only compensation, but also specific relief by rescission, even while this may cause a loss to others as to which his own would be comparatively trifling.

All the shareholders, except the complainants, agreed to a scheme which involved a reorganization of the Pump Company. It provided that a new corporation, the Lamp Company, should be organized; that its capital stock should be \$500,000, divided in 50,000 shares of the par of \$10 each; that, of these shares, 10,000 should be issued to the stockholders of the Pump Company, without any consideration coming from them; that 32,000 shares should be open to subscription pro rata by such stockholders at \$1.25 per share; and that the balance should be issued by the new corporation, as might afterwards be determined by it. It appears that the 32,000 shares had been underwritten; that is to say, that an arrangement had been made by which certain individuals had agreed to take such portion thereof, paying the \$1.25 per share therefor, as might not be taken by the holders of the stock of the Pump Company. This arrangement assured a working capital, and was ratified by the stockholders of the Pump Company at a meeting held June 20, 1895, no shareholder voting adversely. The complainants in the present bill had made known their opposition to the plan, but they did not appear at the stockholders' meeting, alleging that they assumed that the meeting would not be held, by reason of certain suits which they had instituted.

It is well to understand the precise nature of the proceedings against which the complainants protest. What was attempted and done by the Pump Company was not ultra vires in every sense of the term. No question of public policy was involved, and it was all permissible with the consent of all the stockholders; and, if it had been once accomplished with their approval, it could not have been rescinded by either the state or any parties in interest, unless by creditors prejudiced thereby, if there were any so prejudiced. Therefore, if the question involved is one of ultra vires, it is so in a modified way only; that is to say, it concerns only the contractual relations between the stockholders and the corporation, as to which the stockholders might waive their rights, either expressly or impliedly; or, under certain circumstances, any stockholder might become estopped from making a denial of a waiver.

The bill further alleges that the Lamp Company was organized "on or before the first day of July, 1895"; that pursuant to the plan of reorganization, "on or about July, 1895," the Pump Company transferred all its assets to the Lamp Company for the considerations named therein; and that the Lamp Company took possession thereof, and commenced to carry on, and is still carrying on, the former business of the Pump Company. It also alleges that the stock of the new corporation had been allotted; that the complainants are not informed whether it had been paid for or issued; and

that the 10,000 shares intended for distribution among the shareholders of the old corporation are held in the custody of its treasurer; and it professes ignorance whether or not the plan of reorganization had been completed in its other details. It prays for relief in various forms: First, for rescission; second, for a valuation of the complainants' interests in the old corporation, and payment thereof; and, third, as follows:

"Or that your orators may be adjudged severally entitled to receive an amount of the capital stock of said Beacon Lamp Company equal to the amount of their stock in said Beacon Vacuum Pump and Electrical Company, due consideration being had of the difference in the total capitalization of the said two companies, and said Beacon Lamp Company ordered to issue the same, upon surrender of their shares in said Beacon Vacuum Pump and Electrical Company to your orators."

We will call attention hereafter to the peculiar pertinency to the case of the last of these various forms of relief prayed for.

The bill also alleges as follows:

"What subscriptions have been made your orators are uninformed, except that your orators have, but only under protest and in order to preserve their rights, subscribed for an amount of stock in said Beacon Lamp Company pro rata to their holdings, but have not received any of the stock in said new company, nor have they ever surrendered their stock in said first-mentioned company; that, as they are informed and believe, the amount of stock in said Beacon Lamp Company to which your orators would have been at liberty to subscribe has been allotted to others, but whether either paid for or issued your orators are not informed."

Whatever rights the majority of the shareholders of a corporation which finds itself in the doubtful pecuniary condition into which the Pump Company had evidently fallen have with reference to the disposal of the assets of the corporation to a new one for a fair value, whether receiving therefor cash or the shares of the new corporation, when the transaction relates to an absolute sale, and amounts to a winding up of the corporate affairs, we must assume it to be the law that, independently of some appropriate statute provision, the majority has no power to involve the minority in a reorganization on the lines of this now in issue, or on any similar lines, without its consent, expressed or implied. The minority has a lawful right to maintain that the contractual relations which it established with a corporation whose shareholders they became does not include a contractual relation with any other corporation; and there is no right in law to compel it to elect between such new contractual relation and the loss of its shares in the old corporation, or compensation for them on any arbitrary basis which a reorganization may give. The underlying principle was stated in *Clearwater v. Meredith*, 1 Wall. 25, 39, and the rule seems to have been clearly recognized in *Mason v. Mining Co.*, 133 U. S. 50, 10 Sup. Ct. 224; but a rule at law is often one thing, and the right to relief in equity a very different matter. Equity will not raise its hand to give specific relief, and rescind and annul important transactions as to which there is no charge of a dishonest purpose, and which, if not interfered with, may give great profit to parties interested in them, or at least prevent them from suffering great loss, at the demand of a party who does not

show clearly and definitely a valuable and substantial interest, which has been unlawfully disregarded, or is in danger thereof, and who does not, under the circumstances of the case at bar, show that he has consistently maintained a position in protection of his rights adverse to the majority interest, or that he has had no opportunity so to do. Indeed, the rule was well stated by Mr. Justice Field in *Dimpfell v. Railway Co.*, 110 U. S. 209, 3 Sup. Ct. 573, to the effect that the equity courts will not interfere in matters of this character merely because there may be a doubt as to the authority sustaining the proceedings, or as to their wisdom, nor unless a real and substantial grievance exists. A convenient collection of authorities illustrating this proposition will be found in *Bassett v. Manufacturing Co.*, 47 N. H. 426.

As we have already shown, it may well be argued that the bill, which we must presume sets out the best case the complainants can make, nowhere alleges in terms which the equity courts can accept that the complainants have any such grievance, or, in any clear or positive way, that the complainants have brought it for any purpose except that of maintaining their strictly legal rights. On the other hand, the last variation in the prayers for relief, to which we have referred, involves an admission that the complainants make no objection to being put into a contractual relation with the new corporation, but that their real grievance is that they cannot receive their proportion of the 32,000 shares of stock, to be subscribed for, on better terms than their co-shareholders, by being relieved from the payment of the stated \$1.25 per share.

But, passing by all these questions, it is clear that the complainants have not maintained that consistent position necessary to relieve them against an equitable estoppel. They admit that they have subscribed for their proportion of the 32,000 shares of stock in the new corporation. They do not state the date when they made the subscription. The transfer of the assets to this corporation was made in July, 1895, and the bill was not filed until the 12th day of January, 1897; so that, although at the outset they protested against the reorganization, yet their subscription, in the absence of any proper allegation otherwise, must be presumed to have been made at such a time as justified the respondents in assuming that the Lamp Company was authorized, so far as the complainants were concerned, to receive the transfer of the property of the old corporation, and to commence and carry on its manufacturing business, thus involving itself in the liabilities and other complications inevitably arising therefrom. That this raised an estoppel in equity as against a bill praying rescission is too clear to need discussion. It is true that complainants allege that this subscription was under protest, and only to preserve their rights; but the bill does not give the court any details which would enable it to perceive that, by any possibility, the effect of the subscription, which of itself would be an accomplished fact, could be overcome by any protest or other formal reservation which might accompany it. The decree of the court below is affirmed, with the costs of this court for the appellees.

WHITNEY v. NATIONAL EXCHANGE BANK OF NEWPORT.

(Circuit Court, D. Rhode Island. December 8, 1897.)

No. 2,515.

1. MORTGAGE FORECLOSURE—SURPLUS PROCEEDS—JUNIOR MORTGAGEE—ESTOPPEL.

Bill in equity by a junior mortgagee for an accounting from a bank, an elder mortgagee, for surplus proceeds of a foreclosure sale by the bank. At the sale the bank's special agent, authorized to bid a sum sufficient to cover the elder mortgage, by mistake exceeded his authority, and bid a larger sum. *Held*, that the bank was not estopped to set up the mistake and lack of authority, or to deny its receipt of the sum bid.

2. SAME—EQUITABLE RELIEF.

That failing to show that the bank had received any actual surplus, or to prove that the junior mortgage had any actual value, or to offer any evidence thereof except the bid made by the agent through mistake, the complainant had shown no substantial title to equitable relief.

This was a suit in equity by Nathan Whitney against the National Exchange Bank of Newport.

William B. Whitney, for complainant.

William P. Sheffield, for respondent.

BROWN, District Judge. The complainant, Whitney, as holder of a fifth mortgage on real and personal estate, prays that the respondent bank, an elder mortgagee, account for a surplus arising upon a sale at auction by the bank under a fourth mortgage. At the sale the property was offered by the auctioneer, subject to three prior mortgages, the amount whereof was not stated. Upon a single bid of \$6,000, the property was declared sold to one Milliken, as agent for the bank. The bank has not perfected a paper title under this sale, and denies that Milliken's bid is binding upon the bank, for lack of authority. The evidence of Milliken's lack of authority to bind the bank to the amount of \$6,000 is clear. His agency was special, and his authority limited, and gave him no right to bid more than \$1 in excess of the amount of the four mortgages prior to the complainant's. Though he correctly understood the extent of his authority, he was led to exceed it by a mistaken belief as to the subject-matter of the sale, supposing that he was bidding upon the property free from incumbrances, instead of subject to the liens of the mortgages. The complainant invokes by his bill the doctrine of equitable estoppel to preclude the defendant "from denying that it did pay to itself, or did set apart in payment, the said sum of \$6,000, for which it sold and purchased * * * said * * * land." In my opinion, however, the complainant has failed to make out a case for the application of this doctrine.

In *Dickerson v. Colgrove*, 100 U. S. 578, it was said concerning equitable estoppel:

"The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and can-

not be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit."

The present case appears to me an attempt to misapply this doctrine to procure for the complainant a large sum, to which he has shown no just or substantial title, and to create out of the unauthorized act of the bank's special agent—the result of a clearly-proven mistake—a wholly inequitable measure of the money value of the complainant's right. The foundation of the complainant's right was his interest as owner of a fifth mortgage of property, upon which were prior incumbrances amounting to about \$15,000. The bill fails to allege that the property was of any value over these mortgages, and there is in the case no testimony sufficient to show that the complainant's paper security had any actual value. On the contrary, the course of dealings between the complainant and the bank, and the subsequent sale of the property under the third mortgage, for a price insufficient to satisfy the mortgage liens prior to the complainant's, together with the fact that the respondent bank has failed not only to realize any actual surplus, but also to secure the full amount of its own claim under the fourth mortgage, might well be considered sufficient proof that the complainant's mortgage was a mere paper security, without actual value.

A complainant who seeks the aid of a court of equity must make out by affirmative proofs that he has a substantial right. The sole evidence of such a right in this case is the fact that Milliken made a bid of \$6,000, and that the property was struck off to him subject to the prior mortgages. The mistake of Milliken as to the subject-matter of the sale makes his bid entirely worthless as an indication of the value of the property actually offered for sale by the auctioneer. Although the bill alleges that the complainant's conduct was influenced by Milliken's acts, and by his ostensible authority, and that, in consequence, he did not bid at the sale, or attend a subsequent sale under the third mortgage, there is no evidence to support these allegations, and considerable evidence to the contrary. It is very remarkable that the complainant has given no testimony in the case, and that, though many of the matters set forth in the bill are peculiarly within his own knowledge, his failure to testify is unexplained.

The presumption from the unexplained absence of material testimony is entirely unfavorable to the case stated in the bill. Taken in connection with the evidence, which conclusively proves that in making the sale the respondent had no other object than the payment of its own claim; with the agreement of the bank prior to the sale that the complainant might repurchase from the bank at whatever price it should bid the property in for; with the fact that, on the morning following the sale, the bank, in accordance with this agreement, presented the complainant's son and agent with a memorandum of the amount of the incumbrances, as the price for which the complainant might receive a conveyance of the property; this presumption leads to the conclusion that the grounds of estoppel set up in paragraph 9 of the bill are without foundation in fact. Not only does it appear that the bank has not in fact received any benefit which in equity belongs to the complainant, but it is also apparent that the respondent,

both before and after the sale in question, gave the complainant the fullest opportunity to redeem, and offered favorable terms of redemption.

That the complainant understood that his agreement with the bank before the sale was such that his rights were not substantially affected thereby is apparent from his letter to the treasurer of the bank, written after the sale. The letter is as follows:

"Bennington, Nov. 12, 1889.

"Mr. Norman—Dear Sir: We have been thinking the hotel matter over since the sale, and, in the first place, we are a long distance away, and as my foreman on the farm thinks he cannot stay another year with me, so that I will probably have to be out there a longer term next spring than usual, so that it may not be convenient for me to give any time to the Block Island property, I told my son how I should probably be situated, and if he thought best, and could make a sale of it, or, in case we were not able to make a sale before spring, would run it, I would try and fix the security with you. Will graduates late next June, and will necessarily be very busy this winter and spring, and writes that he does not think it best for us to try to have anything to do with it. Under the circumstances, it will be necessary and best for us not to attempt to redeem it.

"Yours, truly,

Nathan Whitney."

All that the complainant can claim from a court of equity is just compensation or a restitution of rights. As this complainant fails to show any loss for which compensation should be made, and has deliberately abandoned the opportunity to secure his interest in the property upon just and equitable terms, the present bill can be regarded only as an attempt by a mortgagee whose security was worthless to create, out of the mistake of the defendant's special agent, a fictitious valuation of a worthless security, and to base upon this valuation his appeal for the intervention of a court of equity.

To sustain his bill would be an act of great injustice to the respondent. For the unauthorized act of its special agent, resulting from a mistake, without any proven damage to the complainant, the respondent, in addition to its own loss as a prior mortgagee, would be compelled to pay a large sum, which the complainant on no principle of equity or justice is entitled to receive. The bill will be dismissed, with costs.

MERCANTILE TRUST CO. v. MISSOURI, K. & T. RY. CO.

(Circuit Court, S. D. New York. January 11, 1898.)

1. EQUITY PLEADING—PLEA AND ANSWER.

Under rule 37, providing that no demurrer or plea shall be held bad on argument because the answer may extend to some part of the same matter covered by such demurrer or plea, pleas in bar and estoppel to the complaint will not be stricken out because they go to the same matter covered by the answer, when such pleas do not cover the whole bill, and, where covering the same ground as the answer, show different grounds of defense.

2. SAME—SCANDALOUS MATTER.

Parts of an answer, though immaterial as a defense, and scandalous in nature, will not on that account be suppressed, when intended to meet charges of bad faith made in the bill.

This was a suit in equity by the Mercantile Trust Company against the Missouri, Kansas & Texas Railway Company, praying an injunction, accounting, and other relief. The cause was heard on exceptions to the report of a master, to whom were referred the questions arising on certain motions made by the complainant to strike out parts of the answer and pleas.

F. K. Pendleton, for plaintiff.

Simon Sterne and E. Ellery Anderson, for defendant.

WHEELER, District Judge. The bill alleged:

"That on or about the 1st day of June, 1890, and at various dates thereafter, the said defendant railway company made, executed, and issued, and, for value, delivered to various persons and corporations, its 23,000 bonds, certified by your orator as trustee, numbered from 1 upwards, of which bonds, 17,000 were and are of the denomination of \$1,000 each, and 6,000 were and are of the denomination of \$500 each; amounting, in the aggregate of their principal sum, to \$20,000,000. Each and all of said bonds are dated on the 1st day of June, 1890, mature 100 years after the date thereof, and bear interest at the rate of 4 per cent. per annum, payable semiannually, in gold coin of the United States, on the 1st days of February and August in each year." That to secure the payment of the bonds the defendant conveyed all its property to the plaintiff, by second mortgage, dated June 1, 1890, with this proviso in section 4: "But the covenant to pay the interest coupons belonging to said bonds maturing on the first of February, 1891, and each six months thereafter, to and including the coupons to mature August 1st, 1895, is subject to the following condition and agreement: The said company shall render each six months an account of the gross earnings, income, receipts, interest, dividends, or profits received from the said mortgaged property. It shall charge against such gross earnings all operating and maintaining expenses, taxes, repairs, renewals, replacements, and insurance; and in each statement it shall charge six months' interest on the forty million dollars of first mortgage bonds. Such net earnings as shall remain after the charges above specified shall have been made shall be applied to the payment of the said coupons." And that "if it should, at any time during the said five years, be deemed expedient to apply any portion of the earnings of the said railway company to purposes other than those hereinbefore specified in this section, the said earnings may be so applied: provided, however, the written sanction of the party of the second part shall first be obtained." That the first coupons upon all of the bonds matured February 1, 1891, and the defendant neglected and refused to render any such account for the six months ending that day. "That, as your orator is informed and believes, the defendant railway company claims and represents that there was no net earnings derived from said mortgaged property, as defined by said section 4 of said mortgage, for the six months ending February 1, 1891; but, as your orator is informed and believes, and therefore now avers, the statements and representations of said defendant railway company in this behalf are wholly untrue and false, and, to the contrary thereof, your orator avers, upon its information and belief, derived as hereinafter stated, that net earnings from said mortgaged premises, as defined in said mortgage, for the said six months ending February 1, 1891, were made and received and existed to a very large sum, to wit, a sum in excess of the amount of interest represented by all of the coupons maturing upon that date. That the defendant railway company has never sought or obtained, and your orator has never given, its sanction, written or otherwise, as contemplated in section 4. Your orator, however, avers, upon information and belief, that notwithstanding no such sanction or authorization has been sought or obtained from your orator, or given by it, a large proportion of the earnings for the period ending February 1, 1891, were applied to, and paid out for, expenditures other than those particularly defined in said section 4, * * * and that such excessive expenditures and unauthorized application of said earnings included amounts paid for new

side tracks, new buildings, real estate, fencing, equipment, and other purposes not included within the provisions of said section 4 as aforesaid, and that the earnings of said property during said period, so used and applied without authority in the provisions of said mortgage, and without such sanction of your orator, aggregated, as your orator is informed and believes, a sum upwards of \$900,000. And your orator further avers, upon like information and belief, that the said defendant railway company has continued to apply, and threatens to further apply, large amounts of the earnings from the said mortgaged premises to like purposes, not included in the specific provisions of said section 4, and without the sanction of your orator as in said section contemplated. In this behalf your orator avers, upon information and belief, that the said defendant railway company has entered into agreements whereby it has undertaken to pay and guaranty the payment of the following obligations: (1) All of the interest upon two million five hundred thousand dollars of the first mortgage bonds of the Kansas City & Pacific Railway Company. (2) All of the principal and interest of the first mortgage bonds of the Sherman, Denison & Dallas Railway Company, the authorized issue of which is one million six hundred thousand dollars, and of which two hundred thousand dollars have been issued. (3) All of the principal and interest of the first mortgage bonds of the Dallas & Waco Railway Company, of which one million one hundred and seventy-three thousand dollars have been issued, out of a total authorized issue of two millions of dollars. (4) All of the principal and interest on one million of dollars of the first mortgage bonds of the Southwestern Coal & Improvement Company. That in the guaranties of said bonds of the Kansas City & Pacific Railway Company, the Sherman, Denison & Dallas Railway Company, and the Southwestern Coal & Improvement Company, the said Missouri, Kansas & Texas Railway Company assumed excessive obligations, in large part in the interest of its own officers and directors, who were personally and financially interested in the securities so guarantied, and in the properties embraced in said mortgages. That the said Missouri, Kansas & Texas Railway Company proposes and intends to apply the earnings and revenues from the property covered by said second mortgage to your orator as trustee to the payment and accomplishment of said guaranties, in preference to the payment of the coupons of the said second mortgage bonds." And that this suit is instituted in compliance with a request of bondholders.

The prayer is for an injunction restraining application of any net earnings:

"That a writ of permanent injunction may be issued, under the seal of this court, perpetually enjoining and restraining the defendant, the Missouri, Kansas & Texas Railway Company, its officers, agents, and attorneys, from applying (without the written sanction of your orator, as in said mortgage provided) any of the net earnings or income from the premises described in said second mortgage of the Missouri, Kansas & Texas Railway Company, as the same are therein defined, to any other or different use or purpose than the payment of the coupons and interest of said second mortgage bonds as the same have matured or may mature, until said coupons have been paid in full from such net earnings derived during the six-months periods to which such coupons, respectively, apply,"—for an account of the earnings for the six months ending February 1, 1891, and payment over of the net earnings, and for further relief.

The defendant pleaded that, in a suit by the plaintiff against the defendant in the circuit court of the United States for the district of Kansas, the property mortgaged was in the hands of receivers from November 1, 1888, to July 1, 1891, who operated and administered the property, and rendered full account thereof, which was approved and confirmed by the court, in bar and as an estoppel, and as accounts stated, and res adjudicata between the plaintiff and defendant. 41 Fed. 8. "And, for an answer to such parts of the said bill as are not pleaded to and in support thereof," the defendant admits the mortgage, as made pursuant to a re-

organization agreement entered into during the receivership; sets up the settlement and confirmation of the accounts; and "avers that from and by the accounts aforesaid, so rendered, approved, confirmed, and accepted as aforesaid, which said accounts are, as between the complainant and defendant herein, accounts stated, it conclusively appears that there were no net earnings, as in point of fact there were none, derived from the property of the defendant for the period of six months prior to the 1st day of February, 1891, and applicable conformably to the terms and conditions of the mortgage of June 1, 1890"; and "denies that there was or existed any sum whatsoever in excess of the amount of absolute fixed charge, or any sum whatsoever applicable to the payment, in whole or in part, of the coupons of the bonds secured by the said mortgage to the complainant, maturing either on the 1st day of February, 1891, or the 1st day of August, 1891"; and "admits that no application has been made by the defendant, or upon its behalf, to the complainant, for any application of its earnings, other than as authorized by the mortgage of June 1, 1890, but the defendant denies that it has ever made, or has in contemplation the making of, any application of any of its said earnings in any manner inconsistent with the requirements, covenants, and conditions of the said mortgage appended to the complaint"; admits the guaranties, but "denies that it proposes or intends to apply any of the earnings and revenues of its property, except in good faith, and in all respects in conformity with the covenants and obligations imposed upon it in and by the said mortgage of June 1, 1890"; avers complicity of the officers of the plaintiff with others in attempting to injure the defendant; and "avers, and charges the fact to be, that this bill is filed, and this suit brought and prosecuted, not for the purpose of protecting any of the interests of the bondholders secured by the said mortgage of June 1, 1890, to the complainant, but that the filing of the said bill, and the prosecution of this litigation, is to their detriment and injury, and for the purpose of impeding and interfering with the business management of the property of the defendant."

The plaintiff moved to strike out, in substance, so much of the answer as set up complicity of officers, and bad motives in bringing the suit, and moved "for an order striking out the pleas heretofore filed by the defendant to the bill of complaint herein, upon the ground that the answer of the defendant to the said bill of complaint covers and extends to all of the matters embraced in said pleas, and thereby constitutes a waiver of said pleas." On motion of plaintiff, and consent of defendant, it was ordered that it be referred to "one of the masters of this court, to hear and report, with his conclusions and opinion, in respect to all the matters embraced in and covered by the said motions and exceptions of the complainant." The master has reported that in his opinion the pleas should be stricken out, because waived by the answer, and that those parts of the answer should be stricken out as scandalous or immaterial, and not constituting any defenses. Exceptions to this report have now been heard.

These somewhat lengthy extracts from the pleadings show clear-

ly that the pleas do not profess to, and do not in fact, cover the whole bill. They apply to so much of the claim for net earnings for the six months next before February 1, 1891, as the possession and accounting of the receivers would meet, but leave the allegation of net earnings in fact applicable to the coupons of that period, and those charging an intention to divert such earnings in the future, wholly unanswered. The answer denies that there were in fact such net earnings so applicable during that period, and states the receivership at the suit of the plaintiff against the defendant covering that period, and the settlement of the accounts of the receivers, including the earnings in that suit, to show why there were in fact no net earnings to be accounted for here. Perhaps the receivership and accounting would be available, under the answer, as a defense in an accounting here for any period covered by them, as evidence showing nothing to account for, and in that view the answer may be said to cover the same ground as the pleas; but they would not be available to show that no accounting for that period should be had, and in that view the answer would not cover the whole ground of the plea. They are merely included in statements tending to different grounds of defense. Formerly, as pleas raise the question whether the defendant ought to answer the bill, or a part of it pleaded to, an answer to the bill, or to that part, was deemed to be a waiver of the pleas. *Stearns v. Page*, 1 Story, 204, Fed. Cas. No. 13,339. Equity rule 37 changed this in the federal courts. As to the origin and effect of that rule, Judge Blatchford, in *Hayes v. Dayton*, 18 Blatchf. 420, 8 Fed. 702, said:

"The plaintiff contends that the putting in of an answer to the whole bill is a waiver of the demurrer. Rule 32 in equity permits a demurrer to a part of a bill, a plea to a part, and an answer as to the residue. If, impliedly, that rule forbids a demurrer to the whole bill, and at the same time an answer to the whole bill, the plaintiff's remedy is by moving to strike out either the answer or the demurrer, or to compel the defendant to elect which he will abide by. By going to argument on the demurrer the plaintiff waives the benefit of the objection now taken, if otherwise he would have it. Moreover, rule 37 in equity provides that 'no demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.' This rule was first made in March, 1842, to take effect August 1, 1842. 17 Pet. lxvii. There was no such rule in the prior rules of March, 1822 (7 Wheat. v.), although rule 18 in such prior rules was the same as the above present rule 32. Under the rules of 1822, not only had it been held (*Ferguson v. O'Harra*, Pet. C. C. 493, Fed. Cas. No. 4,740) that where there was a plea going to the whole bill, and also an answer to the whole bill, the court would, on the plaintiff's motion, disallow the plea on the ground of its being overruled by the answer, but Judge Story had held in 1840, in *Stearns v. Page*, 1 Story, 204, Fed. Cas. No. 13,339, that where a plea stated a ground why the defendant should not go into a full defense, and yet the defendant answered, putting in a full defense, it would be held on the argument of the plea that the answer overruled the plea. Then rule 37 was made. It applies to the present case. The demurrer is allowed, with costs."

This is not varied by what was said by him on the same subject, and done, in *Grant v. Insurance Co.*, 121 U. S. 105, 7 Sup. Ct. 841, except, perhaps, "where the answer extends to the whole of the matter covered by the plea"; nor by *Huntington v. Laidley*,

79 Fed. 865. The "matter" of these pleas is the statement of the same accounts between the same parties for the same time, and a judicial confirmation of them, as a bar to a restatement; and to that, as an effect, the answer does not and cannot extend. The pleas, therefore, should not be stricken out.

As defenses, strictly, the parts of the answer found by the master to be immaterial and scandalous are so; and, if that were all, they should be suppressed. But the bill itself brings forward the motives of the suit, and charges bad motives to the officers of the defendant. The plaintiff has no right to say that its allegations of these things shall not be met. Some of the statements in the answer go further, perhaps, than was justifiable; but as the master divided them by the line of strict defenses, and that cannot be followed, no attempt to distinguish them on any other line is made here. Exceptions to report sustained, and motion to strike out pleas and exceptions to answer overruled.

CHISHOLM et al. v. JOHNSON.

(Circuit Court, D. Delaware. January 4, 1898.)

No. 197.

1. EQUITY PRACTICE—HEARING ON PLEAS.

After a hearing on a plea set down for argument under equity rule 33, the court has power, without passing upon the merits of the plea, to overrule it and direct the defendant to file an answer, without prejudice to his right, subject to all just exception on the part of the complainant, to set forth in the answer the matter contained in the plea, where such course appears to the court best calculated to secure the doing of full justice between the parties.

2. SAME—COSTS.

Where the matter presented by a plea set down for argument is such that it may reasonably be considered by the solicitor filing the plea to be good, although he be mistaken, and the plea is filed in good faith, and not vexatiously or for delay, costs should not be allowed to the complainant under equity rule 34.

(Syllabus by the Court.)

This was a bill in equity by Charles P. Chisholm, John A. Chisholm and Robert P. Scott, doing business under the firm name of Chisholm-Scott Company, against Zachariah Johnson, for alleged infringement of a patent. The cause was heard on a plea filed by the defendant.

C. L. Buckingham, for complainants.

Robert S. Taylor, for defendant.

BRADFORD, District Judge. The bill in this case alleges infringement by the defendant of certain letters patent owned by the complainants, relating to machines and methods for gathering, hulling and separating green peas, and prays for an injunction and an account of profits. The defendant interposed a plea to the whole bill. The plea was set down for argument and has been debated by the solicitors for the respective parties. It sets forth that the defendant

entered into a certain contract with one Empson which provided, among other things, that the latter was, for the consideration therein mentioned, to thresh for the former not less than a certain quantity of peas, to be furnished by the defendant, during a certain period; that the defendant was to supply Empson with all necessary power and labor for the operation of the machinery necessary to be used by Empson in performing his part of the contract, together with belting for the transmission of power to the machinery; and that Empson was to furnish the machinery. The plea further states that pursuant to the contract Empson furnished and set up two machines on the defendant's premises and threshed a quantity of peas belonging to the defendant, the power transmitted to the machines being received from an engine belonging to the defendant; that the machines were operated by an agent of Empson and were controlled and managed solely by such agent; that no part of the work was done by the defendant or his employes except the handling of the peas before and after the operation of threshing; and that "the defendant denies that otherwise than this he ever made, sold, owned or used any machine for threshing peas or used or practiced any process therefor."

The plea is one of non-infringement and, as such, is of very doubtful propriety. 3 Rob. Pat. § 1112; *Sharp v. Reissner*, 9 Fed. 445; *Korn v. Wiebusch*, 33 Fed. 50. It also lacks directness, amounting only to an argumentative denial of the infringement alleged in the bill, and is, therefore, objectionable. *Story*, Eq. Pl. § 662; *McDonald v. Flour-Mills Co.*, 31 Fed. 577. There is some contrariety of practice as to the method of taking advantage of such defects in pleas in equity. In *Korn v. Wiebusch*, and in *McDonald v. Flour-Mills Co.*, the plea had been set down for argument and was overruled, in the former case, because it set up non-infringement, and, in the latter, because it was argumentative. It may be a serious question whether correct procedure does not require a motion to strike the plea from the files, or the filing of exceptions to the plea, in order to take advantage of such defects. But these points of practice are not intended now to be decided. I am satisfied that, under the circumstances disclosed in the case, the doing of full justice between the parties is more likely to be secured by leaving the merits of the defense, sought to be raised by the plea, to be disposed of after the filing of an answer, rather than by now dealing with those merits. A decision, at this stage, of the broad question substantially presented by the plea might lead to embarrassments and complications of a technical nature, which should be avoided, and probably would not hasten the final disposition of the cause. If the matter disclosed by the plea be the only defense, it can just as well be taken advantage of in an answer, which would involve but slight delay. On the other hand, if there be other matters of defense than that presented by the plea, the time of the final disposition of the cause would not be materially advanced by passing now upon the merits of the plea. The course, therefore, which commends itself to the court, is to overrule the plea and rule the defendant to answer by the first rule day in February next, without prejudice to the right of the defendant, subject to all just exception on the part of the complainants, to set forth in his an-

swer the matter contained in the plea. This course will conserve the rights of both parties and avoid the establishment possibly of a troublesome and unsound precedent, and falls within a legitimate exercise of "the equitable discretion always exercised by the court of chancery in relation to pleas." *Rhode Island v. Massachusetts*, 14 Pet. 210, 257. The costs should abide the event of the suit. Equity rule 34 provides that upon the overruling of a plea "the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay." Where matter presented by the plea is such that it may reasonably be considered by the solicitor filing the plea to be good, although he be mistaken, and the plea is filed in good faith, and not vexatiously or for delay, costs should not be allowed under the rule to the complainant. The rule is not susceptible of any other construction; for if it should be held to mean that the court must be satisfied that the plea is good in law or fact, as the case may be, the rule could have no operation, as the plea would not be overruled. Whatever may be the final decision of the court upon the merits of the cause, I think that, in the sense in which the language is employed in the rule, "the defendant had good ground in point of law or fact to interpose the plea," and that "it was not interposed vexatiously or for delay."

KITTEL v. AUGUSTA, T. & G. R. CO. et al.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

No. 41.

1. INSOLVENT CORPORATION—OFFICER AS CREDITOR—RIGHTS AND LIABILITIES.

A director of a corporation, who is also a creditor, is not guilty of a fraud because he places his claim in judgment, and sells the property of the corporation thereunder, provided he thereby obtains no advantage of other creditors; and where he buys the property himself, and fails to divide the proceeds with another creditor, of whose claim he has no knowledge, he can be held accountable by such other creditor for only a proportionate share of the actual value of the property so obtained,—not less than the amount bid.

2. SAME—ACCOUNTING TO OTHER CREDITORS—INTEREST AND COSTS.

Defendant, who was an officer, and also a creditor, of a corporation, sold its property under a judgment obtained by him. Complainant afterwards obtained a judgment against the corporation, and brought suit to compel payment of the same by defendant. No notice of his claim was given, or demand made, before suit. Held that, on rendition of a decree requiring defendant to divide the proceeds of the property sold pro rata, complainant was entitled to interest on the amount recovered, from the date of service of his complaint, and to costs.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by Joseph J. Kittel against the Augusta, Tallahassee & Georgia Railroad Company, the Carrabelle, Tallahassee & Georgia Railroad Company, and William Clark, and is brought up by cross appeals from the circuit court.

John A. Straley, for complainant.

Chas. B. Meyer, for defendants.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The facts out of which the cause of action arose are as follows: In 1889 and 1890 the complainant, Kittel, loaned \$29,450 to the Augusta, Tallahassee & Gulf Railroad Company (hereinafter called the Augusta Railroad), upon its promissory notes secured by mortgage upon 109,000 acres of land situated in the Northern district of Florida, and owned by said railroad. The notes not being paid, suit was brought on the mortgage, and judgment of foreclosure entered, directing the sale of the mortgaged premises, which took place in November, 1892. The premises sold did not realize the amount due for notes, interest, costs, expenses of sale, etc.; and a deficiency judgment against the Augusta Railroad, in the sum of \$6,893.05, was entered on February 28, 1893, in the United States circuit court for the Northern district of Florida. Execution thereon was duly issued to the United States marshal, and returned unsatisfied. The Augusta Railroad seems to have been undertaken in the hope of increasing the value of some lands in Florida owned by defendant William Clark. It was never built or equipped. Some 13 miles were graded, mainly through a swamp, rails laid on about 11 miles, and one or more bridges nearly completed. It owned a small tug, a locomotive, and a few flat cars. According to the evidence given by complainant's witnesses, from \$265,000 to \$400,000 was sunk in the enterprise, practically all of which (except Kittel's loan) was advanced by defendant Clark, who was one of the directors, and substantially the owner of the capital stock. Evidently, it was a speculative enterprise, which turned out disastrously. Appreciating this fact, Clark undertook to close out his interest. Suit was brought in his name in the United States circuit court to recover for moneys loaned by him to the company, and judgment by default entered in his favor on October 6, 1890, for \$432,228.42. Clark was at that time in Europe, and, through some error in duplicating part of the loan which figured in two notes, of which one was a renewal, the amount of this judgment was excessive. Upon petition to the court the error was rectified, and judgment reduced to \$296,484.90. Execution having been issued to the marshal, all the property of the Augusta Railroad (except the land covered by Kittel's mortgage) was sold January 5, 1891, to Clare and associates, for \$100,000. Clare was in reality acting on behalf of Clark. A new corporation, the Carrabelle, Tallahassee & Georgia Railroad Company, was organized, and the property turned over to it. This new railroad company is also practically the property of Clark.

The relief prayed in the bill was: (1) That the judgment in favor of defendant Clark against the Augusta Railroad, and proceedings under it, be set aside, vacated, and declared null and void. (2) In the alternative, that the \$100,000 received on the sale by Clark be declared the property of the Augusta Railroad, and subject to payment of complainant's claim. (3) That injunction be allowed, re-

straining the said defendants, or either of them, from disposing of said property. (4) That a receiver be appointed, to whom the said defendants shall be directed to assign said property and all parts of the Augusta Railroad, who shall be authorized to sell, and apply the proceeds to payment of complainant's claim.

The judge who heard the cause at circuit held as to the claim against Clark:

"He was an active and controlling director, and also a creditor with a just debt. The assets of the corporation should, and on proper proceedings would, be applied equitably (which would be ratably) upon the corporate debts. He did no more than any creditor might do, and got no more than any creditor standing out of any trust relation might have. But, as a director, he ought not to have any preference over any other creditor; and, if he should divide ratably with the plaintiff, he would not have. The \$100,000 so divided would seem to give the plaintiff \$1,901, and leave him \$98,099. The plaintiff should accordingly have a decree for that sum, but—it is so small a part of what he has claimed—without costs."

As to the claim against the Carrabelle Railroad, he held that the property in Florida could not be reached from here by a receiver, since it is without the jurisdiction, and that the Carrabelle Company could not be held liable for the \$100,000, since it never had anything to do with that money; and he dismissed the bill, as to that company, with costs. The bill was dismissed as to the defendant the Augusta Company without costs.

The cross appeals present many questions for consideration, but, by concession or withdrawal upon the oral argument, a large part of them are disposed of. Counsel for the appellant Clark stated that he would not press his assignments of error which questioned the propriety of the judgment against Clark for \$1,901. It will therefore not be necessary to enter into any discussion of the law bearing upon this branch of the case; but we may state that, upon the facts disclosed by the record, we concur with the court below that equity, as administered in the federal courts, should require Clark to divide the proceeds of the sale ratably with complainant.

At the close of the oral argument, counsel for complainant stated that he pressed his appeal only on four points: (1) That the court erred in taking \$100,000, only, as the sum to be thus divided ratably; (2) that complainant should have interest on his recovery; (3) that the court erred in refusing to give complainant costs; and (4) in giving costs to the Carrabelle Railroad.

It may be stated at the outset that although, under the decisions, Clark was technically guilty of fraud, as against Kittel, in procuring a sale of the whole property of the company of which he was a director in order to pay the debt due to himself, without protecting Kittel's claim, we are satisfied from the record that no actual fraud was perpetrated by him. Indeed, he seems to have been himself imposed upon, and deluded into an improvident investment, the only really valuable fruits of which were the 109,000 acres mortgaged to the complainant, and bought in by him on foreclosure. Clark was not only a creditor of the company for nearly \$300,000, but, except for Kittel, he was apparently the only creditor. There is some vague testimony by one Blake, the promoter of the scheme, and at one time

president of the Augusta Company, to the effect that "it was somewhat indebted; that it owed a number of tradesmen; it owed some of its employés; it owed some attorneys." But the treasurer of the road testified that, so far as he knew, there were no other creditors than Clark and Kittel, and that no claims of any such creditors have been presented against the company. Moreover, when Clark sold the property on his judgment, January 5, 1891, it was not yet determined whether or not Kittel's security would not be sufficient to protect his loan, for the sale in foreclosure under the Kittel mortgage was not until November, 1892. The enterprise in which he (Clark) had embarked was evidently a failure; his money, to the extent of more than \$300,000, had been sunk in it, producing nothing of value but the unfinished road, with its paltry equipment; efforts to dispose of the bonds had failed; the railroad practically lived only upon his advances, and when they ceased the work would cease; he had good reason to believe that he was not being dealt with in good faith by some of his official associates; the very loan of Kittel for which most of the real estate was mortgaged seems to have been kept from his knowledge; and he might, with good reason, decide to call a halt, and realize what he could. There was no inequity in his putting his claim in judgment. That such judgment was originally entered for an excessive amount was a clerical error, promptly corrected on his own motion, and not evidence of any bad faith. There was no inequity in his issuing execution upon his judgment, nor in selling the property upon his execution. Equity will not allow a director to obtain preference over other creditors by such judgment, execution, and sale, although bona fide, and therefore the court below required him to share the proceeds with the other creditor. Such proceedings by a director-creditor are sometimes characterized as fraudulent, either because, in the particular cause before the court, other facts showed that actual fraud was present, or because the word is used, inartificially, to indicate that equity will not permit a director to secure a preference over other creditors in this way. It is consonant with entire good faith for a director who is a creditor to enter judgment, issue execution, and sell all property seized under such execution, provided he does not thereby secure any preference, but divides the proceeds ratably with all others who are entitled to share with him. We know of no authority which controverts this proposition. If he neglects to share with another creditor, solely because he did not know of his claim, equity may require him to share when the claim is presented, because it would be inequitable for him to benefit by a preference which it may be presumed that he secured because he was a director. But that is a very different thing from holding that such a transaction is sufficient evidence of actual fraud on his part. If by such judgment, execution, and sale, the director gets possession (or secures possession to his friends) of the property at less than its value, he must account with the other creditors on the basis of the actual value, for he cannot thus secure an advantage to himself over the other creditors. But the court cannot evolve any fanciful estimate of value. It must determine that question from the evidence. The starting point is the price at which it was sold under the court's

order, and the director cannot show that it was worth less. Has it been shown in this case that it was worth any more than \$100,000? The only testimony which it is contended tends to show a greater value is that of the sanguine promoter of the scheme. When asked as to the fair and reasonable value of the property, he replied that, "considered as a basis for the enterprise as projected," it was worth the amount of bonds and stock "intended to be issued" per mile; and, as there were to be \$17,000 of bonds and \$17,000 of stock issued for each mile, the "eleven miles of road would make a valuation of \$374,000." This, of course, is mere wild speculation. The same witness further testified that the "total amount expended was \$265,000 to \$270,000," and that he "should think the property ought to have been worth what it cost, if properly utilized." This testimony is not especially persuasive, even if the court were disposed to place much confidence in the witness' estimate. The question is, what was the property worth when it was sold, not what it would be worth after half a million more had been expended in properly utilizing it. We must accept \$100,000, therefore, as the actual value of the property sold.

In view of the conclusions already expressed, to the effect that the defendant Clark was guilty of no actual fraud, and that when he received the proceeds of the sale it was not known that there would be any deficiency in Kittel's security; and in view, further, of the evidence in the case that, although nominally sold for \$100,000, the property was really bought in in the interest of Clark himself (no money passing on the transaction), and that he, through Clare and his associates, or through the Carrabelle Railroad, has since held property which has been wholly unproductive, and that until this suit was brought no demand was made to share in the proceeds of the \$100,000, and no notification given of the amount of deficiency judgment,—we concur with the court below in the conclusion that no interest is to be allowed, either from the date of the sale of the Augusta Railroad, or from the date of the deficiency judgment. The complaint in this suit, however, apprised defendant Clark that there was a creditor of the old road, entitled, *ex æquo et bono*, to share proportionately in the proceeds of the sale. If he wished to avoid payment of interest thereafter, he should have tendered the proportionate amount. Complainant is therefore entitled to interest on the \$1,901, his proportionate share, from the date of the service of the complaint; and, for the same reason, he is entitled to his costs in the circuit court.

Upon the only theory in this case upon which the proof will justify a decree in favor of the complainant, the Carrabelle Railroad is not a necessary party to the suit. The circuit court therefore properly dismissed the bill as to that corporation with costs.

The decree of the circuit court is therefore modified, and the cause remanded to that court, with instructions to decree in favor of complainant against defendant Clark for \$1,901, with interest from the date of the service of complaint, and costs; in favor of the Augusta Railroad, dismissing the bill, without costs; and in favor of the Carrabelle Railroad Company, dismissing the bill, with costs. As to the

costs in this court, inasmuch as complainant has, upon appeal, increased the amount of his decree against the defendant Clark, complainant is entitled to costs of this appeal. Inasmuch as complainant has, by his appeal, failed to disturb the decree of the circuit court in favor of the Carrabelle Railroad Company, that company is entitled to costs of this appeal against complainant.

DE NEUFVILLE v. NEW YORK & N. RY. CO. et al.

(Circuit Court, S. D. New York. January 10, 1898.)

EQUITY PRACTICE—INJUNCTION PENDENTE LITE.

An injunction pendente lite, restraining the issue of bonds under a mortgage by a railroad company having no title to part of the property described, will not be granted when complainant can obtain full and complete relief on final hearing, and in the interim can suffer no damage, through the issue of such bonds.

This was a suit in equity by Charles De Neufville against the New York & Northern Railway Company, the New York Central & Hudson Railroad Company, and others. The cause was heard on a motion for preliminary injunction.

Simon Sterne, for the motion.

Charles F. Brown, opposed.

LACOMBE, Circuit Judge. The decision of the court of appeals in *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N. Y. 410, 44 N. E. 1043, reversed the judgment of foreclosure under which the New York & Putnam Railroad Company claimed to own and hold the property of the New York & Northern Railroad Company, of which complainant was a stockholder. The lease, therefore, of the New York & Putnam Railroad Company to the New York Central & Hudson River Railroad Company was ineffectual to convey any right or title to such property, and the inclusion of such property in the new mortgage was wholly unwarranted. But this decision of the court of appeals was rendered in October, 1896, and the mortgage was not executed until June 1, 1897. The trustee under the mortgage is charged with knowledge—and so, indeed, is every bondholder—that the enumeration of such property in the mortgage given by the New York Central & Hudson River Railroad Company created no lien thereon in favor of the mortgagees.

The question now presented is whether complainant shall have an injunction pendente lite restraining the sale and issue of any more bonds under the new mortgage (bonds have already been issued to the amount of over \$4,000,000), and requiring so much of the mortgage as covers the property in question to be canceled and discharged of record. It might be a sufficient answer to this application to suggest that the trustee under the new mortgage has not yet been made a party. But assuming that, by a supplemental pleading setting up the making of the mortgage, such trustee were brought in, there is no reason for granting the relief prayed for in

advance of the hearing. If it be decided at final hearing that the mortgage must be canceled and discharged of record so far as it covers the property in question, relief thus granted will fully protect all complainant's rights as against the mortgage. Thereafter the mortgage can certainly constitute no cloud upon the title of complainant's company to the property. There will no longer be even any pretense of a lien thereunder. Complainant, therefore, will not find his measure of relief at all impaired by having to wait for it until final hearing. Nor will complainant be injured irreparably, or, indeed, in any degree, by the circumstance that more bonds may be issued in the interim. This court knows of no authorities supporting the proposition suggested, that the bona fide purchaser of a railroad bond issued under a mortgage which professed to cover property to which the railroad company had no title (the fact of want of title being perfectly apparent to any one who took the trouble to look before mortgage was executed or bonds sold) obtains thereby some equity against the owner of the property. Whether there be issued \$4,000,000 or \$40,000,000 of these bonds can make no difference to complainant, nor in any way interfere with his obtaining full relief at final hearing. Motion denied.

HAMOR v. TAYLOR-RICE ENGINEERING CO.

(Circuit Court, D. Delaware. December 23, 1897.)

No. 187.

1. CORPORATIONS—CAPITAL STOCK—TRUST FUND.

The capital stock of a corporation is a trust fund for the payment of the corporate indebtedness, before any distribution among the stockholders.

2. SAME—CAPITAL STOCK DEFINED.

The capital stock of a corporation, in its merely nominal sense, is the sum specified in its charter or certificate of incorporation, and thereby usually divided into aliquot shares; and such sum is intended to represent in amount the corporate fund which is to serve as the basis for the business or enterprise for which the corporation was created.

3. SAME.

In its substantial sense, the capital stock of a corporation is the fund of money or other property, actually or potentially in its possession, directly or indirectly derived or to be derived from the sale by it of shares of its stock or their exchange by it for property other than money. This fund includes not only money or other property received by the corporation for shares of stock but all balances of purchase money, or instalments, due the corporation for shares of stock sold by it, and all unpaid subscriptions for shares.

4. SAME—DISPOSITION OF CAPITAL STOCK.

In the absence of statutory authority in that behalf a corporation, whether solvent or insolvent, has no legal power to reduce the fund represented by its capital stock by any formal or voluntary act on its part, to the prejudice of its creditors either then or thereafter existing, by distributing any part of it among the stockholders by way of dividend, or by giving any part of it to one or more stockholders, or by disposing of any part of it in any other manner, except by way of changing its form to meet the exigencies of the corporate business.

5. SAME—PURCHASE OF STOCK—ULTRA VIRES.

It is ultra vires of a corporation to dispose of any part of its property other than surplus or net profits for the purchase of shares of its own stock, and a promissory note given by the corporation for that purpose is a nullity.

6. SAME—RECEIVERS.

Receivers of an insolvent corporation represent both the corporation and its creditors and have the right to assert any defense to which the creditors, in contradistinction to the corporation, are entitled.

7. SAME—BURDEN OF PROOF.

Where a corporation gives its promissory note to one of its directors for the purchase of shares of its own stock from him, and within four months thereafter is adjudged insolvent, and has not sufficient assets for the payment of its debts, the burden rests upon the payee of the note who seeks to have it allowed as a claim against the corporation, if, in any event, the existence of a surplus or fund of net profits at the time of the giving of the note might avail him, to show the existence at that time of such surplus or profits.

(Syllabus by the Court.)

This was a suit in equity by John M. Hamor against the Taylor-Rice Engineering Company. The cause was heard on the exceptions of the receivers of the defendant company to a claim against it, filed by Dwight D. Willard.

Levi C. Bird, for Willard.

William S. Hilles, for receivers.

BRADFORD, District Judge. An order having been made in this cause notifying all creditors of the defendant to prove their claims and file the same in this court, Dwight D. Willard filed with the clerk, December 2, 1896, a verified claim amounting to \$2200, with interest thereon from June 22, 1896, based upon a promissory note made by the defendant to his order for the above mentioned sum, bearing date March 19, 1896, and payable three months after date. The receivers of the defendant excepted to the allowance of the claim, as follows:

"As to the claim of Dwight D. Willard, being No. 25, these receivers deny that there is any obligation whatsoever on the part of the said company, the said claim being on a note made by the company to the order of Dwight D. Willard, the consideration for which said note, as these receivers are informed and believe, being the amount agreed to be paid by the said company to the said Dwight D. Willard in purchasing from him stock of the said company, which transaction and the giving of which note these receivers claim was ultra vires so far as the corporation was concerned and not within the power of said company."

The solicitors for Willard and the receivers, agreeing that the exception to the said claim should be determined by the court without the intervention of a master, filed an agreed statement of facts, upon which argument has been heard. The facts so stated are as follows:

"The Taylor-Rice Engineering Company is a corporation duly created by and existing under the laws of the state of Delaware, said corporation having been formed and organized under an act entitled, 'An Act concerning Private Corporations,' passed at Dover, March 14th, 1883. It is agreed that the certificate of incorporation of the said corporation shall be taken as part of this case stated. That the said company, on the 19th day of December, A. D. 1895, gave to the said Dwight D. Willard a certain promissory note, of which the following is a copy:

"\$2200.

Wilmington, Del., December 19, 1895.

Three months after date we promise to pay to the order of Dwight D. Willard, at the First National Bank of Wilmington, two thousand two hundred dollars, without defalcation, for value received.

The Taylor-Rice Engineering Co.
Jas. A. Taylor, Prest.

'Edmund Wright, Jr., Treasurer.'

That the said note was renewed for three months on the 19th day of March, A. D. 1896, which said renewed note is the basis of the claim of the said Dwight D. Willard against the said receivers. That at the time the first of the said notes was given, the said Dwight D. Willard was a director of The Taylor-Rice Engineering Company. That said note was given to the said Dwight D. Willard by the said company in part payment of thirty shares of the capital stock of the said company of the par value of one hundred dollars each, and that the said Dwight D. Willard, upon the receipt of the said note and \$500 in cash paid by the said company, surrendered or was to surrender to the said company the said stock. That the said transaction above set forth was authorized by a meeting of the board of directors of the said company, held shortly before the said note was given. That at the time said note was given and when the said resolution was passed, said corporation was indebted to various persons in considerable sums of money, the greater portion of which is still due and unpaid; but the said corporation in the opinion of the said directors was in a solvent condition. That at the time of the giving of the said note, the greater portion of the stock was owned by the directors of the said company, then consisting of James A. Taylor, John V. Rice, Junior, Edmund Wright, John M. Rogers and the said Dwight D. Willard. That the said board of directors thought that said corporation was solvent and that it was then possible to carry on the business of the said company, and to pay the obligations of the said company, together with the note of the said Willard. That on the 17th day of April, A. D. 1896, and before the maturity of the renewal of said note, the said James P. Winchester and James A. Taylor, were appointed by the circuit court of the United States for the district of Delaware, receivers of the said company, by reason of the insolvency thereof, and that there are not sufficient funds or property in the hands of the said receivers to pay the indebtedness against the said company, exclusive of the claim of the said Dwight D. Willard. That nine tenths or more of the stock of the corporation was owned by the directors, who, at a meeting of the board of directors, authorized the purchase of the said stock and the giving of the said promissory note. The aggregate merchandise accounts against the corporation presented to the receivers, now aggregate \$1475.92, nearly all of which, to wit, \$1137.93, was contracted by the corporation after the note was given to Willard in purchase of his stock, and the balance of the indebtedness other than the Willard note, to wit, \$6692.35, is to James A. Taylor, the president and a director of said corporation, and to John M. Rogers, a director of said corporation, who, as directors, agreed to the purchase of the stock from Willard, and who directed the corporation to give the said promissory note. That the directors who agreed to the purchase of said stock and giving of said promissory note, at the time of the giving of said promissory note, took said action because they believed it to be for the best interests of the corporation in a financial point of view. Taylor's account was for salary due from the corporation and Rogers' claim was for money loaned to the corporation, the Rogers account having been incurred long previous to the purchase of the Willard stock and part of the Taylor salary earned before that time. That the receivers object to paying the said note on the ground that the giving thereof was not within the power of the said company, and was void as against the other creditors thereof."

The defendant was incorporated in September, 1894, under the general incorporation law of Delaware, chapter 147, vol. 17, Laws Del. 1883, with power "to manufacture and sell engines of all kinds, and all appliances pertaining thereto, machinery, tools, tools of precision for

measurements, and all other tools and machinery whatsoever." The capital stock authorized in the certificate of incorporation was \$55,000, divided into 550 shares of the par value of \$100 each, it being required that \$35,000 should be paid in before commencing business. Subsequently, by a supplemental certificate obtained in February, 1895, the authorized capital stock of the defendant was increased to \$750,000, divided into preferred and common stock, the former amounting to \$250,000 and the latter to \$500,000; the par value of shares in each being \$100. It does not appear whether the stock which the defendant undertook to purchase from Willard was part of its original authorized capital stock, or whether it was common or preferred stock issued under the supplemental certificate. Nor does the statement of facts specifically disclose the circumstances under which, or the purposes for which, the defendant undertook to purchase its stock from Willard; nor does it appear whether the defendant at the time of making the first note had a surplus, or a fund of net profits, nor whether it was then solvent or insolvent, or, if then solvent, whether the value of its assets was in excess of the par value of its capital stock issued under or authorized by its charter.

There are few, if any, doctrines more firmly rooted in our jurisprudence than that the capital stock of a corporation is a trust fund for the payment of the corporate indebtedness, before any distribution among the stockholders. In *Upton v. Tribilcock*, 91 U. S. 45, 47, the court said:

"The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just minded man, and will not be permitted by the courts. * * * The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away."

In *Sanger v. Upton*, 91 U. S. 56, 60, the court said:

"The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it bona fide for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security."

In *Crandall v. Lincoln*, 52 Conn. 73, 94, the court said:

"The stock of a corporation is its only basis of credit. Unlike a partnership, its members generally are not individually liable for its debts. The character, reputation and credit of its promoters do not attach to the corporation itself, except to a limited extent. Hence it is of vital importance that the law should rigidly guard and protect the capital stock. Otherwise, especially in these days when so large a portion of the business of the country is carried on by corporations, confidence, on which the prosperity of the country largely depends, would be seriously impaired. Hence it is that in equity the capital stock of a corporation is now regarded as a trust fund for the payment of debts. The creditors have a lien upon it, which is prior in point

of right to any claim which the stockholders as such can have upon it; and courts will be astute to detect and defeat any scheme or device which is calculated to withdraw this fund or in any way to place it beyond the reach of creditors."

The capital stock of a corporation, in its merely nominal sense, is the sum specified or authorized in its charter or certificate of incorporation, and thereby usually divided into aliquot shares; and such sum is intended to represent in amount the corporate fund which is to serve as the basis for the business or enterprise for which the corporation was created. In its substantial sense, the capital stock of a corporation is the fund of money or other property, actually or potentially in its possession, derived or to be derived from the sale by it of shares of its stock or their exchange by it for property other than money. This fund includes not only money or other property received by the corporation for shares of stock but all balances of purchase money, or instalments, due the corporation for shares of stock sold by it, and all unpaid subscriptions for shares. *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, Id. 56; *Sawyer v. Hoag*, 17 Wall. 610; *Burke v. Smith*, 16 Wall. 390, 395. The fund may through accident, shrinkage in values, or business misfortune, be impaired; but, subject to such contingencies, it is intended to, and should, be equal to the par value of the nominal capital stock which it represents. The public in dealing with a corporation has a right to assume that its capital is real, and not fictitious, and that it is equal, subject to such possible impairment, to the capital stock it purports to have and which it holds itself out to the public as possessing. The capital stock of a corporation widely differs in legal import from the aggregate shares into which it is divided by the charter. *Farrington v. Tennessee*, 95 U. S. 679, 686; *People v. Coleman*, 126 N. Y. 433, 437, 27 N. E. 818. While the former includes only the fund above described, the latter represent the totality of the corporate assets and property and, directly or indirectly, the management of the affairs of the corporation. The stockholders have the right, according to their amount of stock, to participate in dividends declared, to vote at stockholders' meetings, and on the dissolution of the corporation, after all corporate indebtedness has been paid, to share between them the remaining assets. A corporation may own property far in excess of its capital stock, or it may, with property less than its prescribed capital, be engaged in a very prosperous business, and in either case the value of the shares may in the aggregate be a multiple of the total capital stock. So, when the corporate assets are in excess of the capital stock, the shares, through unreasonable delay in declaring dividends or other mismanagement, may be less than par in value. The value of the shares in the hands of stockholders, therefore, is no criterion of the value of the capital stock. The latter does not include a surplus or net profits. A solvent corporation, with a surplus or a fund of net profits, may dispose of such surplus or profits for any legitimate purpose within the scope of its charter, whether expressed or fairly implied. And possibly an expenditure from such surplus or profits for the purpose of getting rid of a troublesome stockholder by buying his stock, with a view to its reissue for value, would be

proper. The case presented, however, does not call for a decision on this point.

But, whether a corporation be solvent or insolvent, the fund represented by its capital stock must remain inviolate for the protection of its creditors. In the absence of statutory authority in that behalf a corporation has no legal power to reduce this fund by any formal or voluntary act or contract on its part, to the prejudice of its creditors either then or thereafter existing, whether by distributing any part of it among the stockholders by way of dividend, or by giving any part of it to one or more stockholders, or by disposing of any part of it in any other manner, except by way of changing its form to meet the exigencies of the corporate business. Such an act or contract is ultra vires, not only of the directors or stockholders, but of the corporation itself. In *Farrington v. Tennessee*, 95 U. S. 679, 686, the court said:

"The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations. It represents whatever it may be invested in. If a large surplus be accumulated and laid by, that does not become a part of it. The amount authorized cannot be increased without proper legal authority. If there be losses which impair it, there can be no formal reduction without the like sanction. No power to increase or diminish it belongs inherently to the corporation. It is a trust fund, held by the corporation as a trustee."

In *Burke v. Smith*, 16 Wall. 390, 395, the court said:

"The stock subscribed is the capital of the company, its means for performing its duty to the commonwealth, and to those who deal with it. Accordingly, it has been settled by very numerous decisions that the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the state shall lose any of the benefit of his subscription. Every such arrangement is regarded in equity, not merely as ultra vires, but as a fraud upon the other stockholders, upon the public, and upon the creditors of the company."

If a corporation be incompetent to release a subscriber to its capital stock, whose subscription has not been paid, it is equally without authority to expend the fund represented by its capital stock for the purchase of shares held by a stockholder who has paid for them. In either case the trust fund for creditors is lessened, whatever may be the effect upon the interests of stockholders in the absence of any indebtedness. There are many decisions by the state courts, and some dicta in the opinions of the supreme court, which support the proposition, that a contract of a corporation, not contra bonos mores or involving malum in se or forbidden by the charter or any other law, and merely beyond the grant of corporate power, can be enforced against the corporation after it has been executed on the part of the plaintiff, notwithstanding the fact that the plaintiff at the time of entering into the contract was aware of the lack of corporate authority. But this doctrine has not been accepted by the supreme court. In *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 48, 59, 11 Sup. Ct. 484, the court said:

"The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon

three distinct grounds: the obligation of every one contracting with the corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. * * * A contract of a corporation, which is ultra vires in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

The promissory note of March 19, 1896, on which Willard bases his claim, was given in renewal of a note for the same amount, between the same parties, made and delivered December 19, 1895. Whatever infirmity inhered in the original note attached to the renewal note. The consideration for the original note was the surrender by Willard to the defendant of certain shares of its capital stock held by him. He now seeks to be recognized as one of the creditors of the defendant. Was the money which the defendant undertook to pay him for his surrender of stock to come out of any surplus or fund of net profits, on the one hand, or, on the other, out of the fund represented by the capital stock? The defendant was adjudged insolvent and receivers were appointed within four months after the giving of the original note; and it is admitted that there are not sufficient funds or property in their hands to pay the corporate indebtedness, exclusive of the alleged claim of Willard. In so far as the existence of a surplus or fund of net profits at the time of the taking of the original note might tend to the establishment of a right on his part to compete with the creditors of the defendant, the burden of proof rested upon him to show the existence of such surplus or profits. No such showing has been made; and it cannot be assumed that such was a fact. The note must be treated as an undertaking by the defendant to dispose of part of its capital stock to secure a surrender of Willard's shares. It was a contract to do what was ultra vires of the defendant, as against its creditors, and was a nullity; and, therefore, the note given in renewal is void.

The transaction in question was prohibited not only by the general principles of law applicable to corporations, but by the general incorporation act of Delaware. Section 11 provides that the certificate of incorporation shall set forth, among other things, "the amount of capital stock, the number and par value of shares, and the amount to be paid in before commencing business, which shall not be less than ten per cent. of the whole capital," and also "the value of real and personal estate of which the corporation may become seized and possessed." Section 7 provides:

"It shall not be lawful for the directors of any bank or moneyed or manufacturing corporation in this state, or any corporation created under this act, to make dividends, except from the surplus or net profits arising from the business of the corporation, nor to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the said corporation, or to reduce the said capital stock, except according to this act,

without the consent of the legislature; and, in case of any violation of the provisions of this section, the directors, under whose administration the same may happen, shall, in their individual capacities, jointly and severally, be liable at any time within the period of six years after paying any such dividends to the said corporation, and to the creditors thereof in the event of its dissolution or insolvency, to the full amount of the dividend made or capital stock so divided, withdrawn, paid out or reduced, with legal interest on the same from the time such liability accrued," &c.

The payment to stockholders of any part of the capital stock of a corporation to secure the surrender of its shares, which, on general principles, is ultra vires of the corporation, is by the above section expressly prohibited; and by that section, for the amount of money so paid, such directors as actually or impliedly take part in such illegal action are made liable to the corporation or its creditors. Willard was a director of the defendant at the time he took the original note, and the receivers represent both the corporation and its creditors. It is true that section 23 provides:

"If any incorporated company in this state shall purchase any of the stock of such company, or take the same in payment or satisfaction of any debt due to them, such stock shall not be voted, either directly or indirectly, at any election for directors of said company."

But no inference can justly be drawn from this provision that the corporation can, as against creditors, alienate any part of its capital stock for the purchase of shares thereof. The section is to be read in the light of the other provisions of the act. Corporations created under the act, in many instances, are authorized to and do own real and personal property in excess of their prescribed or authorized capital stock. They may have a surplus or a fund of net profits. It is possible that under certain circumstances a corporation may have legal power to buy shares of its own stock with its surplus or profits, such power being coupled with a legal duty on its part promptly to re-issue such shares for value. However this may be, it is clear that no power exists in a corporation, as against its creditors, to impair the fund, represented by its capital stock, by expending any portion of it in purchasing shares of its own stock.

It was urged in argument that the receivers represented the defendant, and that, if the circumstances of the case were such that it would have been precluded from denying the validity of the promissory notes, the receivers are equally precluded from so doing. But this position is untenable. The receivers, representing both the creditors and the defendant, have the right to assert any defense to which the creditors, in contradistinction to the defendant, are entitled. *Carbon Co. v. McMillin*, 119 N. Y. 46, 23 N. E. 530; *Beach*, Rec. § 671. The facts do not disclose any actual fraud or unfair dealing on the part of Willard. His intention may have been blameless. The law, however, did not sanction the transaction in which he engaged, and his alleged claim must, accordingly, be disallowed with costs.

NATIONAL BANK OF REDEMPTION v. RUTLEDGE et al

(Circuit Court, N. D. Ohio, W. D. August 31, 1897.)

1 JURISDICTION OF FEDERAL COURT—SUIT ON OFFICIAL BOND OF COUNTY OFFICER.

Federal courts may have jurisdiction of suits on the official bonds of state and county officers.

2. COUNTY AUDITOR—PURPOSE OF BOND.

The bond of a county auditor is not given simply to protect the funds and people of his county from loss by reason of his failure to faithfully discharge the duties of his office, but as well to protect the whole world from injury resulting from his abuse of his official position.

3. OFFICIAL ACT—LIABILITY OF SURETIES.

Any act which, if done genuinely and honestly by an officer would be an official act, is, if done dishonestly and fraudulently, an act done by virtue of his office, and the sureties on his bond conditioned for the "faithful discharge of the duties of his office" are liable for injuries resulting therefrom.

4. COUNTY AUDITOR—FRAUDULENT ISSUE OF BONDS.

A county officer who is authorized by law to issue genuine bonds by affixing his signature and seal thereto, if he affixes that signature and seal to fraudulent bonds, it is an official act, for which he and his sureties are liable.

This is an action against the defendant and the sureties on his official bond as the auditor of Hardin county, Ohio, by which they bind themselves that he "shall faithfully discharge the duties of his said office" during the term thereof.

The petition alleges that, in violation of the law and the obligation of the bond, the defendant fraudulently signed and issued \$10,000 of false and duplicate "ditch bonds," purporting to be authorized, ordered, and issued by the commissioners of the county. The bonds are dated July 1, 1891; part of them payable July 1, 1897, and a part July 1, 1898; all bearing 6 per cent. interest, semi-annually, with coupons attached, due April and October 1st of each year. The petition further states that the commissioners, as allowed by law, had authorized the issuance of \$30,500 of "ditch bonds," which were ordered to be sold, and were sold to one Lewis; that the defendant conspired with Lewis to duplicate the issue with fraudulent bonds, which was done,—\$10,000 of them, bearing the numbers named in the petition, coming into the hands of the plaintiff in due course of trade, for value, without notice of the false and fraudulent character attached to them. The county refused to recognize and pay this overissue of bonds, and now this petition alleges as a breach of the official bond the wrongful acts above stated. The demurrer presents two questions: First, the jurisdiction of the court is denied; and, secondly, it is alleged that the petition on its face shows no cause of action against the sureties.

Leedom & Lewis and Doyle & Lewis, for plaintiff.

West & West and John H. Smick, for defendants.

HAMMOND, J. (after stating the facts). There is no objection taken to the jurisdiction of the court except the anomalous one presented in the argument that the federal courts can have no jurisdiction of suits on the official bonds of state officers because the exercise of such a jurisdiction would interfere with and compromise the independence of state government in its local operations. No authority of any adjudication, text writer, or commentator, is cited or suggested for this position, and I feel free to say that it is one which, in my experience, I have never heard suggested in the states south of the Ohio river, or elsewhere, and it therefore seems to me a novel sugges-

tion of very distinguished counsel, coming from that section of the country which, historically, has not been given to exaggerated notions of states' rights. The argument in favor of this position is based upon the statement that counsel has found in the books no cases upon the bonds of state officers, except some in the District of Columbia, where the government of Virginia brought suit upon official bonds given to the state, and one in Nebraska, where a suit was brought by the party injured upon the official bond of an officer who had fraudulently issued county warrants. *Virginia v. Evans*, Fed. Cas. No. 16,969, 1 Cranch, C. C. 581; *Virginia v. Turner*, Fed. Cas. No. 16,970, 1 Cranch, C. C. 261; *Id.*, Fed. Cas. No. 16,971, 1 Cranch, C. C. 286; *Virginia v. Wise*, Fed. Cas. No. 16,972, 1 Cranch, C. C. 142; *McConnell v. Simpson*, 36 Fed. 750. It is sought in argument to avoid these precedents by suggesting that the defendants had left Virginia, and were found in the District of Columbia, and it was a matter of necessity that the government should sue them there. It is more probable that the defendants resided in that portion of Virginia which was cut off to make the District of Columbia, and were, therefore, sued in that place. And as to the Nebraska case it is suggested that the point was not made, and therefore passed sub silentio. No matter what the necessities were, if the jurisdiction did not exist because of an unconstitutional interference by the federal courts with the rights of the states, the suits could not have been brought. The suggestion of a sub silentio precedent is often available to avoid its force, but not always, and particularly when there is no precedent cited for the contrary principle. Nor could they have been brought if the act of congress had not conferred the necessary jurisdiction; and our judiciary acts have never embodied any such exception from the general grant. I have not searched the books for precedents of suits brought in the courts against state officials on their bonds, either where the state is, by its own consent, the nominal party plaintiff for the use of the party who has been injured, or where the plaintiff may bring the suit in his own name by authority of law; but such suits are common in the experience of many lawyers, and are not supposed to be anomalous. It may be suggested, however, in reply to the argument, that, after the original constitution of the United States was offered to the states, a clamor was made against it that it permitted the states to be sued by citizens of other states and aliens in the federal courts, and in order to quiet this clamor the eleventh amendment was proposed and adopted; and if it had been then supposed that suits like this would compromise the independence of the states, the eleventh amendment surely would or should have been made to comprehend it. That was the opportunity of the states to protect themselves against any obnoxious jurisdiction of the federal courts in relation to their own statehood; and, being then engaged in the business of securing such protection, the absence of any direct exclusion of this class of cases is strongly in favor of the jurisdiction.

The other branch of the demurrer raises the ever-present question whether the alleged breach of the bond comes within its stipulations, and presents again the distinction between that which is done by the officer *virtute officii* and that which is done only *colore officii*. The

difficulty rests not in understanding the principle that the sureties are liable in the one case, and may not be in the other, but in determining whether the given facts bring the case within the one or the other category. This is often complicated with the peculiar phraseology of the condition of the particular bond in controversy. In this case, however, we are not confronted with any limitations written in the condition of the bond, which is simply that the defendant "shall faithfully discharge the duties of his said office during the term for which he has been elected, as aforesaid," under which we are to look only to the statutes of Ohio declaring and defining his duties, in order to determine what they may be. A pertinent illustration of the above-mentioned distinction is found in the conflict of authority always raging in the books in the case of a sheriff or like officer having in his hands process authorizing him to seize the goods of A., and he seizes the goods of B., and the question is whether the sureties are liable on his official bond. Early in the history of the question the courts of the state of New York decided that they are not, but subsequently, in the case of *People v. Schuyler*, 4 N. Y. 173, those cases were overruled, and the law is now established that they are. There were dissenting opinions, however, in that leading case, the arguments of which are always resorted to, as in this case, whenever the liability of the sureties is denied, one of the counsel here quoting largely from these dissenting opinions. *People v. Schuyler*, supra. In New Jersey this doctrine was vigorously combated and denied upon arguments almost identical with those which have been used in this case. *State v. Conover*, 28 N. J. Law, 224. I have not taken the trouble to count the states pro and con upon this question, because I find that the state of Ohio has distinctly taken the side of the state of New York, and establishes the liability of the sureties in such a case. *Ohio v. Jennings*, 4 Ohio St. 418. In my judgment, the same argument that makes the sheriff's sureties liable in a case like that makes these sureties liable in a case like this. So far as I can see, the principle is precisely the same; and I do not find in the argument that has been made here any suggestion different from that which is found in the opinions of the judges in New York, New Jersey, and elsewhere, who combat the doctrine of the liability of the sureties. I have examined every Ohio case that has been cited by counsel on either side,—not more particularly than the rest, but more anxiously, in order to find safe guidance in this never ceasing conflict of opinion,—and I do not find a single case which seems to me to be authority for a denial of the liability of the sureties on the facts we have here. Take the case, so much relied upon by the defendants, of *McGovney v. State*, 20 Ohio, 93, where it was held that a bond intended to be drawn in its words so as to secure those interested in the estate of "James" Findley did not accomplish that purpose when erroneously it was written "Joseph" Findley. In *Lang v. Pike*, 27 Ohio St. 498, an appeal bond written to secure a judgment against two could not be permitted to operate where the actual judgment was against one. In *State v. Corey*, 16 Ohio St. 17, a bond to protect school funds was not allowed to protect general township funds. And in *Myers v. Parker*, 6 Ohio St. 501, a bond mentioning the supreme court was not allowed to cover the dis-

strict court exercising the appellate jurisdiction; and so on in all the cases cited by the defendants there is this principle enforced as it is everywhere: that the liability of the sureties is *strictissimi juris*, and they are never bound beyond the very precise words of their obligation. Neither are the sureties here to be so bound; but the exact words of their obligation are very comprehensive, indeed, while they were very limited in the class of cases which have been cited by counsel. Among the cases cited by the defendants that which is seemingly closest in analogy to this case is *Holt v. McLean*, 75 N. C. 347, where it was held that the sureties of the register of deeds were not liable for damages arising out of the false and fraudulent issuance of a marriage license. But upon an inspection of that case it will be found that the condition of the bond was confined by express words to the duty of the register "safely to keep the records and books of his office," and the subsequently occurring words, "to faithfully discharge the duties of his office," were held to be limited by that special recital of his duties which comprehended only those of a custodian of the public records. As was remarked by one of the judges in some case that I have examined, but failed to note, the failure here was occasioned by the neglect of the state legislature to provide a sufficiently comprehensive bond to protect the public against all malfeasance in office. The judge remarked that it was open to the state to protect itself by careful attention to this matter of the condition of the bond, and undoubtedly the laws of Ohio fixing the condition of the bond we have before us were made with special reference to this duty of protecting the public by making a comprehensive bond.

I neglected just above to notice the much-cited case of *State v. Medary*, 17 Ohio, 554, where it was held that a bond did not cover an office not named in it, although most intimately allied to it both in the character of the duties to be performed and in every other respect; but the distinction there was a very plain one. The bond was to cover the duties of a member of a particular board, who had all the duties to perform that devolved upon any member of the board; but in the practical operations of the business from among its own members the board selected a "commissioner of the board," who was charged with the responsibility for certain moneys; and it was held that a bond to cover the discharge of his duties as a member of the board did not cover those special duties as "a commissioner to that board"; and the case, like the rest, falls within the suggestion that has been made with reference to the numerous list of Ohio cases that have been noticed.

Perhaps I should, from local pride, mention the Tennessee cases that have been cited to me. The case of *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200, was a suit for malicious prosecution for a wrongful arrest of a person by the sheriff, and, inasmuch as the sheriff had no process in his hands for the arrest of this citizen, it was held that it was not made *ex virtute officii*, but only *colore officii*. In the case of *Turner v. Collier*, 4 Heisk. 89, where an officer falsely represented himself to have process, and did not, it was held that his sureties were not liable. It will thus be seen that perhaps Tennessee has aligned itself with the states that oppose the doctrine of *People v. Schuyler*,

supra, on this point; but the state of Ohio, as I have already shown, has aligned itself the other way.

I may here notice the case of *Ware v. Brown*, 2 Bond, 267, Fed. Cas. No. 17,170, where a notary public falsely and fraudulently certified that a joint owner had signed and acknowledged before him a deed, when he had not done so. It was not a suit against his sureties, —if he had any sureties,—and they are not mentioned. The suit failed because brought by a remote vendee, but the language of Judge Leavitt is quite applicable here:

"The fraud and malfeasance of the defendant, if the facts averred in the declaration are true, show a most repulsive official corruption on the part of the defendant; and if this action were prosecuted by Buffington, who was the person so defrauded by the acts of the defendant in his official character as notary public, there would be no question that it would be sustained, and that he could recover to the extent of any loss or injury he may have suffered."

Does any one suppose that, if the notary public had given a bond to faithfully discharge the duties of his office as notary public, and the sureties had been sued, it could have been held that this was a bare individual liability of the notary public, and not one attaching to him in his official capacity, for which his sureties would be liable? It may be claimed that that case exhibits a more directly official act than the one we have in hand, but I doubt it.

The case of *State v. Sloane*, 20 Ohio, 327, has been especially commented upon in argument by counsel, for one reason,—because the opinion is by that eminent judge, Mr. Justice Ranney. He says that the sureties were not liable in that case, "especially under the doctrine constantly applied in this court, and reiterated again at this term, that the undertaking of sureties is to receive a strict construction, and not to be extended by implication to cases not falling within the terms of the contract into which they have entered"; which is the undoubted doctrine, well stated, that is to be found governing all courts, whether they proceed upon the lines of the narrowest liability of the sureties, or are disposed to be more liberal in the interest of the public. Everybody agrees to that doctrine. In that case the court of probate had appointed a guardian, and the law required that before he could enter upon the duties of his trust he should give a bond, which he did not do. There had grown up a habit in the office of the clerk of issuing to guardians what were called "letters of guardianship." The law knew of no such letters or authority, resembling letters of administration or letters testamentary, and it was wholly gratuitous on the part of the clerk to issue them. Their only function was as a convenient evidence that the guardian had qualified; but the clerk had no duty to perform in relation to the appointment of guardians except that of keeping the records showing that the court had appointed them, and that they had filed their bonds; and it was held that, under the circumstances, for this gratuitous service the sureties were not liable in damages; and the case is in line with all the other Ohio cases upon that subject. It is precisely like in principle to the North Carolina case above commented on, where the register of deeds issued a false marriage license, which was not within the limitations of his bond, although it was in that case within his authority as an official to issue marriage licenses.

There is a very discriminating opinion in the case of *Commonwealth v. Cole*, 7 B. Mon. 250, which is cited by the defendants. It was a constable's bond, conditioned "in all other things to faithfully execute and perform the said office of constable according to law." I do not know that a court can find any safer guidance in the application of the particular facts of any case than to follow the indications of this opinion, in which Chief Justice Marshall of Kentucky uses this language:

"Conceding, as we are disposed to do, that this class of conditions should receive the same liberal construction, for the protection of the community against fraud, extortion, and every fraud or oppression incident to an abuse of official character and powers of a constable, still there must be some reasonable limits to its operation. It cannot cover all acts which the individual may do while he holds the office of constable, nor even all acts which, in their nature, pertain to the office, and might, under rightful circumstances, be rightfully done by the constable. The act must not only be of this nature, but it must be at least done by him as constable under claim and right to do the act by virtue of his office. And, so far as it implies acquiescence or co-operation in the party injured, this acquiescence or co-operation should be induced by a confidence in the official character and right as asserted." "It is to be recollected that the question is not how far the constable may be individually responsible for his own acts, but how far his sureties may be responsible for them, as by executing the official bond with him they have not only evinced their confidence in his capacity and other qualifications for the office, but have enabled him to assume the character and rights belonging to it. They may, perhaps, be justly held responsible for such acts within the general range of his powers as (though they had no legal authority in the particular instance) he does in the name and by color of the office and of the rights incident to it; but for acts which, in their nature, are wholly beyond the office, or for acts which, though within the general powers of the office, are neither actually authorized in the particular case nor pretended to be done in virtue of official authority,—that is, for acts done as a private individual,—they cannot be made responsible on the bond."

I desire to call attention particularly to the words "nor pretended to be done in virtue of official authority." This seems to be very important, and a safe guide in close cases as a test of the particular act that was done. If the official in the particular thing done is assuming to act in his official capacity, and he has, by virtue of authority of law governing his duties, the right to do a thing just like and precisely similar to that, and particularly where his function is to certify to the genuineness of the thing which he does, so that people dealing with his office and the things that come from it may with confidence rely upon the genuineness of his signature and seal, and all that, what he does in that behalf is not only done by color of his office, but it is done by virtue of his office; that is to say, he does those things by reason of the authority which the law has conferred upon him to do the like things when they are honestly and genuinely required to be done. It is a pretense, to be sure, in the case of the fraudulent duplicate issue of bonds; but it is none the less the exact counterfeit of that which may be genuine, and it is not a "faithful" discharge of the duties of his office to do the wrongful thing. In the case just cited from Kentucky there is required a very close attention to the facts in that regard to understand the force of those distinctions and their illustrative value in the process by which this case is to be determined, and I shall take time to call particular attention to them. The plaintiff knew that there were judgments against him in the office of the justice of the

peace, which in due course of business would come into the hands of Cole, the constable, for collection. Cole represented to the plaintiff that he had these executions in his hands against him for collection, and without more ado the plaintiff paid him the money. As a matter of fact, Cole did not have the executions in his hands, and the plaintiff had to pay it the second time. The case was decided upon demurrer in the absence of necessary averments of fact in the declaration, and not at all upon any principle that such representations were not covered by the bond, as against the sureties. The intimation is that, if the declaration had contained that which the court so properly points out it did not contain, it would have been good. It was not averred that Cole was constable at the time he made these declarations; but, conceding that this was implied, and also that it was sufficiently implied, on the declaration as it was, that Cole represented that the executions were then in force, yet it did not appear, says the court, even by implication, that any payment was made at the time these representations were made, or that there was any claim by the constable at that time of a right to coerce payment, or that the payments were made by virtue of the executions then in hand, or that the plaintiff had the belief that there was a right then existing on the part of the constable to collect the debt. Neither was it averred in the declaration that the process was not in fact in the hands of Cole at the time the representations were made. For all that appears, the representation may have been at that time true. He may have had executions in his hands. They may have been in full force when he said they were; or he may have received the money after he had made an actual return of the executions, or after they had expired, when he had no right to pretend to coerce collection. And it was not stated that the payments were made to Cole as constable, and, for all that appears in the declaration, they may have been made with full knowledge that he had no right to collect them as constable, and upon his promise to make a proper application of them to the judgments in the magistrate's court. From all this it will be seen that the plaintiff loosely paid money upon representations made at one time which may not have been true at the time he paid the money, the result being that the case was really decided upon an insufficiency of the declaration that the injury was the direct and proximate cause of the false and fraudulent conduct on the part of the constable. There is no intimation in the opinion that the constable's sureties would not have been liable if all the things had been averred in the declaration which the judge says were left out. There is no such defect in this declaration, for it is perfectly plain from the petition that when the fraudulent bonds were issued they were immediately put upon the market, and bought by the plaintiff upon the representations contained upon their face that they had been properly issued and attested by this officer, who was required by law to give them this very sanction of his signature and seal.

This sufficiently represents the character of the cases upon which defendants have relied in this argument, and they seem to me to be clearly inapplicable.

In the case of *Cricket v. State*, 18 Ohio St. 9, 23, speaking of an auditor's warrant which had been wrongfully issued, the court says:

"The warrant purported to be an official act. It was drawn under color of office, and constituted the means by which the money was drawn from the treasury." Learned counsel seek to avoid the force of this by saying that the sureties undoubtedly would be liable if, this auditor having issued these fraudulent bonds, they had, upon the faith and strength of that which he did, been actually paid by the treasury; but because the treasury discovered the fraud in time, and did not pay the bonds, it is said that the sureties are not liable. Now, why not? The act is just the same whether they were paid or not paid by the treasury, and it is only a question of who was injured; and this argument only amounts to saying that this bond was given for no other purpose than to protect the money actually in the treasury from such a fraud as this. But, even on that theory of protection only for the county and none others, surely the people are just as much interested in protecting their credit as they are in protecting their actual funds. They are just as much interested in protecting themselves from the danger that the fraud will not be discovered in time to withhold payment as they are in protecting the actual money that is in the treasury. The credit of the county is just as much a part of its assets and property as the funds it has on hand. Its protection from danger, although in some instance averted, and from the loss and injury that comes of defending just such suits as this, is sufficient to show that it is a specious and false assumption to say that, the bonds not having been paid by the treasury, the county and the people cannot be taken to have been injured by such a transaction as this. So that, assuming, for the sake of argument, that this position is correct, that this bond was only given to protect the people of the county of Hardin, and not outsiders, and by that test of what constitutes an official act they are injured by this fraudulent transaction, even if they have nothing more to do than to pay the costs of this suit, this brings it within even the rule contended for by counsel that the act must be of that nature which specifically injures the people of the county. But it has been well decided by the supreme court of Ohio itself in *Walsh v. Miller*, 51 Ohio St. 462, 38 N. E. 381, that these words, "for the faithful performance of all his duties," are, as in other cases of contract, to be interpreted according to the intention of the parties at the time the contract was made, and that this rule of *strictissimi juris* is not to override the other rule that the words are to be interpreted according to the manifest intention of the parties at the time. And can it be supposed for one moment that it was not within the intention of these parties to protect the county and the world against the fraudulent overissue of bonds by an auditor who has possession of its signature and seal, and the only power to attest their genuineness? Surely not. As before remarked, if such a construction were put upon these words, it would show that the legislature of Ohio did not pay that attention to the protection of the public which manifestly they have by such broad and comprehensive language as they used in this official bond, and not adopting those restrictive words which are found in too many of them. And another suggestion occurs that this rule of *strictissimi juris* applies rather to the words of the bond

as written and signed by the sureties, and is not to be extended to modify the language of the statute defining the duties in such a way that it would not be modified if no question of suretyship were involved. The construction of the words of the statute must be the same in any event. Under such language as we have in this bond, and under the description in the statutes of the duties that are required of an auditor of the state of Ohio, it seems to me that it is placing an entirely unjustifiable and strained construction upon the language used to confine the obligation to the protection of the people of the county and the taxpayers and the funds in hand in their dealings with the auditor. The public at large, under any well-regulated and intelligent public policy, should be protected in their dealings with the county as much as the county itself in its corporate interest in the business that is done. Whenever the state authorizes a county to issue negotiable bonds, by necessary implication those bonds are to be put upon the market; and it is therefore an invitation to the people everywhere, domestic and foreign, to come to that county, and deal with it, by lending their money to it, upon the faith of its credit, by purchasing its bonds. The officers designated to discharge the duty of issuing and certifying the bonds are put there for the very purpose of protecting not only the people of the county, but the public at large, against any such transactions as those which are alleged in this petition. It may not be too much to say that the office was created for that very purpose in relation to all the duties that devolve upon it in respect of issuing negotiable bonds to be floated on the market; and therefore the argument that has been made that would take this case out of the official duty of the auditor charged with the issuance of negotiable bonds is altogether like the arguments that are made everywhere in favor of the sureties of the sheriff when it is said he is not acting by virtue of his office, when he seizes the goods of a person against whom he has no process. But, taking into consideration the difference between the duties of a sheriff with process in his hands or without it and the duty of an auditor charged generally with the issuance of all negotiable bonds that have been duly authorized by law, and the application of even the reasoning which is invoked in behalf of the sureties in the case of the sheriff becomes wholly impertinent and inapt in its relation to the duty of the auditor. In the case of *Wayne v. Bank*, 52 Pa. St. 343, where the teller of the bank had authority to issue duebills, and he issued duebills to raise money for his own private use, it was held that his sureties were liable. See, also, *Bank v. Auth*, 87 Pa. St. 419. The distinction that was made in the argument of this case that bank tellers are put into office for the purpose of dealing with the public at large, and that their duties in that respect are different from the duties of an auditor of the state of Ohio, seems to me to be only a difference in the details, and not in the essential nature of their respective positions in their relation to this question; and that the underlying principle that governs in both cases is precisely the same, namely, that in the issuance of the paper of a corporation, whether of a county or a bank, that one charged with the duty of putting it out must act faithfully and honestly in

the doing of that thing. I have not been able to see the case of *State v. Newell*, 2 Ohio Cir. Ct. R. 203, but it is cited by the plaintiff's counsel as pertinent to this case. Upon the authority, among others, of *State v. Jennings*, 4 Ohio St. 418, already cited, and with an especial approval of the opinion of Judge Thurman in that case, the supreme court of the United States has thrown the great weight of its authority in favor of the doctrine of New York, Ohio, and other states, and against the contrary view, by deciding that a marshal of the United States, having process in his hands against one person, who seizes the goods of another, is liable by virtue of his office, and his sureties are bound. *Lammon v. Feusier*, 111 U. S. 17, 4 Sup. Ct. 286. This case is cited with approval, incidentally, in *Covell v. Heyman*, 111 U. S. 176, 181, 4 Sup. Ct. 355, and again in *Lamar v. McCullough*, 115 U. S. 163, 187, 6 Sup. Ct. 1, in which this language is used:

"In *Lammon v. Feusier*, 111 U. S. 17, 4 Sup. Ct. 286, where a marshal having attachment against the property of one person levied it on the property of a stranger, it was held by this court that the sureties on the official bond of the marshal were liable to the stranger because the marshal had acted *colore officii* although he had acted without sufficient warrant."

See, also, *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752.

Just as this auditor acted in the overissue of these bonds, without any actual authority. That was not only under color of his office, but in the discharge of the very duties which the statute in express words required of him. *Rev. St. Ohio*, §§ 1021, 1034, 4482. It is also made a penal offense for him to do that thing which he did. *Rev. St. Ohio*, § 6910. But I quite agree with the position taken by defendants' counsel that this latter section adds nothing to the force or effect of this bond. The sureties are not any more to be held liable because of that section than they would have been without it. *Commissioners v. Bank of Findley*, 32 Ohio St. 194; *McConnell v. Simpson*, 36 Fed. 750. But still it demonstrates that the legislature of Ohio has in the most emphatic method declared its own construction of the meaning of this bond, and of the meaning of the statutes of Ohio which devolve duties upon the auditor in respect of this particular function of issuing negotiable bonds. It was deemed advisable, in compelling the officer to act faithfully and honestly in such a matter, to enforce that fidelity and honesty by criminal penalties; and, while the penal statute adds nothing to the civil bond, it is a very important circumstance to evince the solution that the legislature of Ohio gives to the question whether such conduct is *ex virtute officii* or *colore officii*, or so much on the outside that it does not belong to the office at all. It is a legislative construction of the laws of Ohio and of the official bonds that are required to be given. It punishes the officer for a malfeasance in office also, even if it is a punishment to the individual as well for an offense against him who is injured. It goes to both wrongs. It is said by Judge Wallace in *Bernard v. Bowe*, 41 Fed. 30, 31, that the authorities are overwhelming to the effect that whatever is an attempt to perform an official duty in the execution of process is an official act. How much more surely is it an official act for an auditor charged with the duty

of placing his seal and signature upon bonds of the county to attest their genuineness to the commercial world, if he put that attestation upon bonds which are not the genuine obligations of the county? It may be said in behalf of the sheriff or marshal that the law always requires him to have in his hands process as special authority to make levies and seizures or arrests, and that is a physical indication of his authority, and the only authority he can have, his only source of power to act, and which is open to any one to demand and see and inspect. If, therefore, in the entire absence of such process, he seizes the goods of a citizen, and this can be held to be an official act, how much more clearly is it an official act in the case of an auditor, who has at any and at all times, everywhere, the power to write his own official signature as that of the county, and the possession of its official seal, and these become at any and all times, and under all circumstances, the insignia of his authority, and the symbol of his honesty and his county's as well. He is never without them, as the sheriff or marshal may be when there is no process in their hands, and therefore it is much more easy for the auditor to put the appearance of genuine sanction to his act than it is for the marshal or the sheriff. And therefore it seems to me that it is the much more certain to say that the auditor is in the discharge of his official duty when he signs and attests a fraudulent bond than it is to say that the sheriff or marshal is in the exercise of his office when he makes a false levy.

Other authorities might be cited from the state and federal courts to sustain the ruling we make,—that, where there is no limitation in the language of the bond itself or its recitals, and no limitation in the statutes conferring the authority upon the officer to do the thing, that which is done is done by virtue of his office, or is at least so, to state it more clearly, whenever, if the thing which he does were done genuinely and honestly, it would be an official act; so that, if he be authorized to issue genuine bonds by affixing his signature and seal, if he affixes that signature and seal to fraudulent bonds, it is an official act, for which he and his sureties are liable. Demurrer overruled.

FIDELITY & CASUALTY CO. OF NEW YORK v. EGBERT.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1897.)

No. 938.

1. ACCIDENT INSURANCE—MURDER OR SUICIDE—QUESTION FOR JURY—EVIDENCE.

Liability on an accident policy was denied, on the ground that insured committed suicide. The evidence tended to show that insured, 59 years old and in good health, took his pistol and left his house before daylight, in his nightshirt, telling his wife he was "going down to settle those dogs." Shortly afterwards his wife heard a shot, and saw him walk along the side of the house towards the east, then turn and go rapidly west out of her sight, and shortly afterwards she heard two shots. A neighbor across an alley west of the lot heard a shot, saw a white object in the alley, and sparks of fire on the ground, then saw a flash which did not seem to be near the white object, heard an explosion, and then the slam of the gate, on the east side of the alley. Blood and the pistol of insured, with

one loaded and five empty shells in it, were found in the alley. Insured was found dead in his lot near the gate, with two pistol or gunshot wounds in his body, around which his shirt was burned with powder. *Held* sufficient to sustain a verdict for plaintiff.

2. SAME—MURDER NOT PRESUMED—BURDEN OF PROOF—REFUSAL TO INSTRUCT.

On an issue of whether the death of insured was caused by suicide or by murder, after the court had instructed the jury that the burden was on the plaintiff to satisfy them, by a fair preponderance of the evidence, that the death of insured was accidental, that murder would not be presumed, and, if the evidence did not fairly and reasonably satisfy them that the death was accidental, their verdict should be for defendant, it was not error to refuse a request by defendant to instruct that "the law does not presume murder; it must be proved; if plaintiff relies upon the theory that insured was murdered, she must prove it by competent evidence; mere conjecture or supposition that insured might have been murdered is not enough;" and that if, upon the whole case, the jury found the evidence evenly balanced, they must find for defendant.

3. SAME—DEFINING ACCIDENTAL DEATH—ILLUSTRATIONS OUTSIDE OF ISSUES.

Where the only issue was whether the death of the insured was caused by suicide or by murder, and no other issue was submitted to the jury, it was not error for the court to cite instances of death by the accidental discharge of a gun or pistol, to illustrate the meaning of accidental death.

In Error to the Circuit Court of the United States for the District of Nebraska.

Action brought by defendant in error on an accident policy issued to her husband. The company defended on the ground that insured had committed suicide. Trial to a jury, finding and judgment for plaintiff (defendant in error), and defendant appeals, challenging the sufficiency of the evidence, and alleging error in refusing instructions.

Mr. Charles Offutt (De Lagnel Berier, on the brief), for plaintiff in error.

H. J. Davis (H. D. Estabrook and M. L. Learned, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and RINER, District Judge.

SANBORN, Circuit Judge. This writ of error challenges a verdict and judgment upon a policy of accident insurance. Augustus A. Egbert, the insured, died from gunshot wounds on April 30, 1895. By the terms of the policy in suit the Fidelity & Casualty Company of New York, plaintiff in error, insured Egbert for the benefit of his wife, Luthera L. Egbert, the defendant in error, against bodily injuries sustained through external, violent, and accidental means, but provided in its policy that, in case of injuries wantonly inflicted upon himself by the insured or inflicted upon himself or received by him while insane, the extent of its liability should be measured by the amount of premium paid. The issue was whether the deceased was killed through external, violent, and accidental means, or by injuries wantonly inflicted upon himself. This issue was tried to a jury, and the errors assigned relate to the charge of the court.

It is assigned as error that the court refused to direct the jury at the close of the evidence that the defendant could not recover more than \$42.30, the premium paid, and the interest thereon from August 30, 1895, because the evidence was insufficient to support a finding that

the insured was accidentally shot, and because the weight of evidence showed that he committed suicide. There was evidence tending to show that Egbert, a man 59 years old and in good health, rose from his bed about 3 o'clock in the morning, took his pistol, told his wife that he was "going down to settle those dogs," and left his house wearing an undershirt, nightshirt, and hat; that shortly afterwards his wife heard a shot, looked out of the window, and saw her husband walk along the south side of the house towards the east, and then turn and go rapidly towards the west, out of her sight; that she heard two shots shortly afterwards; that there was a heavy gate in the fence at the west end of the lot, which opened into an alley; that a neighbor who lived in a house west of the alley heard a pistol shot, arose, and saw through her window a white object in the alley and sparks of fire on the ground, and then saw a flash which did not seem to be near the object in white, heard an explosion, and then heard the gate slam; that blood and Egbert's pistol were found in the alley; that he was found dead in his lot, a short distance from the gate, with his night-shirt torn, and two pistol or gunshot wounds in his body, and that his shirt was burned with powder around the holes made by the bullets, and his pistol had one loaded and five empty cartridges in it. There was other testimony in the case, but, in view of that to which we have adverted, we are unwilling to say that the proof of suicide was so clear and convincing upon this trial that all reasonable men who heard it, and exercised a sound and impartial judgment, must have reached the conclusion that Egbert killed himself, and it is in such a case only that a judgment may be reversed in a federal appellate court for the lack of evidence to sustain it. *Insurance Co. v. Melick*, 27 U. S. App. 547, 553, 12 C. C. A. 544, 547, and 65 Fed. 178, 181, and cases there cited.

Another alleged error is that the court refused to instruct the jury that if, upon the whole case, they found the evidence evenly balanced, they must find for the defendant. But the court did charge the jury that the burden of proof was on the defendant in error to satisfy them, by a fair and reasonable preponderance of credible testimony and evidence, that Egbert's death was accidental, and that if the evidence did not fairly and reasonably satisfy them of that fact their verdict should be for the plaintiff in error. This was a fair and just statement of the rule of law invoked by counsel for the plaintiff in error, and it was not error for the court, after announcing this rule in its general charge, to refuse to give it in the exact words selected by counsel. *Insurance Co. v. Melick*, 27 U. S. App. 547, 562, 12 C. C. A. 544, 553, and 65 Fed. 178, 187, and cases there cited.

It is assigned as error that the court refused to instruct the jury that "the law does not presume murder. It must be proved. If the plaintiff relies upon the theory that the insured was murdered, she must prove it by competent evidence. Mere supposition or conjecture that the insured might have been murdered is not enough." But the court told the jury that the presumption was that murder would not be committed, and that they could not return a verdict for the defendant in error unless she satisfied them, by a fair and reasonable preponderance of credible testimony and evidence, that Egbert's

death was accidental. This portion of the general charge robs this assignment of all merit, and it falls powerless, under the rule to which we have already referred.

It is insisted that the court erred because it declared, in that portion of its charge in which it was defining an accidental death under the policy, that such a death might occur from a gunshot wound in four ways,—through the accidental discharge of a gun in the hands of the person killed, by the explosion of a gun in his hands through an accidental slip or fall, by the accidental discharge of a gun held by a third person, and by the intentional shooting of the victim by a stranger. The only issue presented in this case was whether the death of Egbert was caused by murder or by suicide, and the contention of counsel for plaintiff in error is that the court's reference to other methods of accidental shooting erroneously submitted to the jury questions that were not in the case. But a careful perusal of the entire charge shows that no issue was submitted to the jury except the single one which was presented by the evidence. In the portion of the charge criticised the court was merely citing instances of accidental death to illustrate the meaning of the term, and no juror could have supposed that he was to try any question except whether Egbert's death was the result of suicide or of murder. The charge was clear, concise, and free from error, and the judgment below must be affirmed, with costs.

TREMPER v. SCHWABACHER et al.

(Circuit Court, D. Washington, N. D. January 8, 1898.)

1. REMOVAL OF CAUSES—SUFFICIENCY OF PETITION—AMENDMENT.

Where the jurisdictional facts sufficiently appear from the removal petition, taken in connection with the laws defining citizenship in the states where the parties reside, of which the court takes judicial notice, a petition for removal alleging that the parties are respectively residents and citizens of certain cities in different states may be amended to show that they are respectively citizens of the states in which they reside.

2. SAME—PARTIES ENTITLED TO.

In an action against several persons jointly as co-partners, a removal by one of them is not precluded because the others have not joined with him in the removal petition, when they have not been served with process, and have not appeared in the action.

On Motion to Remand to the State Court.

Clarence S. Preston, for plaintiff.

Struve, Allen, Hughes & McMicken, for defendants.

HANFORD, District Judge. This is an action at law commenced in the superior court of the state of Washington for King county, by E. P. Tremper, in his capacity as receiver of the Spring Hill Water Company, a corporation organized under the laws of the territory of Washington, against the defendants, as co-partners, under the firm name of Schwabacher Bros., upon an alleged liability of said firm. The summons was served only upon the defend-

ant Louis Schwabacher, who appeared in the superior court, and filed his petition and bond for the removal of the cause into this court, alleging in his petition that the controversy in said action is between citizens of different states. The particular allegations of the petition as to the citizenship of the respective parties at the times when the action was commenced and the petition filed are, in substance, that the plaintiff individually, and in his capacity as receiver, was a resident and citizen of Seattle, in the county of King, in the state of Washington; that the petitioner was a resident and citizen of the state of California, residing in San Francisco; and that the other defendants were each residents and citizens of the city of San Francisco, in the state of California. The petition also states that the petitioner, Louis Schwabacher, is the only one of said defendants upon whom summons has been served in said action. An order was made and entered in said superior court accepting the petition and bond for removal, and directing the record to be certified to this court. The plaintiff has appeared in this court, and filed an amended complaint. All three of the defendants have appeared in this court, and joined in an answer to said amended complaint. To said answer the plaintiff has filed a reply, and the case has been set for trial. After proceeding so far in this court, a question having been raised as to the sufficiency of the petition for removal, the defendants have applied for leave to amend said petition so as to set forth in a more direct and formal manner the diverse citizenship of the parties, and the plaintiff has moved to remand the cause, on the ground that the petition for removal and the record at the time of removal failed to show by positive averments that the plaintiff was at the time of commencement of the action, and since that time, a citizen of the state of Washington, and that the defendants Abraham Schwabacher and Sigmund Schwabacher were at said times citizens of the state of California, and on the further ground that, as the defendants are sued jointly upon a joint liability, the cause could not be removed by a petition in which all of the defendants did not join.

1. While the decisions of the supreme court establish the principle that the facts necessary to authorize a circuit court of the United States to take jurisdiction of a cause originally commenced in a state court, and in which the right of removal has been exercised, must appear in the record at the time of removal, and that the jurisdiction of a circuit court cannot be sustained by amendments of the record made after removal, if the court would not have jurisdiction without such amendments (*Crehore v. Railway Co.*, 131 U. S. 240-245, 9 Sup. Ct. 692; *Jackson v. Allen*, 132 U. S. 27-34, 10 Sup. Ct. 9), still, where the jurisdictional facts are stated in a petition for removal in an imperfect manner, the circuit court may allow amendments for the purpose of making a good record. The latest decision of the supreme court bearing upon the question at issue which I have found is in the case of *Martin's Adm'r v. Baltimore & O. Ry. Co.*, 151 U. S. 673-710, 14 Sup. Ct. 540. In the opinion by Mr. Justice Gray the rule as to amendments is stated as follows:

"The incidental suggestion, in that opinion [referring to the case of *Ayers v. Watson*, 113 U. S. 594-599, 5 Sup. Ct. 641], that the petition for removal might be amended in the circuit court as to the form of stating the jurisdictional facts, assumes that those facts are already substantially stated therein, and accords with later decisions, by which such amendments may be allowed when, and only when, the petition, as presented to the state court, shows upon its face sufficient ground for removal. *Carson v. Dunham*, 121 U. S. 421-427, 7 Sup. Ct. 1030; *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692; *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9."

Tested by this rule, I consider the grounds for allowing the amendment asked for in the case to be ample. The petition for removal is defective in this: that instead of alleging positively and with directness that the plaintiff is a citizen of the state of Washington, and that the petitioners' two co-defendants are citizens of the state of California, it alleges that the plaintiff is a citizen and resident of the city of Seattle, in the state of Washington, and said co-defendants are citizens and residents of the city of San Francisco, in the state of California, leaving an inference to be drawn therefrom that said parties, respectively, are citizens of the states in which they reside. Taking into account the general laws of the state of Washington and of the state of California, prescribing the qualifications of citizens of municipal corporations, of which laws the federal courts are required to take judicial notice, in connection with the general conclusion stated in this petition for removal that the controversy in the action is between citizens of different states, the inference that the plaintiff was at the time of the commencement of the action, and at the time of removal proceedings, a citizen of the state of Washington, and that the petitioner's co-defendants at said times were citizens of the state of California, is a necessary inference. But legal conclusions and argumentative allegations of jurisdictional facts are not sufficient in a petition for removal. Instead of conclusions and inferences, the court must have set before it, in the record, positive and clear statements of all the jurisdictional facts. Therefore this petition is imperfect in form, and needs amending, although it cannot be said that the necessary jurisdictional facts are not shown substantially, since it does specify the ground of jurisdiction upon which the petitioner claimed the right of removal, and supports the general conclusion by statements which would be proper evidence in his favor upon trial of the issue, if the allegation were denied. The state laws being read into the petition, it does state the necessary jurisdictional facts, and shows upon its face sufficient ground for removal of the cause into this court; and I will therefore grant the application to amend, so that the facts may be stated in a more formal and direct manner.

2. The Code of the State of Washington provides that in actions against two or more defendants, if the summons is served upon one or more, but not on all of them, the plaintiff may proceed as follows:

"If the action is against the defendants jointly, indebted upon a contract, he may proceed against the defendant served, unless the court otherwise directs; and, if he recovers judgment, it may be entered against all of the defendants thus jointly indebted so far only as it may be enforced against the joint property of all and the separate property of the defendants served
* * * 2 Ballinger's Codes & St. Wash. § 4881.

Under this law, the defendant Louis Schwabacher was obliged to appear and make his defense in the action, without waiting for service upon his co-defendants. Therefore, at the time of filing his petition and bond for removal of the case, he stood alone, as if he were the sole defendant. He could not require his co-defendants to join in a petition for removal, nor claim a stay of proceedings. It cannot be claimed that there is a separable controversy between him and the plaintiff; but, from necessity, he should be allowed to exercise his right to have the case removed, because, as the case stood at the time of the removal proceedings, he was the only defendant. The courts have held that where a defendant who, if sued alone, would be entitled to remove a case into a circuit court of the United States, is prevented from exercising the right by being joined with other defendants not entitled to the privilege, he may, after the disability has ceased, by the case being severed as to his co-defendants, remove the case, even though the time allowed for removal would have been passed if there had been no such disability. *Yulee v. Vose*, 99 U. S. 539-546; *Cookery v. Railway Co.*, 70 Fed. 277-280. By a similar course of reasoning, I reach the conclusion that in a case where several defendants have a right to remove a case, and only one of them is brought within the jurisdiction of the state court, and required to defend, he alone may claim the right. If in one case the departure of the co-defendants who have appeared in court removes the barrier to the right of removal, the absence of co-defendants who have not been brought within the jurisdiction of the state court, at the time when the right of removal must be exercised or waived, should give the same freedom to a defendant, in court, who may desire to exercise the right. The motion to remand will be denied, and the application to amend granted.

CASPARY v. CARTER et al.

(Circuit Court, D. Massachusetts. December 14, 1897.)

No. 551.

1. DISCOVERY—ORDER FOR PRODUCTION OF BOOKS—SHOWING UNDER STATUTE.

A plaintiff in an action at law is not entitled, under Rev. St. § 724, to an order for the production by the defendant before trial of private books of account for the plaintiff's inspection on an affidavit merely stating that affiant "believes" such books will tend to prove the issues in the mover's favor, without stating any grounds for such belief.

2. SAME—PRACTICE.

Query as to the proper practice under Rev. St. § 724.

Brandeis, Dunbar & Nutter, for plaintiff.

Fowler & Prentiss, for defendants.

PUTNAM, Circuit Judge. This is a motion, based on section 724 of the Revised Statutes, for production in a common-law suit. It prays as follows:

"Now, the plaintiff moves that the defendants be ordered to produce forthwith, before a day certain, for the inspection of the plaintiff and his attorneys, and to allow the plaintiff and his attorneys to inspect, each and all of

the books and documents hereinafter mentioned, and that the defendants, upon failure to comply with said order, suffer judgment by default, viz.: All the books of the concern formerly doing business under the name and style of C. N. Carter; all the books of the defendant Charles N. Carter, kept as guardian of the defendant William W. Carter; all the books and documents in the possession or control of the defendants, or any of them, containing any entries relative to the formation of a limited partnership between the defendants Charles N. Carter and William W. Carter; all books and documents in the possession or control of the defendants, or any of them, containing any entries relative to the contributions of the defendant William W. Carter to the capital of the alleged limited partnership of C. N. Carter; all books and documents in the possession and control of the defendants, or any of them, containing any entries relative to the disposition made, either immediate or ultimate, of any contributions of the defendant William W. Carter to the capital of the alleged limited partnership of C. N. Carter; the ledger of C. N. Carter for the year 1892; the daybook of C. N. Carter for the year 1892; the journal of C. N. Carter for the year 1892; the cashbook of C. N. Carter for the year 1892; the checkbooks of C. N. Carter for the year 1892; the bank passbooks of C. N. Carter for the year 1892."

The suit seeks to charge one of the defendants as a general partner in an alleged special partnership. It has been the view of the court that it rests on that defendant to prove that he complied with the statute provisions relating to such partnerships, and the parties have so stipulated. Therefore what the plaintiff now asks for concerns more particularly, if not wholly, the defense.

At a prior stage of the litigation, an application was made to direct the defendant in question to answer certain interrogatories, filed under the Massachusetts statutes; and thereupon we directed that some of them be answered, though, so far as this court is concerned, the law must now be regarded as settled otherwise by the formal decision of Judge Aldrich in *Cash-Register Co. v. Leland*, 77 Fed. 242. We refused like directions as to other interrogatories, because they involved the production of books. This did not mean that such interrogatories may secure the production of books which cannot be reached under section 724, but that, for the federal courts, that section covers the whole subject-matter in suits at common law, except so far as a subpoena duces tecum may be effective. The only substantial allegations as to the materiality of the books whose production is asked is that they "will tend to prove the issue in this action in the mover's favor," and "will tend to prove that the defendant in question did not make a bona fide contribution to the capital of the firm." In other words, the plaintiff does not seek discovery of facts, but of matters of evidence which it is supposed will have more or less tendency to establish facts. The extent to which the affidavit accompanying the plaintiff's application goes is that the affiant "believes" the books called for will tend to prove as stated. No basis for the belief is given. The result is that, if the statute requires that this application be granted, it will always require that, on a mere affidavit of belief, each party to a suit at law may compel from the other party a general production of numerous books and papers in his possession, to enable the moving party to make the attempt to sift out of them circumstances, of more or less importance, tending to support his position as to the issues in the action. We would thus have a result fundamentally inconsistent with all hitherto

known rules, whether at law or in equity,—a power given to the adverse party, or to the court, to expose, and search through, a mass of private transactions with the mere hope of finding therein something relevant to the cause in issue. It is impossible for us to credit that the law is so sweeping as this, and no authority is produced to show that it is. An affidavit of so general a character fails to sufficiently raise the presumption of materiality required under this statute in *Iasigi v. Brown*, 1 Curt. 401, Fed. Cas. No. 6,993, and in *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201, Fed. Cas. No. 9,448. In harmony with certain expressions in those cases, a general practice has grown up by which, on a *prima facie* showing on a summary petition, the court orders production under the statute now in question. This practice, so far as we are informed, has not yet received the sanction of the supreme court. The statute contains an express limitation, in its reference to the "ordinary rules of proceeding in chancery"; and, by those rules, no production can be ordered except of books or documents which the respondent admits contain matter relevant to the issues in the cause. All the summary proceedings under the English judicature statutes, relating to production, sedulously preserve to the party moved against the same protection, with a few special exceptions not affecting the principle involved. However this may be under section 724 of the Revised Statutes, we cannot hold that all the bars are thrown down by it, as would be done by granting the present motion, or that the court can properly order production unless it can perceive, at least *prima facie* and with some degree of certainty and particularity, what is to be exposed to search, and the extent of its materiality.

This general proposition relieves us from scrutinizing carefully certain particular features of the plaintiff's motion; yet, that we may not be misunderstood, it may be prudent to refer to them. The practice under this statute seems very unsettled, even to the extent that the decisions in this circuit are not consistent. We are not required, under the circumstances, to determine whether production can be compelled before trial; but Mr. Justice Curtis and Mr. Justice Clifford apparently differed on this point, as shown by the cases cited. Apparently the books in issue here could be reached by subpoena duces tecum, and Mr. Justice Clifford in *Merchants' Nat. Bank v. State Nat. Bank*, *ubi supra*, at page 204, ruled that in such cases the court might not apply the special statute remedy. The same has been held in other circuits, but a careful review of the topic would seem to sustain the view of Judge Townsend in *Kirkpatrick v. Manufacturing Co.*, 61 Fed. 46, that such considerations ought not to deprive litigants of the more efficient remedy given by the statute in question. It has nowhere been held that the statute disregards the settled rule of discovery which ordinarily limits it to matters material to the case of the party asking it. *Smith v. Duke of Beaufort*, 1 Hare, 507, 520; *Wig. Ev. par. 224 et seq.*; *Daniell, Ch. Prac. *579*. We need not, however, consider the precise limits of this rule, nor whether it is applicable to the peculiar circumstances of this case, as we place our decision on the broader reasons which we have already stated. Plaintiff's motion, filed September 2, 1897, is denied.

UNION ASSOCIATED PRESS v. TIMES-STAR CO. BREWER v. SAME.
 UNION ASSOCIATED PRESS v. OHIO STATE JOURNAL. BREWER
 v. SAME. SAME v. LOUISVILLE PRESS CO. UNION ASSOCIATED
 PRESS v. SAME. BREWER v. JOURNAL NEWSPAPER CO. UNION
 ASSOCIATED PRESS v. SAME. BREWER v. EVENING NEWS ASS'N.
 UNION ASSOCIATED PRESS v. SAME. BREWER v. COMMERCIAL
 TRIBUNE CO. UNION ASSOCIATED PRESS v. SAME. BREWER v.
 HERALD CO. UNION ASSOCIATED PRESS v. SAME. BREWER v.
 INTER-OCEAN PUB. CO. UNION ASSOCIATED PRESS v. SAME.

(Circuit Court, E. D. New York. January 13, 1898.)

SERVICE OF PROCESS—FOREIGN CORPORATIONS—RESIDENT AGENTS.

A salaried agent of a nonresident newspaper corporation, empowered to solicit advertisements, make contracts therefor, and receive payment, who carries on the business at an office having the name of the newspaper on its windows, is not "a managing agent," through whom the corporation may be served, under Code Civ. Proc. N. Y. § 432. *Brewer v. Knapp*, 82 Fed. 694, and *Fontana v. Chronicle-Telegraph Co.*, 83 Fed. 824, reversed.

These were 14 actions at law for libel, brought by the Union Associated Press and by William S. Brewer, respectively, against the Times-Star Company and various other newspaper companies incorporated by states other than New York. The cases were heard on motions to set aside the service of summons.

Campbell & Hause, for plaintiffs.

Henry W. Taft, for some defendants.

Shaw, Baldwin & Stotesbury, for other defendants.

LACOMBE, Circuit Judge. The facts in all these cases are more or less similar to those rehearsed in *Union Associated Press v. Times Printing Co.* (Cir. Ct. S. D. N. Y., Oct. 1 and Oct. 29, 1897) 83 Fed. 822, and in *Brewer v. Knapp*, 82 Fed. 694. Upon consideration of the questions presented, I am by no means so confident that my former decision in the *Fontana Case*, 83 Fed. 824, was correct, or that Judge Tenney and myself were right in holding that the several individuals served with process were "managing agents" of the defendants. I am, however, more than ever impressed with the importance of having this jurisdictional point decided in each case, before the time of the court is consumed in trying the merits of the controversy. Here we have (including the cases named in the caption and the others on the calendar) nearly 50 libel suits, all brought by the same parties against different newspapers, located in widely scattered states, with no suggestion that the libel was ever published or circulated here by defendants, or that they have ever done anything more in the way of business here than to solicit advertisements through some advertising agent, who in most cases acts as advertising agent for several other papers, and has no control over the rates to be charged or the space to be given. It is hardly to be supposed that congress intended the federal circuit courts to exercise such comprehensive and far-reaching jurisdiction, except when a case coming strictly within the language of the statute is made out. The proper disposition to make of this entire group of cases would seem to be to grant these motions. By

reviewing such decision in some test case, the plaintiff may have the jurisdictional question settled, and neither side be exposed to the unnecessary burden of trying the case on the merits, with the chance of the appellate court setting aside the judgment for lack of jurisdiction. The question presented is one of grave importance. Probably there are but few newspapers in the United States which do not publish advertisements originating in this city, or which do not solicit such advertisements here. If this and the adjoining (Southern) district are, for that reason, to be considered the proper forum for suits against the owners of such papers, wherever they may reside and conduct their business of publishing and circulating such papers, it seems probable that our calendars may be seriously overburdened. Motions are all granted

KELLEY v. KELLEY et al.

(Circuit Court, S. D. Ohio, W. D. January 20, 1898.)

No. 4,693.

1. EXECUTORS DE SON TORT—CONTRACTS—PERSONAL LIABILITY.

The sons and sole heirs at law of a banker, who died intestate, continued the business of the bank after his death, and prior to the appointment of an administrator; and during such time certificates of deposit were issued, and deposits received, in the name of the bank. Some of the certificates were in renewal of former certificates canceled, and some covered deposits made both before and after the father's death. *Held*, that the sons had no power to bind the estate by any new contracts, though the business was continued for its benefit, and that they became individually liable on the obligations so created.

2. SAME—EFFECT OF PROVING CLAIM AGAINST ESTATE.

Where persons assuming control of the property and business of a decedent created obligations which were not binding upon the estate, but were upon them individually, they were not released from liability by the fact that such obligations were presented and allowed as claims against the estate.

This was an action by Josh Kelley against Lindsey Kelley, Ironton A. Kelley, and Joshua F. Austin, to charge them as partners in the conduct of the business of the Exchange Bank of W. D. Kelley after the death of said W. D. Kelley.

Frank F. Oldham, R. B. Miller, and Julius L. Anderson, for plaintiff.

A. C. Thompson, for defendant J. F. Austin.

W. A. Hutchins and John Hamilton, for other defendants.

SAGE, District Judge. The petition is for the recovery of the amount of two certificates of deposit, dated, respectively, April 1, 1893, and April 12, 1893, and for a balance due upon deposits made by plaintiff in the bank of the defendants; the total amount being \$4,026.43, with interest, as claimed in the petition. W. D. Kelley, whose name appears in the title of the bank, died intestate on the 2d day of October, 1891.

The answer of the defendants Lindsey Kelley and Ironton A. Kelley sets up: That the Exchange Bank of W. D. Kelley was established in the city of Ironton in 1854 by their father, William D. Kelley.

That it received money on deposit, for which certificates, payable at specified times, and with specified rates of interest, were issued. The principal part of the money thus received was used by W. D. Kelley in his various other branches of business, but a small part thereof was loaned in the ordinary way to other persons. These loans, however, were merely incidental. He invested in the bank the sum of \$32,000 in money. Shortly after his death, \$25,000 additional was put into the bank, out of the means provided for that purpose by him before his death. He carried on the bank until the time of his death, October 2, 1891. At that time he was the owner of a large amount of real and personal property, and had always been regarded as solvent, and abundantly able to pay all his liabilities and have left a large surplus. Since his death, and especially during the financial panic beginning in 1892, stocks held by him, and other property of which he was the owner when he died, have depreciated in value, "yet even at present prices his estate is solvent, as shown by the appraised value thereof recently made by the appraisers under proper administration proceedings." There survived him his widow, Sarah A. Kelley, and the defendants Lindsey Kelley and Ironton A. Kelley, his sole heirs at law. The widow, who died shortly after the death of her husband, without having used so much of the estate as the law would have given her, made no claim for dower. No part of the estate was ever set apart for her use. None of the defendants ever had any interest in the banking business carried on by W. D. Kelley. An administrator of his estate was appointed on the 10th day of June, 1893. After the death of Kelley, and until the appointment of the administrator, the answer avers that the banking business was continued "by and on behalf of" his estate. Interest was paid to depositors to the amount of over \$12,000. Certain certificates of deposit were paid in full, and others were renewed. New deposits of small amounts were received, for which certificates were given; and the business generally was continued in the same name and in the same manner as in the lifetime of W. D. Kelley, except that its continued prosecution was upon the basis of gradually paying the debts of the estate, and winding up its affairs. "All this was done with the full knowledge and consent of these answering defendants (and of their mother, during her lifetime), as the sole heirs of the estate of William D. Kelley, and thereby subjecting and rendering liable the entire estate, both real and personal, of the said Kelley, to the payment of both old and new liabilities, including the part of the estate not specially embarked in said banking business, as well as the amount of money actually invested therein, and free from any supposed right or interest said heirs might have in any of the property of said estate that might or could be asserted by them as against any of said liabilities, either old or new."

It is further averred that the creditors of the bank who were such at the time of the death of said Kelley, as well as those who afterwards became such, "including the plaintiff in this suit, with full knowledge of the death of said Kelley, voluntarily continued to deal with it as though said Kelley had been in full life, looking alone to his estate for the payment of their respective claims."

The answer then sets up: That the defendant Joshua F. Austin had been for many years prior to the death of said Kelley his clerk and bookkeeper at said bank. That he was familiar with the business, and fully competent to manage and conduct it, and that Kelley, shortly prior to his death, specially requested him to continue in charge of the business after his death, the same as before, and assist the defendants in gradually settling and closing it up. After his death his said heirs joined in said request, on behalf of his estate; and thereupon Austin continued in charge of the business, as bookkeeper, and managed the same as he had done before; acting, however, under the authority, advice, and direction of these answering defendants, as the heirs of William D. Kelley. And that the business was so continued and carried on in the name of the Exchange Bank of W. D. Kelley, in the interest of, and on behalf of, his estate, and not otherwise. That the plaintiff and all other creditors so dealt with it. That none of the defendants ever acquired any interest in it, or carried it on in their behalf, as co-partners or otherwise, but for and on behalf of said estate, with the knowledge and consent of the plaintiff, and of other creditors of W. D. Kelley. That the continued prosecution of the business did not result in loss or injury to said estate, or the creditors thereof. None of its property or assets has been lost or misapplied, but all of it remains intact in the hands of the administrator of the estate, except what was applied to paying debts. In the process of managing and settling the banking business as aforesaid, the liabilities of the bank were reduced to the extent of over \$40,000, of which amount defendants contributed out of their own private means over \$9,000, the balance coming from the assets of said estate; all other debts of said Kelley, amounting to about \$16,000, having been paid by these answering defendants, excepting a debt of \$50,000, which was abundantly secured by a pledge of property, and by the individual indorsement of these answering defendants.

The defendants further answer that the certificates of deposit sued upon were filled out by their co-defendant, Joshua F. Austin, who, "acting for and on behalf of said estate as aforesaid," signed the name, "Exchange Bank, by A," thereto. Each certificate upon its face purported to be, and was, upon the Exchange Bank of W. D. Kelley, and the plaintiff received the same as an obligation against the estate of said Kelley, and not otherwise.

The defendants further aver that the certificate of deposit for \$1,250, in the first cause of action mentioned, was given in renewal of a former one for a like amount issued by said Exchange Bank on the 5th day of April, 1887, long prior to the death of William D. Kelley, for money at that time deposited in said bank, and for no other consideration. The certificate of deposit for \$2,500 set forth in the second cause of action, it is averred, was given for part of the balance due plaintiff from said Exchange Bank on the 1st of April, 1893, of a running account kept by said bank of money deposited and checks paid, which account commenced years before the death of William D. Kelley, and was from time to time balanced on the books of said bank. On October 2, 1891,—the date

of the death of said William D. Kelley,—the amount due the plaintiff was \$1,407.70.

For answer to the third cause of action, the defendants admit that the balance claimed by the plaintiff is correctly stated, but say that it arises from the running account referred to above, and is the balance of deposit account made after the death of William D. Kelley, with the same understanding as to the relations of the defendants to the estate, and the carrying on of the business, as is hereinbefore set forth.

The defendant Joshua F. Austin denies that he was a partner with the defendants, or that he ever, in his own behalf, or in connection with his co-defendants, executed or delivered to plaintiff the certificates of deposit mentioned in the petition, or either of them, or received deposits, or rendered to the plaintiff an account of deposits, as alleged in the petition. He further denies that he ever had any interest in the business, either before or after the death of William D. Kelley, or any connection therewith, other than as clerk and bookkeeper acting under the employment, and by the direction, of others.

Plaintiff, by reply, puts in issue each and every material averment of new matter by the defendants.

There is no evidence of any contract or arrangement such as is set up by the defendants, and binding upon the estate. There was no one authorized to so bind the estate. W. D. Kelley died intestate. No administrator of his estate was appointed until June, 1893,—long after the defendants had taken charge of the bank, and entered upon the conduct of its business. No administrator would have had authority, on behalf of the estate, to enter upon such an arrangement as pleaded. An executor, even, would be powerless to bind any one but himself by such an arrangement, unless specially directed and empowered by the will of his decedent. In *Childs v. Monins*, 2 Brod. & B. 460, two executors gave a promissory note to the plaintiff, in the following words: "As executors of the late T. T., we severally and jointly promise to pay to N. C. the sum of £200, on demand, with lawful interest for the same." The court held them personally liable, upon the ground that "the promise, from the circumstance of interest being added [as it was in each of the certificates of deposit in this case], necessarily imported a payment at a future day, and an executor promising to pay a debt at a future day makes it his own."

The principle upon which this ruling is based is well stated in *Austin v. Munro*, 47 N. Y., at page 366, as follows: "An executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator."

Counsel for defendants, admitting the general rule as stated, claim that the facts in this case bring it within exceptions recognized in the following cases: In *De Valengin's Adm'rs v. Duffy*, 14 Pet. 290, 291, where it was held that whatever property or money is lawfully recovered or received by the executor or administrator

after the death of his testator or intestate, in virtue of his representative character, he holds as assets of the estate, and is liable therefor, in such representative character, to the party who has a good title thereto. In that case there was no question that the money received by the administrator was money due the estate of the intestate. The case, therefore, does not apply. For here it is denied that the estate had anything to do with the business from which plaintiff's claim arose.

In *Wall v. Kellogg's Ex'rs*, 16 N. Y. 385, it was held that executors, who, under a power of sale, conveyed land of which their testator was in equity a mere trustee, were liable, as executors, to the person having the equitable title to such land, for the damages sustained by him, to the extent of the purchase money received by them. The court held that the estate, having had the benefit of the consideration money received on the sale, was equitably chargeable with the amount so received. This case establishes no exception of benefit to the defendants.

Howard v. Powers, 6 Ohio, 92, raised only the question of misjoinder where there was a count upon indebtedness and promise by the administrator, as such, joined with one upon an indebtedness and promise of the intestate. The court was of opinion that the administrator had no ground to object against a recovery of him in his representative character; that the judgment should have been against him in his individual character.

The holding in *Arbuckle v. Tracy*, 15 Ohio, 432,—that if notes be delivered to an executor to indemnify the estate against a liability, where the testator was a surety only, such notes, and the money collected on them, are not the property of the estate, and the estate is not liable for the misconduct of such executor in respect to such notes and money, but is a trustee for the person delivering the notes, and he alone is responsible for a faithful application of the money collected,—states a proposition not in any sense an exception to the general rule above quoted.

Conger v. Atwood, 28 Ohio St. 134, is also cited. There the administrator had collected rents, to which the widow was entitled under a statutory allowance, and appropriated them to the payment of debts due from his intestate. The court held that she might elect to charge him either in his personal or representative character, and that, in an action against him in his representative character, he could not defeat a recovery on the ground that he was personally liable therefor. I am unable to see that this applies as an exception. Nor does *Thomas v. Moore*, 52 Ohio St. 200, 39 N. E. 803, in which the rule stated in *Austin v. Munro*, 47 N. Y. 360, 366, as hereinbefore quoted, is cited with approval, and it was held that executors and administrators are personally liable for the services of attorneys by them employed, and their contracts therefor do not bind the estate, although the services are rendered for the benefit of the estate, and are such as the executor or administrator may properly pay for, and receive credit for the expenditure in the settlement of his accounts. The court cited with approval the rule stated in *Woerner, Adm'n*, § 515, that "the administrator can be allowed credit only for counsel

fees which he has actually paid, and no more than is reasonable compensation for the services rendered to the estate, no matter what the administrator has actually paid or contracted to pay; and the burden is on him to prove the necessity and value of the services."

This decision is in perfect harmony with the general rule. But it is insisted that the plaintiff is not entitled to recover for the certificate which is the basis of the first cause of action, because it was a renewal by the defendants, after the death of W. D. Kelley, for a certificate issued in his lifetime. The testimony is that a few days after the death of W. D. Kelley the certificate issued by him was brought in by the plaintiff, indorsed by the defendants, interest paid up to October 5, 1891, and there was a renewal for six months. On the 14th of October, 1891, the original certificate was taken up, and the certificate sued upon was given in lieu of it. But that, under the authorities cited, did not create any exception. See *Childs v. Monins*, cited *supra*. See, also, *Winston v. Young*, 52 Minn. 1, 53 N. W. 1015, where it was held that the payment of money, at the request of an executor, to relieve the estate from an incumbrance, does not create a debt allowable and payable, as such, out of the estate. The court in that case said, with reference to the representations made by the executor in connection with his request, that so far as they contained any assurance that, if the plaintiff paid the money, it could be repaid to her as a debt or claim against the estate, it was a representation of law, upon which an action for deceit could not be predicated, for plaintiff is presumed to have known the law as well as defendant. The supreme court of Minnesota, in *Ness v. Wood*, 42 Minn. 427, 429, 44 N. W. 313, recognized as well established the general rule that an executor or administrator cannot bind the estate he represents by any new contract he may make for it. The court held that if he borrows money for the purposes of the estate, and devotes it to the payment of debts due, or if he contracts for services which are actually rendered, valuable and important to the estate, or if he executes a deed, in his representative capacity, containing covenants which fail, he is individually liable, and judgment must be against him personally; the estate is not bound.

The court of appeals of New York, in *Schmittler v. Simon*, 101 N. Y. 557, 5 N. E. 452, held that neither executors nor administrators have power to bind the estate represented by them, through an executory contract, having for its object the creation of a new liability, not founded upon the contract or obligation of the testator or intestate. They take the personal property as owners, and have no principal beyond them, for whom they can contract. The title vests in them for the purposes of administration, and they must account, as owners, to the persons ultimately entitled to distribution.

See, also, *Kingman v. Soule*, 132 Mass. 285, where the court said:

"The general rule is that an executor can make no contract which shall bind the estate of his testator by a new promise. If he borrow money for the purposes of the estate, and devote it to the payment of debts due; if he contract for services, valuable and important to it, which are rendered,—he alone is liable therefor, and it will be for the probate court to determine whether he shall be allowed in his accounts compensation for the liability he has incurred."

In that case the court said that, while the estate was bound for the charges of the funeral incurred by request of the executor, if a promissory note were given by the executor the estate would not be liable upon it.

The supreme court of Alabama in *Vanderveer v. Ware*, 65 Ala. 607, held that:

"Executors and administrators, even when contracting for matters necessary to the execution of their trusts, do not bind the estate they represent, but are individually liable on such contracts. Suits against them must be personal, and the judgment is *de bonis propriis*, and not *de bonis testatoris*."

The court suggests that in such a case a court of equity would, if necessary, undertake to reach any personal assets which might remain unadministered in the hands of a personal representative, and subject them to liability for the claim, but the equitable remedy could not be applied at law.

Also, Judge Daniel, in *Fitzhugh's Ex'r v. Fitzhugh*, 11 Grat. 300, construing the rule that contracts made with an executor or administrator are personal, and do not bind the estate of the testator or intestate, said:

"The representative has no power to charge the assets in his hands by contracts originating with himself; nor can any other person reach the assets, for claims originating since the death of the decedent, by suit against the representative as such. For such contracts and claims the remedy is against the executor or administrator in his individual capacity."

In the course of his decision he quoted with approval *Lovell v. Field*, 5 Vt. 218, where the court said:

"The administrator cannot promise to bind the estate for goods furnished for the benefit of the estate. The promise is his own, and he is personally liable. He may make it on the credit of the estate in his hands, but whether he has a right to pay out of the same depends on its receiving the sanction of the probate court."

In *Banking Co. v. Morehead*, 116 N. C. 410, 21 S. E. 190, it was held that:

"Where an executor executes a note, in his representative capacity, for money borrowed and used for the purpose of paying debts of the testator, the estate is not liable, but the executor is personally liable therefor; and this is so notwithstanding the fact that the lender knows for what purpose the money was borrowed, and how it was used. In such case the executor takes the risk of being reimbursed the amount of the note out of the assets of the estate on the final accounting."

In the case of *Farhall v. Farhall*, 7 Ch. App. 123, decided in 1871 on appeal from a decision of Vice Chancellor Bacon, the executrix of a testator kept an executorship account with a bank; and, having a power under the will to mortgage the real estate in aid of the personalty, she deposited with the bank the title deeds of part of the testator's real estate as security for the balance. The account was considerably overdrawn by the executrix, and the moneys, to a great extent, misapplied, but without the bank having notice of the misapplication. The security having proved insufficient to pay the balance, the bank applied to prove as creditor against the testator's estate for the difference. The court (Lords Justices James and Melish each filing an opinion) held that the bank was not entitled to prove, for the reason that a person cannot, by contract with an executor,

acquire a right to prove as a creditor against the estate, though the executor has power to give him a lien on specific assets.

These cases apply also to the proposition urged, that the business was carried on for the benefit of the estate, and that the proceeds of the business were applied largely to discharging debts of the estate. It is also contended that the plaintiff agreed with the defendants that the business should be carried on for the benefit of the estate, and that they should not be personally liable. This contention is not borne out by the evidence. There is testimony tending to prove that the plaintiff knew that the business was carried on for the benefit of the estate, and that, after the administrator was appointed, he handed his bank book to him, and, when he saw that the administrator had allowed the balance thereby shown to be due him as a claim against the estate, looked at it, took the book, and went away, without making any objection. This was after the failure of the bank, and after, according to the testimony of the plaintiff, he had made a vain attempt to obtain from the defendants security for what was due him. He testifies that defendant Austin, the administrator, told him the best thing he could do was to bring the claim down, and have it allowed. But the presentation and allowance did not operate to release the defendants. This evidence is not sufficient to establish the contention made for the defendants, nor to relieve them from personal liability. The plaintiff testified that he loaned his money to the defendants; that he supposed they were the Exchange Bank; that he was not doing business with any one else; that they were the ones who wanted to borrow the money; that he knew their father was dead, and that he could not borrow it; that defendant Lindsey Kelley told him that the bank was all theirs, as their father was dead and there were no other heirs, and they considered the bank better than it was, because their property was bound for it, as well as their father's. The defendants are the sole heirs of W. D. Kelley. The title to all his real estate vested in them upon his decease, subject only to the debts of the estate, and the dower of the widow, who died shortly afterwards. They were also beneficially interested in the personal estate, and, after the death of their mother, were the sole beneficiaries, subject to the liabilities of the estate. At the time of the alleged contract or agreement there was no administrator, and the defendants themselves were, with their mother, sole parties in interest. They were therefore all the time necessarily acting on behalf of themselves, and for their own interests. The theory of the defense seems to be that the estate, without any administrator, is to be treated as a legal entity, and as the principal in a transaction conducted entirely between the defendants and the plaintiff,—the defendants, it is claimed, having the right and power to deal on behalf of the estate, as principal, with the plaintiff, so as to realize whatever profits might be made, and avoid liability for whatever losses might be incurred. This theory ignores the fundamental propositions that an agency can be created only by the will of the principal, or by operation of law, and that one who, having no principal, assumes to act as agent, is to be treated as himself the principal. There is, in my opinion, no merit in the defense.

The judgment will be for the plaintiff against the defendants Lindsey Kelley and Iron-ton A. Kelley. It is not established that the defendant Joshua F. Austin was a partner. The judgment, as to him, will be in his favor.

AMERICAN DREDGING CO. v. WALLS.

(Circuit Court of Appeals, Third Circuit. January 10, 1898.)

No. 3.

MASTER AND SERVANT—DEFECTIVE APPLIANCES—ASSUMPTION OF RISKS.

A workman who, for several weeks, has gone daily upon an uncleaned inclined table to oil the machinery, without complaining of the want of cleats, assumes the obvious risks resulting from their absence, upon the negligent starting of the machinery by a fellow servant.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action by Joseph H. Walls against the American Dredging Company to recover damages for personal injuries. In the circuit court verdict and judgment were given for plaintiff, and the defendant sued out this writ of error.

Joseph T. Bunting, for plaintiff in error.

Harvey K. Newitt, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

DALLAS, Circuit Judge. The plaintiff below (defendant here) brought his action to recover damages for personal injury sustained while he was in the employment of the defendant below. When the accident happened he was upon a certain "inclined table" on board the steam dredge Republic, for the purpose of oiling a part of the machinery. While thus lawfully there, he fell, and his right hand was caught in the mechanism and severely injured. He averred in his statement of claim that the disaster was occasioned by the negligence of the defendant, in that the said table "had no cleats or other appliances thereon to protect persons lawfully there from falling and injury, [and] the said master of said dredge, in violation of his duty, negligently caused the machinery of said dredge to be put in motion, and the said dredge to roll." The plaintiff proceeded in accordance with this allegation, and adduced evidence in its support. The learned judge, however, held—and in this he was clearly right—that the person who caused the machinery to be put in motion was the plaintiff's fellow servant, and that, therefore, for any negligence of his there could be no recovery; but he declined to charge, as requested, that, "under all the evidence in this case, the verdict of the jury must be for the defendant," and in this we think there was error. It is not clear that the act of putting the machinery in motion should not be regarded as the sole cause of plaintiff's injury. But for that act the plaintiff's situation would not have been a dangerous one, and the accident

would not have happened. He testified: "If the machinery had not been started, my hand would not have been hurt, because there would have been nothing there to hurt it." How then can it be said that the alleged faulty construction of the table contributed to produce that hurt, and that the movement of the machinery was but one of two concurrent causes of the harmful result? This question is, at least, not free from difficulty; but it need not be answered, for our judgment does not depend upon its solution, but rests upon the objection to the plaintiff's asserted right of action, which will now be considered.

The plaintiff was a man 22 years of age. He had been working on this dredge for upwards of 6 weeks when he was hurt. He had been very frequently upon this table. There were not, at any time, any "cleats" upon it; and this, of course, was well known to him. The fact was as obvious to him as it could possibly have been to the defendant. The risk attendant upon being there with the machinery in operation was palpable, and, moreover, his attention had been expressly called to it. He had been directed to work there when the machinery was still. That he intended to conform to this direction upon the occasion in question, as he had previously done, and that the machinery was carelessly put in motion, may be conceded; but for this carelessness of a fellow servant the common master is not responsible. What, then, remains upon which liability on the part of the defendant can be predicated? Only this: that, perhaps, it was its duty to provide means for the protection of the plaintiff against possible negligence of one of his co-employés. But, if this, too, as a general proposition, be accepted, yet the facts of this case require its qualification, under the established rule that the employed assumes all those risks which are incident to his employment, and which are patent and obvious. The absence of cleats, the possibility of the machinery being negligently set in motion, and the consequent danger, were too plainly evident to admit of question as to the knowledge and comprehension of them by a person of mature years and of several weeks' experience. The plaintiff never complained that no cleats were upon the table. If he had done so, it is probable his complaint would have been heeded; and after having, every day, and four or five times a day, gone upon the table without them, and without objection, his charge that the defendant owed him a duty to put them there seems to us to be most unreasonable. It cannot be sustained under the authorities. The many cases which show this need not be cited. Those referred to in the opinion of the court in *Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, will suffice. In that case, "the theory upon which the plaintiff proceeded in the court below was that Seley lost his life by reason of the negligence of the defendant, a railroad company, in using in its switches what is called an 'unblocked frog.'" And the supreme court, after citing with approval several decisions of the courts, state and federal, in cases some of which closely resemble the present one, held, reversing the court below, that, inasmuch as Seley, knowing, as he did, the character of the frog and the liability of being caught in it, yet persisted in exposing himself to an obvious danger, no other conclusion was warranted than

that he took the risk of the work in which he was employed. The like conclusion is, we think, necessary in the present case. The judgment of the court below is reversed.

SIGAFUS v. PORTER et al.

(Circuit Court of Appeals, Second Circuit. January 8, 1898.)

No. 10.

1. TRIAL—MOTION TO DISMISS—WAIVER.

A defendant, by introducing evidence, waives a motion to dismiss, made at the close of plaintiff's case.

2. APPEAL—REVIEW—MOTION FOR NEW TRIAL.

Orders denying motions for new trial are not reviewable in the federal courts.

3. FRAUD—FALSE REPRESENTATIONS—LIABILITY FOR.

One making false representations to induce the purchase of property is equally liable therefor whether he owns the property or not, and whether the representations are made directly to the purchaser, or to one acting in his interest, and who reports them to him.

4. SAME—ACTION—PARTIES.

Purchasers of property, who acted in the matter for themselves and others, the plan which was carried out being to form a company to which the property should afterwards be transferred, may sue in behalf of themselves and all others in interest to recover for false representations inducing the purchase.

5. APPEAL—OBJECTION TO EVIDENCE—SUFFICIENCY.

An objection to the testimony of an expert witness as to the quality of ore produced by a mine as "incompetent, irrelevant, and immaterial" is too general to support a specific assignment of error on the ground that it had not been shown that the witness was at the mine at the particular time inquired about.

6. SAME—QUALIFICATION OF EXPERT.

A ruling admitting the testimony of an expert over a general objection will not be reviewed because a subsequent cross-examination showed the witness to be incompetent, where no request to examine as to his competency was made by the party objecting, and no motion was made to strike out his evidence after the cross-examination.

7. EVIDENCE—FRAUDULENT REPRESENTATIONS—LETTERS.

Where plaintiffs claimed that they were induced to purchase property by false representations made by defendant to one acting in their behalf, letters from such person were admissible to show the communication to them of such representations.

8. SAME—PAROL EVIDENCE TO VARY WRITING—LIMITATION OF RULE.

The rule that parol evidence is inadmissible to vary a sealed contract is limited to actions between the parties or their privies, and a third person suing one of the parties may show by the testimony of the other that such an instrument does not represent the real contract between the parties thereto.

9. CIRCUIT COURTS OF APPEAL—CERTIFICATION OF QUESTIONS—DECISION.

A circuit court of appeal will not withhold a decision of other questions presented for review in a cause because on one out of many it desires the opinion of the supreme court.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Dudley Porter and others against James M. Sigafus to recover damages for deceit. There was judgment on a verdict for plaintiffs, and defendant brings error.

This cause comes here on writ of error to review a judgment in favor of the defendants in error, who were plaintiffs below, against the plaintiff in error, who was defendant below. The judgment was entered upon the verdict of a jury. The action is one to recover damages for deceit by defendant inducing the purchase of a gold mine (real estate, improvements, plant, and mining rights) by the plaintiffs. Much testimony was taken, and the court left it to the jury under instructions that it was incumbent upon the plaintiffs to establish that the defendant had been the author of fraudulent representations or fraudulent concealments in respect to material matters affecting the value of the property; that it was the fraud which induced the contract, and that, but for it, the purchase would not have been made. The jury were further charged that "the measure of damages in actions of this nature is the difference between the value of the property as it proved to be and as it would have been as represented." The facts material to the assignments of error sufficiently appear in the opinion.

Edmund Wetmore and Joseph H. Choate, for plaintiff in error.
Albert Stickney, for defendants in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Out of the 32 assignments of error, 30 have been supported by argument in this court. They may be arranged in 17 groups, and are hereinafter discussed.

1. The exception reserved to the court's denial of the motion made at the close of plaintiffs' case to dismiss the complaint is of no avail. By not resting on his motion, and by thereafter offering his own evidence, the defendant waived his motion. *Runkle v. Burnham*, 153 U. S. 222, 14 Sup. Ct. 837. This disposes of the twenty-first assignment of error.

2. Orders denying motions for new trials are not reviewable in the federal courts. *Railroad Co. v. Fraloff*, 100 U. S. 24. This disposes of the twenty-ninth, thirtieth, thirty-first, and thirty-second assignments of error.

3. Exception was duly reserved to the refusal of the court to dismiss the complaint at the close of the testimony, and is properly presented here by assignment of error. To understand and dispose of this exception it will be necessary to some extent to set forth the facts. Defendant practically owned the mine, and had owned it for some time, and there was evidence tending to show that he wanted to sell it. Some time in May, 1893, one Griffith met defendant, and told him he knew of some people in Los Angeles to whom he thought the property could be sold. Thereupon a contract was made between them in form calling for the sale of the property to Griffith for a sum named therein. Griffith was unable to sell the mine to these parties, and notified defendant to that effect, whereupon this contract terminated. On July 5, 1893, defendant and Griffith entered into a second contract under seal, whereby defendant agreed to sell and convey the property to Griffith for \$230,000. On August 24, 1893, they entered into a third contract, also under seal, referring to the second contract, and to the fact that time was not of the essence of such contract, and providing that, in consideration of Griffith agreeing to make time the essence of said contract, defendant would sell and convey, and Griffith pay the \$230,000, on or before January 1, 1894. It reserved to defendant the right and privilege at any time

before January 1, 1894, to sell the property at not less than \$230,000 (\$115,000 cash at 30 days), in which event he would pay Griffith \$5,000. It was further stipulated in the contract that Griffith should go immediately to New Orleans, and endeavor, as agent for Sigafus, to sell the property to parties named therein for \$350,000, or such other price as Sigafus might authorize Griffith to accept. In the event of effecting the New Orleans sale Griffith was to have 10 per cent. as commission. Subsequently to the making of this contract, Griffith succeeded in effecting a sale of this property to plaintiffs for \$400,000. Before this sale was effected, one Egan, a mining expert, had visited the mine, had seen Sigafus, had been furnished with what purported to be a report on the mine by another mining expert (Burnham), and had made an examination of the mine and of a mill run conducted while he and Sigafus were there. Griffith associated Egan and a Col. Platt with himself in the enterprise of selling the mine, the three to divide profits between them. Charles W. Morse was the first of the plaintiffs to hear of the mine, meeting Griffith, Platt, and Egan in Denver, in October, 1893, and there is evidence tending to show that it was in part upon his employment that Egan went to the mine to make his examination. Subsequently Morse brought the other two plaintiffs into the scheme, and, after receipt of Egan's reports, oral and written, as to the mine, they, on December 28, 1893, completed the purchase for the price named, \$400,000. The complaint avers that previous to December 28, 1893, defendant, through Griffith, entered into negotiations with plaintiffs for a sale to them of said mine, and plaintiffs entered into negotiations for the purchase of said mine, and thereupon, and in the course of said negotiations, the defendant falsely and fraudulently, and with intent thereby to deceive and defraud, made certain false representations, etc., specifically set forth in the complaint; that thereafter, and on December 28, 1893, plaintiffs, believing said representations to be true and correct, and relying thereupon, and induced thereby, purchased said mine. In support of the motion to dismiss it is contended that there was no proof sufficient to go to the jury that Griffith was in any way the agent of the defendant to sell the mine; that it appears that the relation was that of vendor and vendee, and that plaintiffs' sole contract was with Griffith. Also that at the time of Egan's visit to the mine there was no relation existing or intended between the plaintiffs and Sigafus. In reply to this it might be sufficient to say that an action for false representations will lie against the falsifier, whether the sale thereby induced is of his own property or of another's. The court accurately expressed the theory upon which recovery was had in the charge to the jury:

"The plaintiffs claim that they were induced to make the purchase in consequence of false representations made to and fraudulent devices practiced on Egan by the defendant, while Egan was making the examination of the property, whereby Egan was led to believe the Burnham report to be true, and other facts to be true, afterwards incorporated into a report made by himself; that the defendant practiced these frauds on Egan, knowing him to be acting in the interest of prospective purchasers, and expecting that he might mislead them by giving them incorrect information contained in the Burnham report and his own report about the property; that Egan did give

the erroneous information to the plaintiffs, did corroborate to them the statements in the Burnham report; and that the plaintiffs, relying upon the truth of the various facts stated in that report and in Egan's report, purchased the property. If the jury find this theory to be established by the evidence, the defendant is responsible to the same extent that he would be if he had personally misrepresented the facts to the plaintiffs, and personally misled them by fraudulent practices."

There was no objection taken or exception reserved to this part of the charge. Had defendant at the trial insisted that the case thus submitted to the jury was variant from that set out in the complaint (and we do not now decide whether it was or not), the complaint might have been amended to conform to the proof; and, indeed, such amendment might now be made, if it were necessary. But there was abundant evidence to sustain the verdict upon the theory that Sigafus was in fact undertaking to sell his own mine through the agency of Griffith. He held the title until the plaintiffs paid the money. The testimony fairly warrants the inference that when he made the contract of sale to Griffith (which he himself in his testimony refers to as a bond,—folio 892) he knew that Griffith had no money to buy the mine with, and that the contract would be valueless and void, as the earlier one was, unless Griffith found some real purchaser in Los Angeles, or New Orleans, or the East, or elsewhere. There was testimony in the record, quite sufficient, if the jury believed it, as they did, to indicate that Sigafus had very good reason for keeping his own personality as much as possible in the background when the mine was to be offered for sale to a bona fide purchaser. Griffith testified that on the day he left the mine, after the last contract was made, to look for a purchaser, Sigafus told him he could sell the property on the best terms possible; that he (Griffith) told Sigafus that he could not get all the money down as his contract called for, but that he believed "these people have money, and told him about a telegram Colonel Egan had sent to Morse. He [Sigafus] said, make the best terms possible, and he would stand by it." It would have been manifest error to take the case from the jury in the face of such evidence, and, if defendant wished to have the attention of the jury more specifically directed to his theory of what the proof showed, he should have asked for instructions.

A further ground on which motion was made to dismiss was that "there was no relation between the plaintiff Morse and Colonel Egan at the time of Egan's examination of the mine that would enable Morse, any more than the other plaintiffs, to hold the defendant liable for the statements made to Egan." It will be a sufficient reply to this proposition to refer to the testimony of Morse, Griffith, and Egan to the effect that Egan went to the mine to make his examination upon the employment of Morse and Platt.

The other propositions advanced in support of the motion to dismiss deal with the evidence generally, it being contended that there was no proof of false and fraudulent representations made by defendant with intent to induce the sale, which were material, and were relied upon by plaintiffs. It would be a waste of time to enter into any discussion on this branch of the case.

What credit was to be given to the story of particular witnesses, how satisfactory might be the explanations offered of some of defendant's letters, were questions for the jury to pass upon; but to contend, in the face of the evidence of Doran and his wife, of Egan, Morse, and Hobson, and of the cross-examination of the defendant himself, that there was no evidence to go to the jury, is preposterous. There was no error, therefore, in denying the motion to dismiss. This disposes of the twenty-fourth assignment of error.

4. Defendant excepted to so much of the charge as instructed the jury that, "if defendant authorized Griffith or Egan to use the Burnham report for the purpose of influencing prospective purchasers," etc., "plaintiffs are entitled to recover," on the ground that there was not sufficient proof to go to the jury that defendant authorized either Griffith or Egan to use such report for such purpose. If it be assumed that Griffith was in reality defendant's agent to sell, and, as has been shown, there was evidence tending to establish that relation, it would be a perfectly fair inference that, when Sigafus gave him the Burnham report, he expected and intended that it should be used to help the sale. But we need not even make this assumption. There was abundance of evidence tending to show that the Burnham report which was put into Egan's possession came originally from Sigafus through Griffith; that, when he came to the mine, Egan told Sigafus that he was to make an examination for Morse and others, and that one purpose of the examination was to verify the Burnham report; that they (Egan and defendant) had subsequent interviews, in which this report was referred to, and Sigafus stated that certain parts of it were correct. The exception is wholly without merit. This disposes of the twenty-fifth assignment of error.

5. Plaintiffs sued in behalf of themselves and their associates jointly interested and associated with them in the enterprise. The evidence shows that from the beginning what they contemplated was the formation of a company to which the mine should be turned over, and which should be composed of such of their friends as might be inclined to take an interest in the enterprise; and that a number of persons other than plaintiffs, some prior and some subsequent to the consummation of the sale, signed a subscription paper, which pledged them to take and pay for the respective interests therein set forth. Although the plaintiffs were the only persons appearing at the final transfer of the property from defendant, the real parties in interest were those who had thus united in the purchase, and we know of no reason why, under section 449 of New York Code of Civil Procedure, suit could not be maintained by the plaintiffs, with whom the negotiations were had, and to whose agent the representations were made, to recover the entire damages, which, when received, they would have to distribute ratably among their associates. This disposes of various exceptions to the admission of evidence, and to the charge and refusals to charge, which are set forth in the twelfth, thirteenth, and twenty-seventh assignments of error.

6. Exception was taken to testimony given by some of plaintiffs'

witnesses tending to show a falsification by one Cheatham of the mill run which was had as part of Egan's examination, on the ground that Cheatham's acts were not sufficiently connected with defendant. Cheatham was defendant's foreman of the mine, introduced by him to Egan as the man who would "give him every assistance in his power." Defendant was himself present and overseeing whatever was going on while Egan was there. The falsification of the mill run was accomplished in part by bringing up from the levels some sackfuls of peculiarly rich ore, which had been mined before; and there was direct evidence, fortified by letters of the defendant, tending to show that that rich ore was put in those sacks, and laid away, by his express direction, "to be used in case prospective buyers exacted a mill test." There was also direct evidence tending to show that Sigafus himself falsified this same mill run by throwing in valuable specimens of rich ore not brought up from the workings while the mill run was going on. Naturally enough, Cheatham testified that he did not falsify the mill run, and Sigafus that he did not direct or authorize Cheatham to do so, but there was sufficient in the case to warrant the jury in finding the converse to be the truth; and, that being so, the evidence as to actual falsification under Cheatham's direction was admissible. This disposes of the first and second assignments of error.

7. One James B. Doran, a witness called for plaintiffs, was asked this question: "Are you able to state with substantial accuracy the average richness of the ore in the Good Hope Mine in November, 1893?" This was objected to as "incompetent, and as calling for an opinion." It is a subject as to which the opinion of experts is proper testimony, and Doran was certainly qualified to express an opinion, since he had been a practical miner for 24 years, having "done nearly everything from tool boy up to superintendency," and had been in charge at defendant's mine from August, 1889, till he fell sick, in August, 1893. It is now contended that his testimony should have been excluded, because it does not appear that he was in the mine after he was taken sick, in August. No such specific objection was made at the trial, and it is apparently an afterthought of counsel. Had it been duly taken, however, we are still inclined to hold the exception unsound. The evidence pretty clearly indicates that under Sigafus' methods of having the mine worked there was not much chance of any material change in three months, and, although there is no evidence to show that Doran was in the mine in November, there is no evidence to show that he was not, and, for aught that appears, he saw the ore which came out of the mine, even if he did not go down into it after his sickness, in August. His opinion as to the value of the ore was admissible. What consideration should be given to it was for the jury. We prefer, however, to put our decision as to this exception on the ground that the objection was not fairly called to the attention of the judge who tried the cause. The stock objection "incompetent, irrelevant, and immaterial" covers a multitude of sins. There is hardly an objectionable question but what can be classified under

one or other of these heads. Sometimes the real nature of the objection is so plain that the general phrase will be quite sufficient to indicate it; indeed, it may be quite apparent without any statement of the grounds of objection at all. But there are many other objections which rest upon some particular theory of the case, or upon some single fact in proof, which a judge may readily forget in the course of a long and intricate trial. It is only fair in such cases to require counsel to state clearly to the trial judge on what ground it is that they object. Certainly it is not fair to allow such a general dragnet as "incompetent, irrelevant, and immaterial" to be cast over every bit of evidence in the case which counsel would like to keep out, and then to permit counsel, upon careful analysis of the printed narrative of the trial, to formulate some specification of error not thought of at the time, and which, if seasonably called to the court's attention, might have been avoided or corrected. This disposes of the third assignment of error.

8. An exception to the admission of a similar question to one Kingsbury as to the value of the ore in sacks is disposed of in the like manner. Incidentally it may be noted that at the time the question was asked it appeared that Kingsbury was a miner of several years' experience. No request was made to be allowed to cross-examine him as to his qualifications as an expert before taking the answer. Subsequent cross-examination developed the fact that he had never made an assay of this ore, nor pounded it in a mortar, nor panned it,—circumstances which are now relied upon to support the assignment of error. But no motion was made, after cross-examination, to strike out the evidence; and the point now raised was never called to the attention of the circuit judge, who, of course, ruled upon the original objection solely in the light of the testimony as it stood when the objection was raised. This assignment of error is also apparently an afterthought. This disposes of the fourth assignment of error.

The fifth assignment was withdrawn on the argument.

9. Objection was interposed to the entire deposition of Egan on the ground that "there is no evidence in the case that Egan represented the plaintiffs, or that there existed at that time between Egan and the plaintiffs any engagement, or even any knowledge of each other." This objection was sufficiently disposed of by the evidence of Morse, Griffith, and Egan himself that the latter went to the mine to examine it on the employment and at the request of Morse. This disposes of the sixth assignment of error.

10. Upon his direct examination Egan was asked: "What conversation, if any, did you have with Sigafus as to the Burnham report?" Objection was taken on the ground that "there is no evidence thus far introduced in the case as to what the Burnham report was." Whatever deficiency there may have been in the proof at the time this question was asked, there was abundant evidence before the case closed to warrant a finding that the particular "report" as to which Egan had conversed with Sigafus was one sent out by the latter, containing additions to the original report, which additions included statements which defendant's counsel on

the trial admitted to be fabrications. The exception reserved is without merit. This disposes of the seventh assignment of error.

11. The various objections to testimony set forth in the eighth and ninth assignments of error are based on the proposition that Egan did not represent the plaintiffs. The remarks in subdivision 4 of this opinion, *supra*, sufficiently dispose of them.

12. The hypothetical questions put to the witnesses Egan and Olcott, which were framed so as to elicit testimony tending to show the value of the property had it been as plaintiffs' evidence tended to show it was represented, and its value as it really was, have been carefully compared with the evidence, and, in our opinion, are fairly within the rule, which authorizes counsel to "assume the existence of any state of facts which the evidence fairly tends to justify." It might be that plaintiff would not succeed in convincing the jury that Sigafus was substantially the father of the altered and fabricated edition of the Burnham report which he sent out, and about which Egan testifies that he talked to him; but certainly there was evidence tending to connect this edition with the defendant. And the "hypotheses" in the questions are in accordance with the statements in such report. Incidentally it may be noted that the jury apparently did not accept the valuation elicited by these questions, but rather fixed upon the price paid as a fair value of the property if it had been as represented. This disposes of the tenth, nineteenth, twentieth, and twenty-third assignments of error.

13. In view of the testimony already referred to, the objection reserved in the eleventh assignment of error that plaintiffs' Exhibit A—the fabricated edition of the Burnham report which Egan had—was not sufficiently identified to warrant its being read in evidence, is without merit.

14. Certain letters of Egan to Morse and Platt (including one to Roberts, Platt's secretary) were put in evidence, to which defendant duly objected as "not binding on defendant, and as immaterial, irrelevant, and incompetent." No claim is made that they were "binding on defendant." It is the other grounds of objection only that need be considered. The letters were written while Egan was conducting his examination at the mine. The action is to recover damages for false and fraudulent representations alleged to have been made by defendant, and in reliance upon which representations the plaintiffs purchased the mine. As matter of fact the defendant and plaintiffs never met (until the day title was passed). It is evident, therefore, that plaintiffs must show some conveyance of the representations from defendant to plaintiffs. This they undertook to do by proving that Sigafus deceived Egan; that Egan, relying on Sigafus' misrepresentations, made a most favorable report to his employers, upon the strength of which they bought. Manifestly, to do so they would have to establish two entirely separate propositions,—one the misrepresentations by Sigafus to Egan, and the other the reproduction in some form of those misrepresentations by Egan in his report to his employers. It is practically conceded that Egan's report was competent, relevant, and material. No objection was interposed to its

reception. Supplemented by the testimony of plaintiffs, it tended to show on what they relied when they decided to purchase. Whether this report contained material misrepresentations, which were induced by fraudulent representations or concealments of Sigafus, which misled Egan, was a question to be established by other proof; but, when established, the chain of proof would be complete. The court correctly charged the jury that, if they believed the plaintiffs "were influenced by Egan's corroboration of the Burnham report, and by his own report, then the important question is whether Egan was deceived and misled by the defendant and whether he [defendant] falsely represented to him [Egan] the facts stated in the two reports." But, if Egan's "report" on the mine was admissible, it is difficult to see why these other written descriptions sent by him to his employers of what he found there, and of what was the present appearance and past history of the mine, are not equally so. It would be for the jury to determine whether any material false statements in them were induced by fraudulent misrepresentations by defendant, relied upon by Egan. Any sentences in the letters not thus material or relevant might have been excluded from the jury, had attention been called to them specifically; but, as a whole, each letter was admissible as a part of Egan's report to his employers, upon which there was evidence tending to show that plaintiffs relied in making their purchase. This disposes of the fourteenth, fifteenth, and sixteenth assignments of error.

15. Exception was reserved to testimony of the witness Wood that the two reports (Burnham's and Egan's) were submitted to the investors. In view of the opinion already expressed, it is unnecessary to discuss this exception. Exception was also reserved to a question to the same witness whether he made any statements to them as to the contents of the papers, upon the ground that such statements were not brought home to defendant. Inasmuch as the witness replied that he could not recollect that he made any definite statement to them, any discussion of the sufficiency of the objection would be a waste of time. The answer was harmless. This disposes of the seventeenth assignment of error.

16. It will be remembered that, in support of plaintiffs' contention that Griffith was in reality the agent of Sigafus to sell the mine, Griffith was allowed to testify that on the day he left the mine, after the last contract was made, to look for a purchaser, "Sigafus told him he could sell the property on the best terms possible"; that he (Griffith) said to Sigafus, "We cannot get all the money down as my contract calls for, but I believe these people have money; and I told him about a telegram that Col. Egan had sent to Morse"; and that he (Sigafus) said, "Make the best terms possible, and he would stand by it." This was objected to as incompetent, and exception reserved. The ground of the objection is that plaintiffs could not, by the testimony of one of the parties thereto, vary the terms of a written contract under seal. If this were an action upon the contract under seal by Sigafus against Griffith, or by Griffith against Sigafus, there would be force in the objection that neither party could vary its terms by parol testimony; but we know of no principle of law which precludes a third person,

who is suing one of the parties to a sealed instrument upon a cause of action not arising upon such sealed instrument, from showing that the instrument was in fact a mere device concocted to mislead outsiders dealing with one or other of the parties to it, and not truly representing the relations between these parties. This disposes of the eighteenth assignment of error, and the twenty-second was withdrawn on argument.

17. The only remaining assignments of error are the twenty-sixth, to so much of the charge as instructed the jury that the "measure of damages is the difference between the value of the property as it proved to be and as it would have been as represented," and the twenty-eighth, to the refusal to charge substantially that the measure of damages is the money plaintiffs had paid out for the mine, with interest, and any other outlay legitimately attributable to defendant's fraudulent conduct, less the actual value of the mine when plaintiffs bought it. In view of the recent opinion in *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39, this court desires the instruction of the supreme court for its proper decision of the question arising upon these two assignments of error. A certificate in the form required by the act of March 3, 1891, has, therefore, been prepared, and will be forwarded to the supreme court. The fact that instructions are thus desired as to a single question out of the many arising upon this writ of error affords no sufficient ground for withholding the decision of this court as to the other questions in the cause. *Compton v. Railroad Co.*, 31 U. S. App. 486, 15 C. C. A. 397, and 68 Fed. 263. This opinion is therefore placed on file, and, when instructions are received as to the question certified, the cause will be finally disposed of.

UNITED STATES V. E. L. GOODSSELL CO.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

No. 32.

CUSTOMS DUTIES—NEW TARIFF LAW—IMPORTATION OF LEMONS.

The act of August 28, 1894, provides that, unless otherwise specially provided, there shall be levied upon all articles "imported from foreign countries or withdrawn for consumption" the rates of duty therein prescribed. An importation of lemons was entered a few days before the passage of the act, and, according to custom and the rules of administration of the port, were designated for examination on the wharf. On August 29th the goods were examined there, having remained in the custody of the government up to that time, and were then sold by the importers. *Held*, that they were dutiable under the new law.

This cause comes here upon appeal by the United States from a decision of the circuit court, Southern district of New York, affirming a decision of the board of general appraisers, which reversed the action of the collector of the port of New York in assessing certain boxes of lemons for duty. The facts appear in the opinion.

Henry C. Platt, for the United States.

W. Wickham Smith, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The vessel containing the lemons arrived at the port of New York on or prior to August 23, 1894. The goods were entered for duty on that day, and a written permit to land and deliver them was also issued on the same day, in due form, designating the goods for examination on the wharf, which, under the rules of customs administration at this port, dispensed with the necessity of their removal to the public stores or warehouses. On August 28, 1894, the tariff act of 1894, went into effect, supplanting the prior tariff act of 1890. On August 29, 1894, the goods were examined, and the permit, on being presented to the examiner, was indorsed by him "Examined," with his initials and the date. The lemons were sold by the importers on the wharf by auction, on August 29, 1894, according to the custom of importers to sell lemons and other fruits on the wharf, on arrival, without removal. It was customary to offer such goods for sale after, or at once on, the issue and receipt of the permit to land, and often before actual examination of the goods, which generally took place on the wharf at the time of sale. The lemons in question took this course. The examiner indorsed his examination on the permit August 29, 1894, at the time of the auction sale on the wharf, according to the prevailing custom in dealing with goods of that character. The goods were never in bond in any warehouse, but came direct from the vessel to the wharf, where they were sold by the importers, as aforesaid. It is the practice of the port, in the case of such goods, that the owner has no control over them until the permit of delivery has been presented to the examiner and duly indorsed by him. The entry was stamped, "Paid Aug. 23, 1894," and also stamped, "Liquidated September 8, 1894," but no additional duty was paid; the amount originally paid by the importer, on August 23, 1894, at the time of getting his duty-paid permit, being the same amount at which the duties were liquidated. The collector classified and assessed the lemons for duty under paragraph 301 of the act of 1890. The importers protested, claiming that their merchandise was dutiable under the lower rate of duty imposed in paragraph 216 of the act of 1894.

The act of 1894 provides as follows:

"On and after the first day of August, eighteen hundred and ninety-four, unless otherwise specially provided for in this act, there shall be levied, collected and paid upon all articles *imported from foreign countries or withdrawn for consumption*, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely."

Inasmuch as this statute was not passed until August 28, 1894, the section above quoted is to be construed as if it read "on and after the twenty-eighth day of August." U. S. v. Burr, 159 U. S. 78, 15 Sup. Ct. 1002.

The phrase, "withdrawn for consumption," is a technical one, well known in customs administration. When goods arrive here from abroad, they are entered either "for consumption" or "for warehouse." In the latter case they go into the public stores or a bonded warehouse, where they remain until the importer withdraws them for consumption, by one or more separate withdrawal entries. Articles,

then, which are "withdrawn for consumption," are articles which, until the time of such withdrawal, were in public store or bonded warehouse, and the phrase in the act as italicized above covers articles imported from foreign countries on and after the date named, and articles imported before that date, but still remaining in public store or bonded warehouse on August 28, 1894.

Technically, as the appellant contends, the lemons in question were never in bond in any public store or warehouse or other place, and were never "withdrawn for consumption"; but none the less are they within the provisions of the section of the statute last quoted from. The question presented on this appeal has been practically determined by the supreme court. The tariff act of 1883 contained in its tenth section the following provision:

"That all imported goods, wares and merchandise which may be in public stores or bonded warehouses on the day and year when this act shall go into effect, except as otherwise provided in this act, shall be subjected to no other duty upon the entry thereof for consumption than if the same were imported respectively after that day."

This is substantially the same provision as that contained in the act of 1894, viz. that articles imported before the new act went into effect, but remaining on that day in public stores or bonded warehouses, shall be subjected to the new rate of duty. In *Hartranft v. Oliver*, 125 U. S. 525, 8 Sup. Ct. 958, it appeared that the bark containing the goods arrived before July 1, 1883, the date when the act went into effect, but on that date were still on board, the vessel remaining with unbroken hatches, and with a custom-house officer in charge of the same. The court says:

"The plain meaning of this section is that, though goods are imported before the act takes effect, yet, if they are kept until after that period in a public store or bonded warehouse,—that is, in the custody and under the control of officers of the customs,—they shall be subjected only to the duties thereafter leviable when they are entered for consumption. * * * The place in which the goods are thus kept is not the essential fact, but the custody of the government, and the consequent exclusion of control over them by the owner, which calls for the suspension of previous duties. There is manifest justice in the rule that goods thus withheld from the control of the owner or importer shall be subject only to such duties as are leviable by the law when he is at liberty to take possession of them. Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse, and thus the designation of the goods as thus placed is, in the legislation of congress, in effect a designation, and no more, of their being in such custody. But goods on board of a ship, in charge of a customhouse officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are, within the spirit and intent of the law, subject only to such duties as are leviable when the goods are freed from such custody. So far as the government is concerned, they are in the same position as if technically in a public store or bonded warehouse. When in either of those places, they cannot be removed without a permit from the collector. When on shipboard, in charge of a custom-house inspector, they are in the same condition, and cannot be removed without a like permit. * * * We are therefore of the opinion that, within the spirit and intent of the tenth section of the act of March 3, 1883, the goods were not chargeable with duties, while on board the bark, in the custody of an officer of the customs, at any greater rate than they would have been chargeable if in custody of such officer in a public store or bonded warehouse of the government, and that, therefore, duties were only leviable on the goods by the act which went into

effect on the 1st of July, 1883. The intent of the legislature is to be followed, even if not strictly within the letter of the statute."

We are unable to distinguish the case at bar from this decision. The decision of the circuit court is affirmed.

VOLKMAN, STOLLWERCK & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—CACHOUS.

Victoria cachous (being small pellets, made in part of licorice, with a peppermint or wintergreen flavor, used by smokers and others, to sweeten the breath) were dutiable as "articles of perfumery," under paragraph 61 of the act of 1894, and not as "licorice and extracts of," under paragraph 23, or as "confectionery," under paragraph 183.

This was an appeal by Volkman, Stollwerck & Co. from a decision of the board of general appraisers sustaining the action of the collector in respect to the classification of certain imported merchandise. The merchandise in suit consisted of Victoria cachous, being small pellets, made in part of licorice, with a peppermint or wintergreen flavor, used by smokers and others to sweeten the breath. Duty was assessed thereon, under paragraph 61 of the act of August 28, 1894, as perfumery, at 40 per cent. ad valorem. The importers protested, claiming the merchandise to be dutiable at the rate of 5 cents per pound, under paragraph 23, as "licorice and extracts of, in paste, rolls, or other forms," or as confectionery, at 35 per cent. ad valorem, under paragraph 183.

W. Wickham Smith, for plaintiffs.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.

WHEELER, District Judge. These cachous are used by smokers and others for perfuming the breath, and seem, well enough, to be "articles of perfumery," provided for in paragraph 61 of the tariff act of 1894, as they have been classified. Decision affirmed.

TUSKA v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—SCREENS.

Screens composed of cotton, paper, and wood, the paper being of chief value, were not dutiable, under the act of 1890, as "furniture," under paragraph 230, or as manufactures of cotton, under paragraph 355, or as manufactures of silk, under paragraph 414; and having been classified by the collector as embroidered articles, under paragraph 373, held, that the classification must be affirmed, though not proper in itself, as the protest named only the paragraphs above enumerated.

This was an appeal by A. L. Tuska from a decision of the board of general appraisers affirming the action of the collector of the port of New York in respect to the classification for duty of certain imported merchandise.

The merchandise in question consisted of screens composed of cotton, paper, and wood, and were classified for duty by the collector under paragraph 373 of the act of October 1, 1890, as "embroidered articles," at 60 per cent. ad valorem. The importer protested, claiming that the articles should have been assessed for duty under paragraph 230, at 35 per cent. ad valorem, as furniture; or under paragraph 355, at 40 per cent. ad valorem, as manufactures of cotton; or under paragraph 414, at 50 per cent. ad valorem, as manufactures of which silk is the component material of chief value. The local appraiser reported that the cotton embroidery was the chief element of value, and duty was accordingly assessed under paragraph 373. On subsequent examination, by a special appraiser appointed for the purpose, it was ascertained, however, that paper was in fact the component material of chief value.

W. Wickham Smith, for plaintiff.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.

WHEELER, District Judge. These screens were not assessable according to the protest; and the classification by the collector, although erroneous, could not be changed by the board, but had to be followed, as it was. Decision affirmed.

DIECKERHOFF et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—BRASS BOXES FOR MOURNING PINS.

Brass boxes for mourning pins, though costing more than the pins, held to be not unusual coverings, and not therefore subject to separate or additional duty.

This was an appeal by Dieckerhoff, Raffloer & Co. from a decision of the board of general appraisers affirming the action of the collector of customs for the port of New York in respect to the classification for duty of certain imported merchandise.

The merchandise in suit consists of mourning pins, imported in small brass boxes, which were packed in cases. The brass boxes cost considerably more than the pins, and were classified for duty as unusual coverings, at the rate of 35 per cent. ad valorem, under paragraph 177 of the act of August 28, 1894. The importers protested, claiming that the brass boxes were the ordinary and usual coverings for such merchandise, and were not subject to additional duty. On the trial the importers produced evidence to show that the boxes were the usual coverings of such pins, and were never dealt in separately from the pins, but always accompanied the latter into the hands of the consumer. There was nothing to indicate that the boxes were designed for use otherwise than in the bona fide transportation of the pins to the United States, beyond the fact that they were more expensive than the pins, and that the same pins were sometimes, and perhaps more frequently, imported in cheaper, pasteboard boxes.

W. Wickham Smith, for plaintiff.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.

WHEELER, District Judge. These brass boxes for mourning pins do not appear to be so uncommon or rare, for that purpose, as to be properly called "unusual"; and they do not appear to be "designed for use otherwise than in the bona fide transportation of the" pins to the United States. The value of the boxes is large

In proportion to that of the pins; but the use, not the value, is made controlling, by the statute, as to whether they should be separately dutiable. Decision reversed.

MORRISON et al. v. UNITED STATES.

WOLFF et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

Nos. 54 and 55.

CUSTOMS DUTIES—CLASSIFICATION—GLASS BEADS STRUNG.

Glass beads strung, of two kinds, one consisting of small brown beads, which were a poor imitation of the precious stone known as "cat's eye," and the other of larger size, and also an imitation of precious stones, held to have been dutiable as "imitations of precious stones composed of paste or glass, not exceeding one inch in dimensions, not set," under paragraph 454 of the act of 1890, and not as manufactures of glass not specially provided for under paragraph 108.

These were appeals taken, respectively, by E. A. Morrison & Son and H. Wolff & Co. from a judgment of the circuit court affirming a decision of the board of general appraisers which affirmed the action of the collector in the classification for duty of certain imported merchandise.

Albert Comstock, for appellants.

Jas. T. Van Rensselaer, for the United States.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In the year 1891, E. A. Morrison & Son imported into the port of New York two invoices of glass strung beads not exceeding one inch in dimensions, of two different kinds. One kind consisted of small brown beads, which were a very poor imitation of the precious stone known as "cat's eye," which were used principally in the millinery trade for trimming, or for trimming ladies' garments, and were popularly styled "jewels" or "jewel stones." The second kind consisted of larger beads than those of the first class, which were also strung, and were imitations of precious stones, and did not exceed one inch in dimensions, and were used for trimming, and were also called "jewels." In 1893 and 1894, H. Wolff & Co. imported into the port of New York sundry invoices of glass strung beads, not exceeding one inch in dimensions, which were imitation pearl beads, and were called by that name, or were called "wax beads," or "Roman beads," and were used for necklaces or for trimming. All these articles have been long commercially known as beads. The collector assessed a duty of 60 per cent. ad valorem upon all of these goods, under paragraph 108 of the tariff act of 1890, which was as follows:

"Thin blown glass, blown with or without a mold, including glass chimneys and all other manufactures of glass, or of which glass shall be the component material of chief value, not specially provided for in this act, sixty per centum ad valorem."

The importers protested that the goods were dutiable under paragraph 454 of the same act, which imposed a duty of 10 per cent. ad valorem upon "imitations of precious stones composed of paste or glass, not exceeding one inch in dimensions, not set." The board of general appraisers sustained the collector, and the circuit court affirmed the decision of the board upon the articles now in question, whereupon the importers appealed to this court. The cases were tried together upon substantially the same record.

"Glass beads, loose, unthreaded, or unstrung," are dutiable at 10 per cent. ad valorem, under paragraph 445 of the act of 1890. There is no duty specifically placed upon glass strung beads, and it is conceded that the merchandise in question was excluded from classification under paragraph 445, and that, unless it was dutiable under paragraph 454, it was properly classified by the collector, under paragraph 108, as manufactures of glass not specially provided for. The articles were, in both popular and in commercial language, beads. The two Morrison importations, which were used for trimming, were also called, apparently for convenience sake, "jewels," but this subname has no bearing upon the classification for tariff purposes. The term "imitations of precious stones" is not a commercial term, and has no especial commercial meaning. All these articles were in fact imitations of precious stones, and are known to be such by the people who deal in them. The term, "imitations of precious stones, unset," implies that there were imitations which were set; that is, made into or arranged as ornaments or imitation jewelry. A natural suggestion is that the two Morrison importations were to be exclusively used for trimming ladies' hats or apparel, and were not to be set into ornaments for the person; but there can be no practical tariff distinction between imitations of precious stones, made of glass or paste, unset, which are to be set into articles of jewelry, and those imitations which are to be used as ornaments upon ladies' hats or apparel. Inasmuch as the only glass beads which are named in the tariff act are unstrung beads, these strung beads are not classified by name, and their position for tariff purposes must be within some paragraph of general description. The only two paragraphs that can be discovered which describe them are Nos. 454 and 108. They are imitations of precious stones, composed of glass or paste, of the designated size, and are unset, and they are manufactures of glass, and, if not specially provided for, must fall into the general receptacle for glass articles which have escaped other classification. But adequate provision seems to have been made for them by the terms of paragraph 454. The decision of the circuit court, so far as it related to the articles in question, is reversed.

UNITED STATES v. KAUFFMAN et al.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

No. 33.

CUSTOMS DUTIES—CLASSIFICATION—HULLED MILLET SEED.

Hulled millet seed, which is adapted for use as food, and in which the germinating power has been destroyed, was dutiable, under section 3 of the act of 1894, as an article "manufactured, in whole or in part, not provided for in this act," and not as "seeds," under paragraph 206½. 78 Fed. 804, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an appeal by Kauffman Bros. from a decision of the board of general appraisers affirming the decision of the collector of the port of New York in respect to the classification for duty of certain merchandise imported by them. The circuit court reversed the decision of the board (78 Fed. 804), and the United States have appealed.

Henry C. Platt, for the United States.

Everit Brown, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The firm of Kauffman Bros. imported, in November, 1894, into the port of New York, 200 bags of hulled millet seed. The collector assessed the merchandise for duty at 20 per cent. ad valorem, under section 3 of the tariff act of August 28, 1894, which provides as follows:

"That there shall be levied, collected and paid * * * on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per cent. ad valorem."

The importers protested against this assessment upon many grounds. The one now relied upon is that the article was dutiable under paragraph 206½ of the same act, which is as follows:

"Garden seeds, agricultural seeds, and other seeds not specially provided for in this act, ten per centum ad valorem."

The board of general appraisers affirmed the decision of the collector, and the circuit court reversed the decision of the board upon the ground that by commercial designation the article was known as a "seed." From the decision of the circuit court this appeal was taken.

The merchandise is millet pulp, from which the hull has been removed, and therefore it will not germinate, and cannot be used for agricultural purposes. It has been destroyed as a "seed," according to the common understanding of the word, or according to the meaning given to it by lexicographers, and has been removed, by the removal of the hull, to a different condition, and to be used for different purposes. It is used largely, especially by persons of German birth, for food, as oatmeal is used, and it is also used for food for birds. Millet seed, not hulled, is not used for human food. Hulled millet seed is not dealt in by seedsmen, but it is sold by grocers, especially by dealers in fancy groceries and canned goods. The hulled and the

unhulled millet seed are called by these respective names, and the two articles are quite distinct from each other. The circuit court felt itself constrained, notwithstanding these facts, to hold that the article was by commercial designation classified among seeds. The testimony upon this subject was given by three dealers in fancy groceries, who did not deal in garden seeds. The testimony was mainly drawn out by leading questions, and was to the effect that in the trade of which they were members, and in their catalogues, hulled and unhulled millet each had the name of "seed." For example, one of the protesting importers was asked:

"Q. In the trade with which you are familiar, do you know of a class of articles which are commercially recognized, and generally so, as seeds? A. Yes, sir. Q. Please enumerate the kind of seeds generally in that category. A. Canary seed, hemp seed, rape seed, caraway seed, poppy seed, millet seed. Q. Those, in actual transactions, are known by their specific names you have just mentioned, I presume? A. Yes, sir. Q. But all in the general class of seeds? A. Yes, sir. Q. Is the seed mentioned in connection with this the hulled or unhulled millet seed? A. Both. Q. And to further distinguish between the two kinds of millet seed you have to specify whether it is hulled or not? A. We put down millet and millet hulled, and sometimes the German name, which indicates that it is yellow."

Another witness dealt in both kinds of millet seed, and was asked:

"Q. And they are both commercially within the category of seeds? A. Yes, sir. Q. Being specifically designated, in case of purchase, to distinguish them? A. Yes, sir."

The third witness was asked and answered as follows:

"Q. Is there, or is there not, in the wholesale trade and commerce of this country, and has there been for some years past, a well-defined and accepted trade meaning for the word 'seeds'? A. Yes; it is a class term of seeds. Q. Are there various kinds of seeds, bought and sold under their specific names, under the general name, 'seeds'? A. Yes, sir. Q. Please enumerate some of them. A. Canary, rape, hemp, fennel, anise, and perhaps half a dozen others,—there are plenty others,—millet seed. Q. Those, when they are ordered, are ordered by their specific names, in order to distinguish them? A. Yes, sir."

The testimony merely amounts to the fact that importers and dealers in foreign groceries, which are "specialties," import various seeds to be used for food for animals or for man, and naturally call them by their appropriate names; that, among other articles in this class, millet seed of both varieties is kept; and that each is known by its appropriate name. This testimony falls very far short of proving that, in the trade and commerce of this country, hulled millet seed, which the circuit court properly found to have been advanced by manufacture, so as to pass from the group of garden or agricultural seeds to the group of food products, needs a commercial designation which differs from its popular and natural designation. The fact that grocers keep a certain class of seeds for sale, and with them they keep for sale hulled millet seed,—which is its proper name, and shows it to be a partially manufactured article,—and call it by that name, is not valuable upon the question of general commercial classification of the article as a seed.

The decision of the circuit court is reversed.

KOECHL v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

No. 53.

CUSTOMS DUTIES—CLASSIFICATION—ANTITOXINE.

Antitoxine, used by inoculation for the prevention and cure of diphtheria, was dutiable as a "medicinal preparation," under paragraph 59 of the act of 1894, and was not duty free, under paragraph 664, as "vaccine virus."

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal by the importer from a decision of the circuit court, Southern district of New York, reversing a decision of the board of general appraisers, which reversed the action of the collector of the port of New York in classifying certain imported merchandise for duty.

Albert Comstock, for appellant.

Jas. T. Van Rensselaer, for the United States.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The merchandise in question is antitoxine, the well-known specific used by inoculation for the prevention and cure of diphtheria. The collector assessed it for duty under paragraph 59 of the tariff act of August 28, 1894, as a "medicinal preparation," which it undoubtedly is. The importers contend that it should be admitted free of duty, the paragraph on which they rely being, "664. Vaccine virus." Vaccine virus is the morbid principle of cowpox, which acts as a preventive of smallpox, and is, of course, a different article from antitoxine. The importers cite the Century Dictionary, which, after giving the correct definition of "vaccine," both as adjective and noun, sets forth as a secondary definition of the word when used as a noun: "In a general sense, the modified virus of any specific disease introduced into the body in inoculation, with a view to prevent or mitigate a threatened attack of that disease, or to confer immunity against subsequent attacks." No authority for this use is cited. The quotation expresses merely the opinion of the compiler or compilers of the dictionary, and it would certainly require more than the mere ipse dixit of a contributor to such a work to satisfy us that the words "vaccine virus" are actually used with such meaning by educated people; especially in view of the fact that none of the other standard dictionaries—Webster, Worcester, Funk & Wagnalls, etc.—give any such definition of the phrase. No testimony was taken before the board of appraisers, but in the circuit court it was shown affirmatively by uncontradicted evidence that the antitoxine in question was not within the common meaning of the words as understood by the pharmaceutical trade and the medical profession. Congress used the words in the same sense as the trade

uses them in Rev. St. 1874, § 2505, including in the free list "cow or kine pox, or vaccine virus." The decision of the circuit court is affirmed.

DODGE et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 8, 1898.)

No. 42.

1 CUSTOMS DUTIES—CLASSIFICATION—RULES OF INTERPRETATION.

In construing provisions of the tariff laws, such as paragraph 558 of the act of 1894, which provides for "moss, seaweeds, and vegetable substances, crude or unmanufactured, not otherwise specially provided for in this act," the principle of "*noscitur a sociis*" is to be applied, so as to confine the concluding general words to vegetable substances of the same kind with those specifically enumerated. *Ingersoll v. Magone*, 4 C. C. A. 150, 53 Fed. 1008, distinguished.

2. SAME—CAMPHOR OIL.

Camphor oil, in its crude state, which is a heavy, oily liquid, obtained from the same tree as crude gum camphor (the two being mixed together without any chemical connection, and separated merely by drainage), was not dutiable as "camphor, crude," under paragraph 429 of the act of 1894, or as "moss, seaweeds, and vegetable substances" not otherwise provided for, under paragraph 558, or as "drugs, such as barks, beans, berries," etc., not edible, and not advanced in manufacture, under paragraph 470; and the same having been classified by the collector under paragraph 60, which provides for distilled, essential, expressed, and rendered oils, etc., as against a protest naming only said paragraphs 429, 470, and 558, *held*, that such classification must be affirmed. 77 Fed. 602, affirmed.

This is an appeal by the importers from a decision of the circuit court, Southern district of New York, affirming a decision of the board of general appraisers which affirmed a decision of the collector of the port of New York.

Albert Comstock, for appellants.

Henry D. Sedgwick, Jr., for the United States.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The record is not entirely clear as to how the article here imported is obtained. It comes from the same tree from which comes the crude camphor of commerce,—the whitish, translucent, crystalline, volatile substance which is well known to every one as "camphor" or "gum camphor." The article in question is a dark-brown, heavy, oily liquid; and, as obtained from the tree, the crude gum camphor and this brown liquid are mixed together without any chemical connection. They are separated merely by drainage. It may be inferred from the testimony that these products thus jointly presented are obtained by some process of distillation from the chopped-up wood of the tree,—that they are not mere exudations; but upon this point the evidence is unsatisfactory, being entirely hearsay; and, indeed, it is not necessary to determine such question in this case. The evidence does establish the proposition that they are different substances; that neither of the two is produced from the other; that neither can by any process be transformed into the other. From the crude gum camphor, refined camphor is made,

and from the brown liquid is manufactured refined oil of camphor. The board of appraisers found that the "merchandise is camphor oil, sometimes commercially known as 'heavy oil of camphor,' and is the crude article from which refined camphor oil is distilled." The evidence abundantly sustains this finding. The collector classified the importation for duty under paragraph 60 of the tariff act of August 23, 1894, which provides for "products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils and all combinations of the foregoing." The importers protested, claiming free entry under one or the other of three paragraphs in the same act,—429, 470, and 558. Two other paragraphs (10½ and 16½) were included in the protest, but have been abandoned on the argument. It will be necessary to determine only the question whether the importation is within the terms of either of these three paragraphs. If it be not, it is immaterial to inquire how otherwise it should be classified. The importer can be heard only in support of the claims specified in his protest.

Paragraph 558 refers to "moss, seaweeds, and vegetable substances, crude or unmanufactured, not otherwise specially provided for in this act." Under the familiar principle of "*noscitur a sociis*," this vague general phrase, "vegetable substances, crude or unmanufactured," should be restricted to such vegetable substances as are *ejusdem generis* with the substances specifically enumerated in this paragraph. It certainly was not the intention of this court in *Ingersoll v. Magone*, 4 C. C. A. 150, 53 Fed. 1008, to abrogate a rule of construction so well settled, so long established, and so convenient as this. In that case a noun of highly-specific designation, which originally covered one class of articles, had gradually, in popular speech, acquired a meaning broad enough to include another and somewhat similar class. The decision in *Ingersoll v. Magone* must be limited closely to the facts then before the court. This crude camphor oil presents no points of resemblance to mosses or seaweeds, and is not to be classified under paragraph 558. Paragraph 470 reads as follows:

"470. Drugs, such as barks, beans, berries, balsams, buds, bulbs, bulbous roots, excrescences, fruits, flowers, dried fibers, dried insects, grains, gums and gum resin, herbs, leaves, lichens, mosses, nuts, roots and stems, spices, vegetables, seeds aromatic, seeds of morbid growth, weeds, and woods used expressly for dyeing; any of the foregoing drugs which are not edible, and which have not been advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially provided for in this act."

The first three words of this paragraph are manifestly transposed for convenience of alphabetical arrangement. The enumeration given is: "Such drugs as barks, beans, berries, etc." *U. S. v. McSorley*, 13 C. C. A. 15, 65 Fed. 492. If the merchandise in question here be a drug,—and the evidence is not entirely persuasive to that conclusion,—it certainly is not a drug "such as barks, beans, berries," or any of the other varieties of drug included in the enumeration, and therefore it is not within the provisions of paragraph 470.

Paragraph 429 reads, "Camphor, crude." Whatever this importation be, it is certainly not crude camphor. As the judge who heard the cause in the circuit court expressed it:

"It comes with crude camphor from the tree, and is separated from the camphor crystals by drainage. * * * 'Camphor, crude,' implies what may become camphor refined. This, * * * although it may be called 'camphor oil,' because of its origin, contains no camphor, and can never become camphor. It is not in fact, nor is called, camphor, crude."

In this conclusion we entirely concur. The decision of the circuit court is affirmed.

WIEBUSCH & HILGER, Limited, v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

No. 52.

CUSTOMS DUTIES—INTERPRETATION OF LAWS—CLASSIFICATION—MEASURING TAPES.

The tariff act of 1883 provides, in paragraph 334, for "brown and bleached linens, ducks, canvas, * * * handkerchiefs, lawns, or other manufactures of flax, jute, or hemp, * * * not specially enumerated or provided for." Paragraph 336 provides for "flax or linen thread, twine, and pack thread, and all manufactures of flax * * * not specially enumerated or provided for." *Held*, that these paragraphs were to be construed by the rule of "*noscitur a sociis*," so as to confine the concluding general descriptive terms to articles of like kind with those enumerated; that the former paragraph was therefore confined to woven fabrics capable of being measured by the square yard, and the latter to spun and twisted goods; and, hence, that the former covered measuring tapes mounted for use, which were woven with a warp and filling, in complete widths, with selvages.

This is an appeal from a decision of the circuit court, Southern district of New York, affirming a decision of the board of general appraisers which reversed a decision of the collector of the port of New York. 78 Fed. 807.

The articles in question are measuring tapes, mounted for use. The tapes are woven with a warp and filling, in complete widths, with selvages, and are not spun or twisted. After the weaving, the surfaces are treated with paint, or similar composition, and marked with letters and figures. They are then rolled up in leather cases, with metal adjuncts. The collector classified them under paragraph 216 of the tariff act of 1883, as manufactures in part of metal. It appears that flax is the component material of chief value, and for that reason the board reversed the collector; their decision being, to that extent, acquiesced in by both sides. The board (and the circuit court) held that the articles were dutiable under paragraph 336. The importer claims that they are covered by paragraph 334.

Everit Brown, for appellant.

Jas. T. Van Rensselaer, for the United States.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The two paragraphs in question are as follows:

"334. Brown and bleached linens, ducks, canvas, paddings, cot-bottoms, diapers, crash, huckabacks, handkerchiefs, lawns, or other manufactures of flax, jute, or hemp, or of which flax, jute, or hemp shall be the component material of chief value, not specially enumerated or provided for in this act, thirty-five per centum ad valorem."

"336. Flax or linen thread, twine, and pack thread, and all manufactures of flax, or of which flax shall be the component material of chief value, not

specially enumerated or provided for in this act, forty per centum ad valorem."

The tariff act of 1883 provided that, if two or more rates of duty are applicable to any imported article, it shall be classified for duty under the highest of such rates. Each paragraph above quoted contains a provision for "manufactures of which flax shall be the component material of chief value, not specially enumerated or provided for," and there is no more specific enumeration or designation of these measuring tapes contained in the act. It was therefore held in the circuit court, upon the authority of *Dieckerhoff v. Robertson*, 40 Fed. 568, that both rates of duty were applicable, and that the question as to which rate should prevail must be settled by the provision as to highest rate of duty above referred to. *Dieckerhoff v. Robertson* (which was decided by the writer of this opinion) is undoubtedly authority for that proposition,—the articles in that case being measuring tapes of flax, but not mounted as these are; but it is not controlling authority in this court, being a decision of the circuit court upon a jury trial which was never reviewed. A more careful consideration of the question leads this court, upon consultation, to a different conclusion. Past experience has shown, as might well be expected, that in statutes as long, detailed, comprehensive, and intricate as are the tariff acts, there will be found, not only awkward and obscure sentences, but also errors, inconsistencies, contradictions, and duplications. Nevertheless, it is hardly to be expected that in two paragraphs, standing almost in juxtaposition, different rates of duty should, by the use of precisely the same descriptive phrase in each paragraph, be made applicable to the same articles. If it be possible, under well-settled canons of interpretation, to construe the phrase, "manufactures of which flax shall be the component material of chief value," so as to cover different articles, when used in the 40 per cent. paragraph, from those which the same phrase covers when used in the 35 per cent. paragraph, this should be done. Each paragraph, it will be observed, contains an enumeration of articles denominatively named, and between the two groups thus separately enumerated there is an easily recognizable distinction. The "linens, ducks, canvas, paddings, cot-bottoms, diapers, crash, huckabacks, handkerchiefs, and lawns" are all woven with warp and filling. They are all articles capable of being measured by the square yard, and sometimes, in former tariff acts, were subjected to a duty per square yard. The "thread, twine, and pack thread," on the contrary, are all spun and twisted, but not woven. They are not capable of measurement for a square-yard duty, and have never been thus assessed. This separation of manufactures of flax into groups of woven goods and of spun and twisted goods is not a novel arrangement. It is found in the act of March 2, 1861, § 14; in the act of June 30, 1864, § 7; and in Rev. St. § 2504, p. 462. And in these earlier acts, after the denominative enumeration, alike in the "woven" group and in the "spun and twisted" group, appears the same general description, "other manufactures of which flax shall be the component of chief value." It is reasonable to infer that congress meant in each case to cover "other manufactures" of like character to those denominatively named in the specific enumeration.

"Nearly fifty years ago it was stated by Mr. Justice Story (*Adams v. Bancroft*, 3 Sumn. 384, 386, Fed. Cas. No. 44) that 'one of the best-settled rules of interpretation of laws of this sort is that the articles grouped together are to be deemed to be of a kindred nature and of kindred materials, unless there is something in the context which repels that inference. "*Noscitur a sociis*" is a well-founded maxim, applicable to revenue as well as to penal laws.' The rule was stated in different language in *Butterfield v. Arthur*, 16 Blatchf. 216, Fed. Cas. No. 2,249 as follows: 'When a general descriptive term is employed in a statute in connection with words of particular description, the meaning of the general term is to be ascertained by a reference to the words of particular description.' This rule of construction has been judicially declared so frequently and so consistently that it is as much incorporated into a revenue law as though it were expressly embodied in it." U. S. v. *Sixty-Five Terra-Cotta Vases*, 18 Fed. 508, 510. In *Manufacturing Co. v. Worthington*, 132 U. S. 654, 10 Sup. Ct. 180, the supreme court held that certain show cards, consisting of thin sheet iron, on which the name of the person or of the article advertised, and some picture or ornament, were printed by lithographic process, "were not 'printed matter,' within the meaning of the clause relied on by the plaintiff, because those words, as there used, applied only to articles ejusdem generis with books and pamphlets, which iron show cards were not." The paragraph referred to in that case reads, "Books, pamphlets, bound or unbound, and all printed matter, not specially enumerated or provided for, etc." In opposition to the application of such a rule of construction in the case at bar, two authorities are cited, *Arthur's Ex'rs v. Butterfield*, 125 U. S. 70, 8 Sup. Ct. 714, and *Ingersoll v. Magone*, 4 C. C. A. 150, 53 Fed. 1008. In the first of these the paragraph construed read as follows:

"On hair cloth of the description known as hair-seating, eighteen inches wide or over, forty cents per square yard; less than eighteen inches wide, thirty cents per square yard. On hair cloth known as crinoline cloth, and on all other manufactures of hair not otherwise provided for, thirty per centum ad valorem."

The supreme court held that the phrase, "all other manufactures of hair not otherwise provided for," should not be restricted to other manufactures like those enumerated in the same section, viz. crinoline cloth or hair-seating. In the tariff act then under discussion, however, there was no other provision for "manufactures of hair"; and consequently there was no apparent necessity for a construction which would avoid inconsistencies, and thus find in the act, considered as a whole, a harmonious tariff. In the opinion of this court in *Dodge v. U. S.* (handed down at this session) 84 Fed. 449, will be found a statement of the reasons for restricting our former opinion in *Ingersoll v. Magone* to the facts then before the court, and which are not found in the case at bar. The appellant's goods, therefore, being woven with warp and filling, and not spun or twisted, are dutiable under paragraph 334, and not under paragraph 336. The decision of the circuit court is reversed.

PALMER et al. v. JOHN E. BROWN MFG. CO.

(Circuit Court, D. Massachusetts. December 13, 1897.)

No. 589.

1. PATENT—VALIDITY.

A subsequent patent to the same patentee, which involves nothing more than the application of an invention, covered by an earlier patent, to a special art for which it was peculiarly adapted, is void.

2. SAME—INFRINGEMENT SUITS—PUBLIC ACQUIESCENCE.

Public acquiescence, founded presumably upon two patents to the same inventor taken together, does not necessarily avail to support the later patent when sued on alone.

3. SAME—MACHINES FOR SEWING OR QUILTING FABRICS.

The Palmer patent, No. 308,981, for a "machine for sewing or quilting fabrics," is void, as being a mere application to an appropriate use of what was covered by claim 7 of patent No. 304,550 to the same inventor.

This was a suit in equity by Frank L. Palmer and others against the John E. Brown Manufacturing Company for alleged infringement of letters patent No. 308,981, issued December 9, 1884, to Frank L. Palmer, for a "machine for sewing or quilting fabrics."

Edwin H. Brown, for complainants.

James E. Maynadier, for defendant.

PUTNAM, Circuit Judge. The patent in suit was issued on December 9, 1884, and is described as for a machine for sewing or quilting fabrics. The original application also covered what the inventor and the patent office designated a "mechanical movement," but, on the requirement of the office, the application was divided, and a patent was issued to the inventor on September 2, 1884, for what also was therein described as a "mechanical movement"; and it is this patent of earlier date which creates the only substantial difficulty the court finds in the case.

Claim 24 requires, however, independent consideration. It seems too indefinite. The Incandescent Lamp Patent, 159 U. S. 465, 16 Sup. Ct. 75. However this may be, the claim, if it can be properly interpreted, will be found either too broad to be sustained, or only a variation of what is covered by the other claims, in which latter event it must fall with them.

The underlying principle of the invention, and its application to a quilting machine, are made plain by the following extracts from the specification of the patent in suit:

"My invention relates more particularly to machines for quilting bed comfortables and other articles composed of several thicknesses of material; but such machines may be employed for sewing upon various fabrics in one or several thicknesses. The principal objects of my invention are to enable fabrics of comparatively large size—such as quilts and bed comfortables—to be quilted by a sewing machine while held in an extended or stretched condition upon suitable supports, and to produce such changes in the relative position of the fabric and sewing-machine needle by a universal movement in any and all directions, under control of a pattern, that quilting in large and elaborate patterns of artistic design may be quickly and automatically produced. The invention consists in various novel combinations, which are hereinafter described, and referred to in the claims. In order that the invention may be more readily understood, I will first give a brief description of the

principal parts of the machine which I have chosen to illustrate the invention. The fabric to be sewed or quilted is extended on a frame, which constitutes a holder or supporting carrier for the fabric, and the sewing machine has a long arm, to enable its needle to operate on all parts of the fabric which it is desired to quilt. Two carriages are employed, which are movable in directions transverse to each other, and one of which is supported upon the other. The lower carriage, which has only a simple movement, I term the 'first carriage,' and the other or upper carriage, which moves with as well as upon the first carriage, I term the 'second carriage.' The second carriage, therefore, has a compound movement, and controls the relative position of the fabric and sewing-machine needle. The fabric frame or fabric holder is supported by or suspended from this second carriage. Neither of the two carriages has a determined and invariable movement, but the speed and direction of movement of either carriage may be varied or changed relatively to the speed and direction of the other to any degree and at any point within the whole range of movement of the carriages. The speed of each carriage is increased or diminished inversely as the speed of the other is increased or diminished, and hence the change in relative position of the fabric and needle is always made at uniform speed in any direction. The fabric frame or holder is supported or suspended, preferably, by converging arms or hangers of rigid material, and these arms or hangers are connected with a single central support, which consists of an upright shaft or bar having a bearing in the second carriage. The movements of the carriages and fabric frame or holder are controlled by a pattern consisting of a guide or guiding slot arranged in pattern form, with which the aforesaid upright shaft or bar engages, and along which it is moved, and the movement of the fabric under the sewing-machine needle conforms to the movement of the aforesaid shaft or bar along the pattern. The fabric frame or holder is moved in any and all directions along the pattern or former, and the carriages serve simply as supports for the fabric frame, and permit such movement. The pattern or former preferably consists, in addition to the guide or slot before mentioned, of a rack or track also arranged in pattern form, and adjacent to the guide or slot, and the fabric frame and its central supporting shaft or bar are made to follow the rack or track by a pinion or wheel loosely mounted on the shaft or bar, and gearing with the rack or track. The pinion or wheel is or may be rotated by an endless band or chain, and by its rotation it travels along the pattern rack or track, and carries with it the fabric frame, its supporting shaft or bar, and the two carriages. Of course, as the pinion or wheel moves along the pattern rack or track, more or less of the driving band or chain is taken up, and I employ means for taking up the slack in the said band or chain and idler pulleys around which it passes. The end of the shaft or bar on which the said pinion or wheel is arranged enters the above-mentioned guide or slot, which is in pattern form, and thereby holds the pinion or wheel in engagement with the pattern rack or track."

These patents gave a monopoly of a valuable and important manufacture, which monopoly has been acquiesced in by the public until the late attempts of the respondent to disturb it. Therefore, if the entire invention described in the patent in suit was covered by it, these facts would give it so much support, and the underlying principle would be so broad, that the whole case, with reference alike to patentability and infringement, would be easily disposed of by the application of the rules stated by the circuit court of appeals for this circuit in *Reece Buttonhole Co. v. Globe Buttonhole Co.*, 10 C. C. A. 194, 61 Fed. 958, and *Heap v. Suffolk Mills*, 82 Fed. 449.

The respondent relies especially on patent No. 185,954, issued to Frank L. Palmer on January 2, 1877, as anticipatory. The device covered by that patent did, indeed, make use of the germ of the invention before the court for quilting a narrow range of patterns; but it lacked the "universal movement in any and all directions" which

now appears. The present invention unfettered the thought made use of in the earlier device, and to unfetter thought is one of the prerogatives of great intellectual power and of genius. This fact has been so often applied practically in determining what is and what is not invention as not to need elaboration here.

We come, therefore, to the difficulty which arises from the issue of the patent No. 304,550, on September 2, 1884, to the same patentee to whom the patent in suit issued. As already said, the earlier patent assumes to cover a "mechanical movement," but it is safer to look directly at its essence than to attempt to settle the meaning of this phraseology and its application to this particular topic. Its seventh claim is as follows:

"(7) The combination, with a rack or track in pattern form and a positively operating engaging device acting thereon and capable of bodily movement relative thereto, of carriages supporting said device, movable in directions transverse to each other, and one mounted upon the other, whereby provision is afforded for the movement of said engaging device along the rack or track by its engagement therewith, substantially as herein described."

However the subject-matter of this claim may be designated, it contains much more than the elements necessary to complete the mechanical movement which underlies the invention, and it enumerates all the working details of a concrete mechanism, needing only the additions of power, and of well-known special parts, to convert it into a useful machine. The complainants, on inquiry by the court, declined to admit that the patent of September 2, 1884, is void; so that the question necessarily arises whether the additions of power and of special working parts, as shown and claimed in the patent in suit, involved patentable invention. Since, under the circumstances, the patent of September 2, 1884, cannot be regarded as anticipatory in the ordinary sense, the answer to the question just stated must determine the suit.

It is plain that any quilting machine which used the elements of the seventh claim of the patent of September 2, 1884, would infringe that patent, whether or not it employed the additional elements set out in the later patent. So that, if those additional elements involve no patentable invention, and, nevertheless, the later patent should be sustained, the monopoly of the earlier patent would be extended in violation of the statute, and it would be wholly immaterial in law whether the extension covered years, or only months. All this involves such a clear rule of law, and has been so many times decided, that it need not be elaborated.

The case was ordered reargued in order that the complainants might point out to the court, in detail or in general, the elements of patentable invention found in the later patent, and not in the earlier one. We are unable to perceive that they have done so, unless by referring the court to the following citations from *Reece Buttonhole Co. v. Globe Buttonhole Co.* (C. C. A.) 61 Fed. 958, 970:

"The essential feature of this claim is the so-called 'compound movement' given the needle bar, the result of simultaneous longitudinal and lateral motions. This alone was, of course, old and common in the arts; yet the suggestion of its application to this purpose, combined with the mechanism

devised therefor, constitute a patentable invention of a fundamental character, highly meritorious, and one to be protected by a liberal construction."

The complainants, seeking to apply these expressions to the case at bar, maintain that the patent of September 2, 1884, was only for a mechanical movement, namely, the "universal movement"; that the invention in the patent in issue consisted in applying this movement to a quilting machine; that in this respect the case corresponds to the application in *Reece Buttonhole Co. v. Globe Buttonhole Co.* of the "compound movement" to making buttonholes; and that it is immaterial whether the movement was adapted from an earlier patent, as the complainants claim they did, or from the common art, as *Reece* did. This may be true as a rule, but the error is in the application of it. The patent in issue found in the earlier patent much more than *Reece* found in the earlier art, because it found in the seventh claim, which we have cited, not only the "universal movement," but all the parts and mechanism needed to guide the engaging device in the rack or track which develops the pattern in the practical work of quilting as done by the complainants.

Neither is the complainants' case aided by the rules discussed and applied in *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670, *Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, and *National Cash-Register Co. v. Boston Cash Indicator & Recorder Co.*, 156 U. S. 502, 515, 15 Sup. Ct. 434; because it is not a question of applying to a new art what is covered by the seventh claim cited, but of applying what was on its face expressly intended for all the arts to a special art for which it was peculiarly adapted. On the whole, the respondent maintains that what is claimed in the patent in suit was simply an application to an appropriate use of what was claimed in the earlier patent, without the development of the inventive faculty in making the application. We think this proposition must prevail.

It seems proper to add that the result is not a result rendered necessary by the law, looking at *Palmer's* whole invention, but of his own option in accepting two patents, followed by resting complainants' suit on the later patent alone. We must also add that, in this suit, the public acquiescence to which we have referred does not avail, as it presumably relates to the two patents combined, and not to the later one alone, and it cannot be apportioned in its behalf.

The respondent maintains that in the patent of September 2, 1884, the patentee disclaimed what is now set up under the patent in suit, but we think the case in that respect falls within *The Barbed-Wire Patent*, 143 U. S. 275, 280, 281, 12 Sup. Ct. 443, 450, and not within *Underwood v. Gerber*, 149 U. S. 224, 230, 13 Sup. Ct. 854; yet, for the reasons stated, the complainants cannot prevail. Let there be a decree, as provided in rule 21, dismissing the bill, with costs for the respondent.

EASTMAN CO. v. GETZ et al.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

No. 13.

1. PATENTS—MACHINES FOR COATING PHOTOGRAPHIC PAPER.

The Eastman & Walker patent, No. 358,848, for a machine for manufacturing sensitive photographic films, was anticipated by the Sarony & Johnson machine, for making carbon paper (English patent of May 18, 1878), as to claim 3, which is a broad one, covering a combination of driven smooth-faced rolls, a suitable hang-up machine, and a coating mechanism consisting of a smooth-faced roll partly submerged in the coating material, arranged at such a distance from the hang-up machine as to allow the gelatinous coating to set before it reaches the looping slat. 77 Fed. 412, affirmed.

2. SAME—PROCESS PATENTS.

The Eastman & Walker patents, Nos. 370,110 and 370,111, for processes of coating photographic paper, were anticipated by the method used in the Sarony & Johnson English machine.

3. SAME—SUPPRESSION OF TESTIMONY—COSTS.

A large mass of testimony introduced into a patent case, merely in response to a remark by one of plaintiff's witnesses as to the inferiority of the defendants' product, and having no bearing on the real issues, together with nearly 100 pages of printed testimony by an expert witness, consisting mainly of argumentative matter, comments, and criticisms, mingled with opinions, beliefs, and hearsay, *held* to have been improperly introduced into the record, so that no costs of either court should be allowed therefor.

Appeal from the Circuit Court of the United States for the Northern District of New York.

The complainant's bill in equity in the circuit court for the Northern district of New York alleged the infringement by the defendants of claim 3 of letters patent No. 358,848, dated March 8, 1887, for apparatus for manufacturing sensitive photographic films, and of the four claims of letters patent No. 370,110, and of claim 3 of patent No. 370,111, each dated September 20, 1887, and each for a process of coating photographic paper, the three patents having been granted to William H. Walker and George Eastman, and having been assigned to the complainant. The original application for Nos. 358,848 and 370,110 was filed October 25, 1884. It was divided, and an application for Nos. 370,110 and 370,111 was filed March 5, 1887, which was also divided, and the application for 370,111 was filed August 20, 1887. The circuit court dismissed the bill (77 Fed. 412), and the complainant appealed to this court.

M. H. Phelps and M. B. Phillipp, for appellant.

W. A. Jenner, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts). Bromide paper, which is chiefly used for making photographs of life size, was discovered in or about the year 1873. The photographic agent is finely divided bromide of silver, and the paper is coated with a gelatino bromide emulsion, the gelatine being the vehicle by which the bromide is conveyed to the paper. A uniform distribution of the silver is necessary in order to produce good photographic results. The coated paper must be free from streaks or bubbles or specks of dust, and must be preserved from inequalities of expansion which cause unevenness, and therefore coating by hand was

unable to produce, with regularity, a satisfactory article. No machine was in ordinary commercial use which coated bromide paper with a sufficiently uniform degree of evenness and freedom from defects to satisfy the needs of the photographer until the patented machine of 1884, when its product promptly became a reliable and standard article.

The patentee said, in the specification of the machine patent, that the invention involved "the use of a partially submerged roller, by which the paper is carried into the emulsion, to be coated on one side only, a series of carrying or conducting rolls and a hang-up frame of any approved construction being located at such distance from the coating roll that the gelatino argentic emulsion may have time to dry before the web is deposited on the drying frame." The specification points out that the feeding rolls must be positive and uniform in their action, and must not bear upon or make contact with the coated face of the paper, and that, as the paper web is limp with moisture, nothing but smooth, plain-faced rolls can be used as feeders. It is also said that as the tendency of a moist web, after leaving one support, is to assume an irregular form, this unevenness is remedied by the straight surfaces of the rolls which remove the depressions, so that evenness of the emulsion is maintained. In the process patent, No. 370,110, another action is pointed out, which is due to the position of the rollers relatively to each other, whereby the direction of the motion of the paper is changed, so that it passes upward and then downward, and the flow of the emulsion is reversed, so as to "regulate and maintain its uniformity," and to prevent it from "settling" or hardening unequally.

It is to be premised that there was nothing new in the coating devices. The patentees had received, in 1881, from Anthony & Co., of New York, an English machine, which was designed to coat photographic paper, known as "carbon tissue," and which the patentees took for the purpose of seeing if bromide paper could be made upon it. It was not successful, but its coating devices were substantially the same in construction and operation with the coating devices of the machine patent, and applied the emulsion to the face of the paper.

Claim 3 of letters patent No. 358,848 is as follows:

"(3) In an organized machine for making sensitive gelatine argentic paper for photographic use, the combination of one or more driven smooth-faced rolls for maintaining the coated paper in motion, a suitable hang-up machine, and a coating mechanism, consisting of a smooth-faced roll partially submerged in the coating material, said coating roll being arranged at such a distance from the hang-up machine as to allow the gelatinous coating to set before it reaches the looping slot, substantially as described."

It is strongly urged that, inasmuch as the machine was the original successful device which introduced a new department in the art of photography, the questions of novelty and patentability are in a great measure settled. The success of the machine was due to the details of its construction, and not to the naked combination of a coating mechanism, a smooth driven roll, and some one of the

numerous kinds of "hang-ups" which may be in the market. The patentees made such a union of these three elements that success was attained; but in claim 3 they described their invention in such broad terms that any one who combined by means of different mechanical details would be an infringer, but so broadly that it is not strange that the patentable validity of the combination could be successfully attacked.

The same elements were in combination in the English patent of May 18, 1878, to Sarony & Johnson, for a machine for making carbon paper, if the succession of rolls and cords upon which the finished paper is hung in loops can properly be called a "hang-up." It is admitted that it has the partially submerged coating roll, the coating trough, the apparatus for heating the trough, and a driven smooth-faced roller, but it is said that it does not have a hang-up. It has a succession of rollers over which the paper is kept progressing while hanging in loops between them. The coating is "set" or hardened by the time a few loops are hung, and the paper is carried forward to the other rollers until all the loops are hung, to remain at rest until dry, and until wanted for use or for the market.

The main attack upon the anticipatory character of this machine is that it cannot be operative and successful, and it is true that the feed depends upon the frictional adhesion of the paper to the driven rollers, and that the paper, not being under sufficient tension, will occasionally, more or less, "buckle" or crinkle at the bottom of the loops. With obvious modifications of the machine, it is admitted that the complainant filled 20 loops, each of 17 feet in length, three times out of four, with narrow paper, 14 inches wide. The buckling or crinkling which occurred when the machine failed was on the third loop from the beginning, after the paper had progressed three or four loops more. It may well be admitted that the Sarony & Johnson machine, either as originally described or as modified, cannot be a commercial success for the manufacture of paper in large quantities. It is subject to too many stoppages from the buckling of the loops of paper, and commercial success requires certainty and exactness of manufacture, and does not permit detention; but it can make bromide paper of a fair quality, and is an operative machine.

The next objection to it is that its hanging mechanism, which consists of rollers and cords, is not the "hang-up" to which the patent refers. Apparatus for hanging up and carrying off in festoons or loops moist paper hangings, so as to be dried without injury from handling, was well known, and was easily procured. The bars of this class of hang-ups were at rest after the paper was put upon them. The Sarony & Johnson device is not a hang-up which is continually at rest, the slats or bars being continually motionless; but it is in motion until it is filled, and then it rests, and the drying process is completed, and it is used exclusively for drying purposes. There would be an argument that the patentees meant some one of the well-known wall paper hang-ups if the requirements of the specification in regard to the hang-up were not as vague as those of claim 3. It was called "a suitable mechan-

ism in which the coated paper is automatically hung up to dry in pendent loops," and it was to be "a hang-up frame of any approved construction." When, however, the process patent, No. 370,111, which relates especially to the delivery of the web upon a support to dry, is looked at, the Sarony & Johnson drying frame and its mechanism fully correspond with the description of the final part of the process, which is said to be the delivery of the web "to a suitable rack or frame to dry," or "to a suitable drying frame or rack," or "depositing that part of the web on which the coating has set or stiffened at rest with relation to its supports to dry." Our conclusion is that the patentees, for the purpose of making a claim broad enough to include infringers who took merely the skeleton of the invention, made it so broad as to include the preceding machine of Sarony & Johnson, and that there is no proper method of construction by which claim 3 can be cramped into narrower limits than it was intended to include.

The process patents are next to be considered. Patent No. 370,110 does not relate to the portion of the process after the coating has set or stiffened, and confines itself, speaking generally, to the application of the coating material evenly upon the face of the web, and to the change of the flow of the emulsion, so as to regulate and maintain the uniformity of the coating. Patent No. 370,111 includes, as an additional step, the method of manipulating the web after the coating has set, whereby the coated web is deposited upon a frame to dry. The four claims of No. 370,110 are as follows:

"(1) The herein-described method of producing uniform coatings upon continuous webs or strips of fabric, which consists in applying the coating material in a fluid condition evenly upon the face of the web, and in changing the flow of the coating upon the web to regulate and maintain its uniformity, and maintaining the web in motion, and its coated surface unobstructed by contact with foreign bodies until the coating has set or hardened sufficiently to prevent running, substantially as described.

"(2) The herein-described improvement in the art of producing photographic paper, which consists in applying to one face of a web of paper a thin uniform coating or surface of fluid gelatino argentic emulsion, by causing the paper to emerge from the level surface of a body of emulsion, and subsequently maintaining the coated web flat and in motion continuously and uniformly in the same direction, and the surface of the coating undisturbed by contact with foreign substances until the gelatine has set or stiffened sufficiently to prevent running, substantially as and for the purpose set forth.

"(3) The herein-described process of producing gelatino argentic fabric for photographic reproductions, consisting in applying to a moving continuous web of fabric a uniform layer of sensitive gelatino argentic emulsion, keeping said web in motion and the coated side unobstructed until the coated gelatine is set or stiffened sufficiently to prevent flowing, and finally drying said coating.

"(4) The herein-described method of producing uniform coatings upon continuous webs or strips of fabric, which consists in applying the coating material in a fluid condition evenly upon the face of the web, and subsequently maintaining the web in motion and its coated surface unobstructed by contact with foreign bodies until the coating has set or hardened sufficiently to prevent running, substantially as described."

Claim 3 of No. 370,111 is as follows:

"(3) The herein-described continuous process of producing gelatino argentic fabric for photographic reproductions, consisting in applying in a suitable nonactinic light, to a moving continuous web of fabric, a uniform layer of

sensitive argentic fluid emulsion, keeping said web in motion and the coated side unobstructed until the coated gelatine is set or stiffened sufficiently to prevent flowing, and, finally, while the web is in motion and the coating being applied, depositing that part of the web on which the coating has set or stiffened at rest with relation to its supports to dry."

We shall omit the discussion of the questions whether these two patents are invalid because they describe merely the function of the patent, or because the processes involve nothing more than mechanical operations, inasmuch as the processes of these two patents, so far as they are described in the claims which were alleged to have been infringed, were exhibited in the Sarony & Johnson machine. All the steps in the process, including that stated in claim 1 of 370,110, which consists "in changing the flow of the coating upon the web to regulate and maintain its uniformity," and which, though alluded to in the machine patent, was not the subject of especial comment, were taken by Sarony & Johnson in their apparatus.

The complainants moved before the circuit court to suppress a portion of the defendants' testimony, on the ground of its irrelevancy, which motion was denied; but the court properly refused any costs for the testimony of Hudson and Rogers. The record, including paper exhibits, contains 3,924 printed pages, and is unnecessarily voluminous, by reason of the multiplicity of issues of fact which were entered into, and the extent to which testimony was introduced upon them. The complainant's *prima facie* case occupied 28 pages. The defendants' testimony occupied 357 pages, denied infringement, and introduced the machines which were alleged to anticipate. The complainant's rebuttal was at very great length, occupying 1,662 pages. The defendants were apparently permitted, by order of the circuit court, to take testimony in reply to the complainant's case, and their oral testimony occupied 989 pages. The complainant's testimony in surrebuttal occupies 403 pages. A great deal of testimony was introduced on both sides in regard to the method of construction of the defendants' roll, which bore upon the question of infringement; and the investigation in regard to this part of the case became both lengthy and acrimonious, and out of it grew indictments for perjury. The complainant moves to suppress the testimony of John Hatch, James Hatch, Carrie E. Townsend, George W. Stump, and portions of the testimony of Ernest L. Cafilisch, Edward Wilhelm, and De Witt C. Hoover, all of which related to the subject of the use of a smooth-faced roll by the defendants, and therefore bore upon the question of infringement, and was in a near or remote degree relevant to that issue.

The complainant's rebuttal, in addition to the testimony which has been mentioned, was much occupied by the opinions of experts, by tests and experiments in regard to the ability of pre-existing machines to coat bromide paper, and by the history of the Allen & Rowell machine; and the defendants replied with opinions, tests, and experiments, which on each side were varied and exhaustive. Indeed, controverted questions of fact sprang up and were cultivated with expensive frequency; and therefore some of the defendants' testimony which was objected to, and which seems not valuable for the development of the real issues in the case, was admissible. In this class are the depositions of Blair, Hahn, Vandenberg, Wilhelm, Hoover, and

Reichenbach. The depositions of Alfred Simon, Charles Tomlinson, Luke A. Power, Arthur P. Yates, and questions and answers 1 to 19 of the deposition of Ernest Caffisch, were to prove the superiority of defendants' bromide paper over the complainant's product. The deposition of Harry Littlejohn was to show the inferiority of some of complainant's paper which his company had received and been unable to sell. The complainant moves to suppress all this testimony on the ground of its immateriality, and although it seems to have been introduced to meet a little testimony from George G. Rockwood, who spoke of the inferiority of the defendants' paper, the issue had no bearing upon the real issues in the case, was immaterial, and the motion, so far as it related to that testimony, should have been granted. The testimony of Mr. Abbott for the defendants, in reply to the rebuttal of the complainant, is deserving of censure. He was the defendants' patent expert, and testified in their behalf. After the complainant's experts had replied in rebuttal, he was again examined; and, in reply to a single question, made an argument from previously prepared manuscript notes, of 100 printed pages, consisting of comments and criticisms upon the testimony, and his opinions and beliefs occasionally mingled with hearsay. While a portion of his testimony related to experiments in which he had assisted, and was not objectionable, the argumentative portion went entirely beyond the proper bounds of expert testimony; so that it ought not to be treated as testimony for which costs should be allowed. No costs should be allowed in either court for the first hundred pages, and no costs should be allowed in either court for the other testimony which has been pronounced inadmissible. The decree of the circuit court, except as modified in the matter of costs, is affirmed, with costs of this court as specified.

KANSAS CITY HAY-PRESS CO. v. DEVOL et al.

(Circuit Court of Appeals, Eighth Circuit. September 6, 1897.)

No. 808.

PATENTS—VALIDITY AND CONSTRUCTION—HAY-BALING PRESSES.

Patent No. 495,944, to Knight, Kelly, and Alderson, as assignees of Livengood et al., for improvements in hay-baling presses, if valid at all as to its fifth claim, must, in view of the prior state of the art, as shown especially in the Whitman patent, No. 446,311, be narrowly construed. 81 Fed. 726, reversed.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

This was a suit in equity by the Kansas City Hay-Press Company against H. F. Devol, George Devol, and W. S. Livengood, for alleged infringement of certain patents relating to hay-baling presses. In the circuit court the bill was dismissed after a hearing on the merits (72 Fed. 717), and the complainant appealed. This court heretofore, on May 10, 1897, reversed that decree, and directed the court below to enter a decree dismissing the bill as to certain of the patents sued on, but sustaining others, and directing an injunction and accounting

for infringement thereof. 81 Fed. 726. The case is now heard upon a petition for rehearing.

James Scammon (Offield, Towle & Linthicum, of counsel), for appellant.

Geo. A. Neal and T. S. Brown (Bond, Adams, Pickard & Jackson, of counsel), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURLAM. When the opinion in this case was prepared, the chief point of controversy with respect to patent No. 495,944, issued on April 18, 1893, to James E. Knight, Edward Kelly, and William A. Alderson, as assignees of Winfield S. Livengood et al., seemed to be whether the title to that patent was duly vested in the complainant, the Kansas City Hay-Press Company. To this question our attention was chiefly directed on the argument, and for that reason full consideration was not given to the further questions whether claim 5 of said patent was valid and had been infringed. We find no occasion to modify our views with respect to the title to the patent, and what was said on that subject will be adhered to. In a petition for a rehearing recently filed by the appellees, the question whether claim 5 of patent No. 495,944 is valid, or was shown to have been infringed by the appellees, is more elaborately discussed, and our attention has been more particularly directed to the state of the art to which claim 5 of patent No. 495,944 relates. We have become satisfied, after considering this claim in relation to the state of the art as disclosed by several prior patents,—to wit, patent No. 446,311, issued to H. L. Whitman on February 10, 1891; patent No. 375,078, issued to Winfield S. Livengood on December 20, 1887; and patent No. 459,630, issued to John H. Hampton on September 15, 1891,—all of which patents relate to improvements in baling presses, that the claim is not valid, or, if valid, that it must be construed with such limitations as to exempt the appellees from the charge of infringement. We do not deem it necessary to go into this question in detail, and therefore content ourselves with the statement that the Whitman patent, No. 446,311, to which reference has been made, discloses a combination substantially the same as that covered by claim 5 of patent No. 495,944. As this question has received full consideration in connection with the petition for a rehearing, we do not deem it necessary to set the case down for reargument on this point. We have accordingly concluded to modify our former decree by directing that the bill of complaint be dismissed as to patent No. 495,944, at the cost of the complainant company, and that so much of our former judgment as upheld the validity of claim 5 of said patent, and directed an accounting as to the profits realized and damages sustained by the infringement thereof, be expunged. In all other respects the decree as formerly entered will be sustained and remain undisturbed, and the petition for a rehearing will be denied.

LOPES et al. v. LUCE et al.

(District Court, D. Massachusetts. December 11, 1897.)

Nos. 821-826.

WHALE FISHERIES—SHIPPING ARTICLES—PROFITS OF TRADE.

The printed shipping articles for a whaling voyage contained an interlineation providing that the officers and seamen were not to participate in any furs, skins, or bones "taken in the way of trade." It appeared that the owners intended to engage to a considerable extent in trading with the natives, but did not inform the seamen thereof. In the course of the voyage they were required to perform much extra work connected with the trading, and in the preparation and care of the skins, bone, etc., acquired thereby. *Held*, that they were entitled to compensation for this extra work, and, under the peculiar circumstances of the case, they were entitled to the same share in the profits of the trading as was given them by the shipping articles as their lays in the catch.

These were six libels filed by seamen of the whaling schooner *Era* against Thomas Luce and others to recover the value of their lays, and also compensation claimed by them as their share in the profits of trading ventures carried on during the voyage. These libels were consolidated and heard together.

Thomas F. Desmond and Thomas A. Codd, for libelants.
Carver & Blodgett, for respondents.

BROWN, District Judge. Upon the evidence of witnesses as to the value of the catch of the whaling schooner *Era*, there appears no reason to disturb the allowance of 28 cents a gallon for oil, and \$3.50 a pound for bone. According to the decided preponderance of testimony, the price for the bone was fair, if not liberal, and an allowance of a greater quantity of oil than was actually contained in the vessel more than offset the difference that would result from the allowance of the price of 30 cents per gallon for the oil. From the testimony of intelligent witnesses upon both sides, it appears that the owners took no unfair advantage of the men, but estimated the value of the catch fairly, at a figure very close to the actual cash value. Under such circumstances, the settlement should stand, so far as the value of the catch is concerned.

Whether the men are entitled to an additional amount for a share in the trade is a more serious question. The shipping articles contain the following provision: "It is understood and agreed that the officers and seamen are not to participate in any furs, skins, or bone taken in the way of trade." This provision was a written interlineation in printed articles. The men deny that it was read to them or called to their attention. The testimony of the owners is that the men were told simply that they were to have no share in the trade, and that no explanation was given them as to the amount of trade contemplated. It appears in evidence that the trade with the natives was considered by the owners a considerable part of the venture; that the sum of \$1,351.37 was invested in articles for barter, which an owner testified was "quite a sum for trading"; and that a portion only of the articles procured in trade sold for \$2,039.02.

It further appears that the men did considerable work upon the skins and other articles taken in trade, and were ordered to do so by the master, and were subjected to hardship in consequence. I find no satisfactory evidence of a custom of owners of whaling vessels to engage in trade to a similar extent, or to exclude the men from sharing in substantially all that results from the voyage. In *The Holder Borden*, 1 Spr. 144, 149, Fed. Cas. No. 6,600, it was said:

"We should keep in mind that this is a whaling voyage, in which the great principle of maritime policy, of uniting the interest of the mariners with that of the owner, is adopted in its greatest force."

This policy is applicable for the benefit of the seamen as well as of the owners. Even were the men informed that they were not to participate in the profits of trade, which they dispute, they had no reason to suppose that trade was an important object of the voyage, or that, through their labor, they were to assist the owners gratuitously in what was practically an independent venture. As at the time of the signing of the shipping articles the owners had in mind a trading enterprise of considerable importance, which, from the testimony, they regarded as "something of an experiment," and as the men were not informed of this intention, either actually or by any existing usage, I am of the opinion that the minds of the owners and of the men did not meet when the contract was signed. The articles should not be so construed as to permit the conversion of a voyage ostensibly for whaling into a voyage for the double object of whaling and trading. The evidence in this case, which tends to show the success of the trading experiment, and the probability of further and more important trading enterprises, affords a warning against a construction of the articles in question that would permit owners of whaling vessels to increase indefinitely the size of their trading ventures, and to secure without compensation, in a private business of freighting articles of barter to and from remote Northern regions, the services of men who visit these regions, and encounter peril and hardship, for the doubtful profits of a whaling catch. I find no evidence of an existing usage that would justify such a construction, and in the absence of evidence that all that was contemplated by the owners was communicated to the men, and undertaken by them voluntarily and with a full understanding, I consider such a construction of the stipulation as one derogatory of the seamen's general rights, and not to be supported by a court of admiralty. *Matern v. Gibbs*, 1 Spr. 159, Fed. Cas. No. 9,273; *Brown v. Lull*, 2 Sumn. 443, Fed. Cas. No. 2,018. As the libelants contributed to this collateral enterprise of the owners, not only in the transportation upon the vessel of the articles given and received in barter, but also by special labor expended in the work of trading, and in the preparation and care of the skins, bone, etc., I am of the opinion that they should receive compensation. The case should therefore be referred to a commissioner, to take an account of the fair market value at the time of the termination of the voyage of all articles received by the owners in trade, and, after deducting from the gross amount thereof such sums as shall be a fair allowance to the owners for their special

investment and special expenses in the trading venture, to report the balance, if any, in favor of the owners, as the amount of profit of said trade. Whatever rule of compensation might under other circumstances be adopted, I am of the opinion that under the present libels and proofs the libelants are entitled, respectively, to the same share in the profits of said trade as appear by the shipping articles to be their lays in the catch. A decree for the libelants may be entered in accordance with this opinion.

RED R. S. S. CO., Limited, v. NORTH AMERICAN TRANSPORT CO.

(District Court, S. D. New York. January 6, 1898.)

1. CHARTER OF STEAMER—LAY-DAYS—DISPATCH MONEYS—TIME SAVED IN LOADING.

A charter of the steamship William Storrs to the defendants, allowed for loading 15 running days, Sundays and holidays excepted, and dispatch money £10 per day for each day or part of a day saved in loading. The master permitted the charterers to commence loading with the use of the ship's appliances on the day preceding the time when the lay-days by the charter began, without prejudice to the continuance of the lay-days. *Held*, that the time used by the charterers in loading on the day preceding the commencement of the lay-days, was not time saved in loading, and that the charterers could not, therefore, claim dispatch money for that time.

2. SAME—DETENTION OF SHIP'S PAPERS.

Under a second charter of the same steamer, 18 running lay-days were allowed, Sundays and legal holidays excepted, with the provision for dispatch moneys at £15 per day "if steamer be dispatched in less time than is specified." *Held* under this provision of the charter that the right to dispatch moneys would begin on the day the ship was actually dispatched by the charterers, notwithstanding their use of the ship by permission for loading before the lay-days commenced. *Held*, further, that under a charter providing for bills of lading and a delivery of the cargo according to the custom of the port, the charterers had no right to require the master to sign bills of lading containing more specific provisions as to a particular alleged custom of which the master was ignorant, or to detain the vessel on account of his refusal to sign such bills, although the custom was in fact correctly stated, and the dispatch moneys, therefore, could not be claimed for the time lost in dispatching the ship on account of this controversy.

(Syllabus by the Court.)

This was a libel in rem by the Red R. Steamship Company, Limited, against the North American Transport Company, to recover money claimed under a charter party.

Convers & Kirlin, for libellant.

Butler, Notman, Joline & Mynderse, for respondent.

BROWN, District Judge. The above libel was filed to recover certain small balances alleged to be due to the libellant for the hire of the steamship William Storrs under two different charter parties, dated the one July 26, 1893, and the other October 10, 1893. The items claimed consist of certain credits for dispatch moneys, which in settlement with the charterers the master allowed to them as credits against the charter hire, for time saved in loading, and in dispatching the vessel less than the lay-days specified in the charter.

The charter of July provided that:

"The lay-days shall not commence until 7 a. m. on the morning after the steamer is ready to receive the cargo at the place of loading, notice being given before 12 o'clock on the day the steamer is ready. 15 running days, Sundays and holidays excepted, are allowed for loading. * * * Dispatch money at the rate of £10 per day of 24 hours is to be allowed the charterers for each running day or part of day saved in loading. The vessel is to load at night if required by the charterers, they paying all extra expense thereby incurred excepting overtime of officers and crew; steamer to furnish use of her tackle, steam hoisting engines and engine drivers in landing [loading?] cargo."

The vessel was ready to load and gave the requisite notice on August 22d, so that the lay-days, according to the terms of the charter, began at 7 a. m. of Wednesday, August 23d. Fifteen running days from that time, Sundays and holidays excluded, expired at 7 a. m. on Monday, September 11th, to which time the charterers would have been entitled to hold the ship for the purpose of loading, without any liability for the payment of demurrage. In this computation, three Sundays are excluded, and also Labor Day, on September 4th, which under the statutes and customary practice at Norfolk, Va., where the ship was loaded, I find should be treated as a holiday within the provisions of the charter.

By arrangement with the master, however, the charterers commenced loading on Tuesday, August 22d, at about 2 p. m., the day before the lay-days regularly commenced under the charter, but with the understanding that the earlier commencement to load should not affect the duration of the lay-days. Nothing was said regarding the effect of the earlier commencement of loading upon the right to dispatch moneys. The loading was completed at half past 4 p. m. on Saturday, September 2d, and the vessel sailed the next morning. In the settlement for the charter hire the master allowed the charterers' claim to a credit of 8 days and 14 hours dispatch moneys, making no account of the time used in loading on August 22d. The libellant contends that by commencing to load on the 22d, the lay-days must be counted from that time, and that the lay-days therefore expired on Saturday, the 9th of September (even if Labor Day were allowed as a holiday), instead of on Monday, the 11th; and that the master had no authority to modify the charter party, or to permit the charterers to commence loading earlier than the charter party provided, upon any terms that would throw upon the owners the expense of additional dispatch moneys.

I do not think the master's permission to commence loading earlier than the charter party provided, should be regarded as an act done in excess of his authority; nor on the other hand should this permission, in the absence of express agreement, be so construed as to authorize the charterers to use the ship and her appliances for loading without compensation or equivalent in reckoning, or so as to impose the payment of dispatch moneys beyond what would otherwise have been due. The charterers cannot claim dispatch moneys except in strict accordance with the express stipulation of the charter. This stipulation in the July charter is, that dispatch moneys shall be allowed for each running day or part of day "saved in loading." But, plainly, a day is not saved in loading that is occupied in loading. While loading, the ship's officers, men, steam and tackle

are at the charterers' service and are more or less employed. In this charter I have some doubt whether the word "landing" is not a misprint for "loading," which is the word used in the subsequent charter; but the practice of vessels to supply these facilities is well known, and the previous provision of this charter that for loading at night, the charterers should "pay all extra expenses excepting overtime of officers or crew," indicates that the general custom in this case was to be followed. The expenses of the ship while loading, though perhaps but a minor part of the consideration in the allowance of dispatch moneys, cannot be wholly ignored; nor can they be separated from the other consideration for the allowance of dispatch moneys. Consequently, under the first charter, the whole time that the charterers occupied in loading, from the hour when they began to load up to the hour when the loading was finished, should be counted against them as time used in loading, and none of it as time "saved in loading." This whole time, including one Sunday, was 11 days, $2\frac{1}{2}$ hours. The lay-days as provided by the charter counted 18 running days, and the understanding with the master was that these should not be shortened by beginning to load on the 22d instead of the 23d. The lay-days remained, therefore, up to 7 a. m. of September 11th, as before. But this on the other hand has no effect on the time actually saved or used in loading. The time used in loading being 11 running days and $2\frac{1}{2}$ hours, and the time allowed by the charter counting 18 days in all, the difference, viz. 6 days, $2\frac{1}{2}$ hours, is the time "saved in loading," beyond that contemplated by the charter. This is all that the owners agreed to pay for; since they did not agree, as in the succeeding charter, to pay for any time saved in the dispatch of the ship sooner than the 18 days. The charterers were, therefore, entitled under the first charter to dispatch moneys for 1 day, $16\frac{1}{2}$ hours, less than the 8 days, 14 hours, charged in their settlement with the master.

2. The provisions of the second charter, dated October 10, 1893, were the same as regards giving notice and the commencement of lay-days; but as respects dispatch moneys the provision was different from that of the preceding charter. It was as follows:

"If the steamer be not sooner dispatched, 18 running days, Sundays and legal holidays excepted, shall be allowed the charterers for loading. * * * And if steamer be dispatched in less time than is specified, then the charterers are to be allowed £15 British sterling dispatch money for each and every working day so saved."

The vessel loaded at Newport News. The ship was in readiness and gave notice on October 18th, so that the lay-days of the charter commenced Thursday, October 19th. At the charterers' request, the master gave permission to begin loading on the 18th, and signed this memorandum:

"Agree commence loading to-day 18th instant, time to commence to begin 7 a. m. to-morrow 19th.

"[Sgd]

J. Daniels."

The vessel accordingly commenced loading at 2 o'clock on October 18th, and finished loading at 7 p. m. on Thursday, October 26th. She, therefore, occupied in loading (deducting one Sunday) 7 days and 5

hours of actual working days, while the charter time allowed was 18 working days, a saving in loading time, therefore, equal to 10 days and 19 hours, for which the charterers would have been entitled to credit if the provision of this charter had been that they were to be paid for the time "saved in loading." This charter, however, reads that they are to be paid in case only that "the steamer be dispatched in less time than is specified." The time specified is 18 running days, Sundays and legal holidays excepted, which, under the notice, counts from October 19th, and it is expressly provided in article 11 that the charter shall not commence until that day. The lay-days, therefore, excluding three Sundays, expired at 7 a. m. on November 9th, and the right to dispatch moneys depends upon the charterers' "dispatch of the ship" prior to that time. There is no express reference to the completion of loading, or time saved in loading or in other ways.

After the loading was completed, on the evening of the 26th, a dispute arose between the master and the charterers' agents as to the terms of the bills of lading. The bills of lading were prepared by them, and, as presented to the master for signature, contained, as regards certain tobacco, the following clause:

"Tobacco to be delivered at Queen's Warehouse at ship's expense."

The charter provided "that the customs and usages at the ports of loading and dispatching shall be observed, unless otherwise expressed." Article 7. "Tobacco, if any, to be delivered according to the custom of port of discharge; charterers guaranty not to ship exceeding 100 hogsheads." Article 9. The master at once signed all the other bills of lading as presented, but objected to the above clause, which would require the ship to pay the expenses of cartage to the warehouse in Liverpool. He offered to sign bills of lading in the form provided by the charter party as above stated. The respondents would not accept this, and refused to deliver to the captain the necessary clearance papers of the ship, in consequence of which the ship was detained until the evening of October 28th, when the bills of lading were accepted in the form proposed by the master, and the ship's clearance papers were delivered, so that she sailed on the morning of the 29th.

The custom of Liverpool required the ship to pay the expenses of warehousing, and this charge was in fact subsequently paid. But the master, while at Norfolk, could not be required to ascertain and determine at his peril the fact as to this custom, and insert it in the bills of lading. The provisions of the charter party were explicit as to the bills of lading, and were sufficient; and the respondents had no right to insert additional specifications, which were not in the charter, and which the master did not have immediate means of determining. The detention of the vessel during this dispute was not, therefore, justifiable on the part of the respondents; and so long as they withheld the ship's clearance papers without justifiable cause, manifestly the ship was not "dispatched." The dispute on this matter was not adjusted until so late on the 28th that no pilot could be obtained until the 29th. This charter, moreover, does

not provide for any division of a day. The vessel was, therefore, dispatched but 9 working days earlier than the lay-days stipulated in the charter, and for these 9 days only were the respondents entitled to dispatch moneys, instead of 11 days.

I find, therefore, that the libellant is entitled to be restored dispatch moneys under the first charter, for 1 day and 16½ hours, and under the second charter for 2 days.

Judgment may be entered accordingly, with interest and costs.

THE ELLA.

NEAFIE & LEVY SHIP & ENGINE BUILDING CO. v. THE ELLA.

(District Court, D. Delaware. December 10, 1897.)

No. 553.

1. MARITIME LIENS—NECESSARY REPAIRS.

Repairs to a vessel are necessary, within the meaning of the maritime law, where they are such as would be ordered by any prudent shipowner for the purpose of fitting and equipping her for efficient maritime service of the character for which she is designed or employed.

2. SAME—REPAIRS ON OWNER'S ORDER.

The maritime law does not recognize any lien on a vessel for repairs furnished in a foreign port on the direct order of the owner in person, unless there is an agreement, express or implied, for a lien; but if there be a common understanding on the part of the repairer and the owner that the furnishing of necessary repairs is to proceed upon the basis of a lien or of extension of credit to the ship as well as to the owner or master, there is an implied agreement or contract for a lien, and a lien will be recognized and enforced.

3. SAME—PRESUMPTIONS.

Where necessary repairs have been furnished to a vessel in a foreign port on the direct order of the owner who is present, there is a presumption that the repairs were furnished, not on the credit of the vessel, but solely on that of the owner; but this presumption is not conclusive. It may be rebutted by an implied agreement for a lien. Such implied agreement does not serve to create a lien *de novo*, but merely to overcome the presumption that credit is given exclusively to the owner.

4. SAME—WAIVER OF LIEN—GIVING NOTE—PRESUMPTIONS.

The mere acceptance by a person, entitled to a maritime lien for repairs, of a promissory note of the owner of the ship repaired, does not defeat the lien. There is a presumption that the note is taken only as collateral security; and this presumption continues unless it affirmatively appears that the note was taken with an intention that it should extinguish the lien.

5. SAME—INNOCENT PURCHASERS—ADVANCES.

Neither a bill of sale nor a mortgage of a vessel given to secure an antecedent indebtedness will confer upon the vendee or mortgagee the rights of a purchaser for value or affect the existence or enforcement of a maritime lien; but money advanced in consideration of the execution of a bill of sale or mortgage of a vessel will constitute the vendee or mortgagee a purchaser for value; and if the money has been advanced without notice, actual or constructive, of the existence of a maritime lien, the vendee or mortgagee will, in proceedings to enforce such lien, be treated as an innocent purchaser for value.

6. SAME—ENFORCEMENT OF LIEN—UNREASONABLE DELAY.

A maritime lien is not in any case directly defeated by an innocent purchase for value. The effect of such a purchase is that proceedings for

the enforcement of the lien must be instituted without unreasonable delay, and what is unreasonable delay must be tested by what constitutes a fair opportunity, by the exercise of reasonable diligence, to arrest the vessel.

7. SALE OF VESSEL—PURCHASE FROM CORPORATION BY ITS PRESIDENT—RIGHTS OF THIRD PARTIES—NOTICE.

Where one claims title to a vessel under a bill of sale from a corporation, of which he was at the time president, he is, for the protection of innocent third persons, chargeable with knowledge of all material facts which would have been disclosed to him if he had exercised the duties of his office with reasonable circumspection.

8. MARITIME LIENS—LIBEL IN REM—COSTS.

The fact that a libel in rem is filed for repairs before the maturity of a promissory note given for the price, and still held by the libellant, does not defeat the suit, but at most merely affects the question of costs.

(Syllabus by the Court.)

Levi C. Bird and Andrew E. Sanborn, for libellant.

Lewis C. Vandegrift, for claimant.

BRADFORD, District Judge. In this case The Neafie and Levy Ship and Engine Building Company, a corporation of Pennsylvania, filed September 30, 1896, a libel in rem against the steamboat Ella to recover the price of repairs supplied to her by the libellant in Philadelphia from May 21, 1895, to May 30, 1896, inclusive, amounting to \$1123.31, together with interest thereon from the last mentioned date. While the repairs were being furnished, the Ella was owned solely by The Philadelphia and Smyrna Transportation Company, a corporation of Delaware, and Alfred H. Smith during that time was her master. The transportation company executed a bill of sale of the Ella to John H. Hoffecker, the claimant, August 21, 1896, and from that time the claimant was the real or apparent owner of the vessel until she was sold October 19, 1896, under a writ of venditioni exponas issuing out of this court for the enforcement of a wharfage lien. The sale was confirmed and the purchase money, \$6200, was paid into the registry of the court. Subsequently, \$1075.54, parcel of the said sum of \$6200, was applied to the satisfaction of certain lien claims and costs against the Ella, leaving \$5124.46 in the registry as the balance of the proceeds of said sale.

It is admitted that the items contained in the schedule annexed to the libel were furnished, and that the charges therefor are reasonable; and it clearly appears that Philadelphia was a port foreign to the Ella, in the sense of being a port in a state other than that in which she was owned, when the repairs were furnished.

The vital questions in the case are two; first, whether the libellant by furnishing the repairs acquired a lien of a maritime nature against the Ella; and, secondly, whether if such a lien existed, the libellant is entitled to payment of its demand out of the balance of the proceeds in the registry.

The evidence as to the existence of a lien is voluminous, and largely circumstantial, and has required and received careful scrutiny and consideration. In view of the character of the items set forth in the schedule and of the testimony relative thereto, the repairs were necessary, within the meaning of the maritime law. They were not only

in aid of commerce and navigation, but were such as would be ordered by any prudent shipowner, engaged in business similar to that of the transportation company, for the purpose of fitting and equipping his vessel for efficient maritime service. The repairs were necessary and were furnished by the libellant to the Ella in a foreign port. But it does not follow from these facts alone that a maritime lien arose or was created. It was requisite that the repairs should have been furnished on the credit of the vessel. It is necessary to determine, among other things, with whom the libellant dealt in the transaction in order to ascertain whether they were furnished on her credit. Did it deal with the transportation company, or with the master qua master, or with both of them? The libel states that "the owners of the said steamboat 'Ella,' by themselves or through the said Alfred H. Smith, Master as aforesaid, acting as the agent of the said owners, applied to the libellant to furnish repairs for said steamboat," and that "the libellant, accordingly, in pursuance of the said contract, and orders given it from time to time, made the various repairs to the said steamboat 'Ella,' set forth in the account or schedule hereto annexed," etc. The answer states that the claimant admits that "the owners of the steamboat 'Ella' applied to the libellant to furnish repairs for said steamboat," and avers that "the libellant in pursuance of a contract made with the then owners of said steamboat 'Ella' and orders given from time to time by the then owners of said steamboat to the libellant" made the repairs in question. Much light is shed upon the point now under consideration by the course of dealing between the libellant and transportation company for years prior to the furnishing of the repairs in question as well as by the circumstances attending that transaction.

The libellant was incorporated in March, 1891, under the laws of Pennsylvania, for the purpose of constructing and repairing vessels propelled by steam, and succeeded to the property and business of the long established firm of Neafie & Levy, of which Jacob G. Neafie, the president of the libellant, was a member. The character of the business conducted by the libellant was substantially the same as that for many years carried on by Neafie & Levy. The transportation company was incorporated in February, 1883, under the laws of Delaware, for the purpose of transporting freight by vessel between the town of Smyrna, Delaware, and the city of Philadelphia, or elsewhere in the Delaware river and bay, or any navigable waters. The claimant was among its incorporators and became its president five or six years prior to the furnishing of the repairs and has continued to hold and now holds that office. Under its charter the transportation company engaged in the carriage of freight by vessel to and from Smyrna and Philadelphia, regular trips being made over the route several times a week. It had its main office in Smyrna and also had a small steamboat office on pier No. 9 in Philadelphia. In 1889 it became the owner of the Ella and continued to own her until after the repairs had been furnished. There is no evidence that at any time during the period between the acquisition of the Ella and the completion of the repairs any other vessel was operated by that company on its route, or was owned by it. Before and substantially until the transportation

company became the owner of the Ella, it owned and operated on its route a steamboat called the John E. Tygert, and some of the correspondence between Neafie & Levy and the transportation company relates to that vessel.

Augustus E. Jardine became connected with the transportation company in September, 1885, as general manager. He subsequently became its secretary and treasurer, which offices he has held for about ten years. It appears from the evidence, documentary as well as oral, that, while secretary and treasurer, he was also the general manager of the transportation company, and was dealt with as such. Correspondence intended for that company and relating to its affairs was indifferently addressed to the company and to Jardine. Whether or not constituted general manager by formal action of the company, he performed the functions of such an office; and it nowhere appears that his authority so to act was questioned in any quarter. His dealings on behalf of the company, if not expressly authorized, were acquiesced in by it. The claimant, in answer to the question, "And you had the general charge of the affairs of the corporation as president?" testifies, "I don't think so. I think those things were in the care and hands of the secretary and treasurer." He further testifies, "I didn't keep any run of the affairs of the company; Mr. Jardine was the general manager and run the affairs of the company." That Jardine was regarded by both Neafie & Levy and the libelant as one in authority in the transportation company, clothed with the powers of a general manager, is clear. From the organization of that company Neafie & Levy or the libelant had furnished repairs to its vessels, and such of the correspondence since that time as is in evidence shows that Jardine assumed to act in that capacity. Jacob G. Neafie, the president of the libelant, testified that he recognized Jardine as manager of the transportation company. The correspondence prior to the furnishing of the repairs in question shows direct dealings between Neafie & Levy and the libelant, on the one side, and the transportation company, on the other. Respondent's Exhibits G, G1, G4, G5, G8, G10, G13, H, I, J, K. It appears, from the manner in which this correspondence was addressed or signed, as shown by the exhibits, not only that Jardine acted and was recognized as the principal agent or general manager of the transportation company, but, further, that where reference is made to Smith, he is regarded rather as a direct agent of that company with respect to the work or repairs mentioned in the correspondence than as master qua master. From the time the transportation company became the owner of the Ella in 1889 until after the repairs in question had been completed all repairs to her had been almost exclusively furnished by Neafie & Levy or the libelant; Smith testifying that it was "only twice since we owned the Ella' that we went elsewhere." The oral testimony as to the course of dealing between the transportation company and Neafie & Levy and the libelant in the ordering and furnishing of repairs, while at first sight conflicting and apparently irreconcilable, upon careful examination will be found, when taken as a whole, to be in the main consistent with the inference drawn from the correspondence. The Ella every year received a general overhauling at the yard of the

libellant. It was called her annual spring overhauling, and included such general repairs as to make her seaworthy and keep her in good condition. She was overhauled usually in May or June. As occasion required, however, she was sent at other times to receive repairs. From time to time the transportation company by letter or through Smith, who was in constant communication with the company, arranged with the libellant for the use of its marine railway in connection with the repairing of the vessel, and, the time having been agreed upon, the patrons of the line were notified by advertisement of the fact that the Ella would be temporarily withdrawn from the route. Before she was sent to be overhauled Jardine and Smith conferred together and agreed upon the needed repairs. Such repairs were ordered either by correspondence between the transportation company and the libellant or, when the vessel was at the yard of the libellant, by Smith usually, or by Jardine occasionally, and sometimes by one of them in the presence of the other. Smith remained with the Ella while being overhauled to superintend the work and to order such repairs as were necessary to the proper completion of the repairs agreed upon. It is true that Smith testifies that when he was at the yard he was consulted by the officers or employes of the libellant as to the required repairs and that he ordered such repairs as he wanted which were furnished accordingly. But this statement is consistent with the evidence that the vessel was there by prearrangement between the transportation company and the libellant, and that he was there in charge of the executive details of work which had been discussed and generally agreed upon by Jardine and himself in Smyrna. It is also true that Smith from time to time ordered casual repairs for the Ella in the absence of any correspondence relating to them between the transportation company and the libellant. But it appears that the libellant never looked to Smith for payment or, in supplying such repairs, in anywise gave credit to him. All bills were sent to the transportation company as the owner of the vessel. It may seriously be doubted whether Smith's testimony, when carefully examined, in connection with the general course of dealing between the transportation company and the libellant, as disclosed by the correspondence and other evidence, does not show that in ordering such casual repairs he was acting rather as a direct representative of the transportation company than in the character of master of a ship in a foreign port. But, however this may be, there can be no doubt that prior to the furnishing of the repairs in question the general course of dealing in the repairing of the vessels of the transportation company by the libellant or Neafe & Levy was through direct negotiations between that company and the repairer. Such having been the course of dealing prior to May, 1895, it must be assumed, unless the contrary appears, that it was not abandoned with respect to the repairs in question. It is unnecessary, however, to rely upon such an assumption. The evidence shows that the usual course of dealing was continued. The metallic life boat and the repairs to the rudder of the Ella, included in the bill of particulars, were subjects of direct correspondence between the transportation company and the libellant. Respondent's Exhibits

N. and L. The smokestack, included in the bill of particulars, was also the subject of direct negotiations between the two companies. In May, 1895, shortly before the spring overhauling for that year, Jardine and Smith were in the office of the libelant in consultation with its officers in relation to some of the repairs in question, and on that occasion Smith in the presence of Jardine stated to the president of the libelant what he wanted done in the way of repairs. It also appears that the items in the bill of particulars in May and June represent work that was planned in advance and arranged for between the transportation company and the libelant and that the use of the marine railway was secured by direct negotiations between Jardine or Smith and the libelant. The evidence thus supports the presumption that the usual course of dealing between the transportation company and the libelant in former years continued during the period of the furnishing of the repairs in question. An analysis of the items contained in the bill of particulars shows that ninety five per cent. of the amount of the claim consists of charges for spring repairs, use of the railway at other times, the metallic life boat, the smokestack and the rudder. All these items were the subject of direct dealings between the transportation company and the libelant. The remaining items, comparatively insignificant in amount, may have been ordered by Smith in the absence of any correspondence between the two companies and of any consultation with Jardine. But, in view of the general mode of dealing, the furnishing of these casual or incidental repairs does not warrant an inference that they were regarded either by the libelant or the transportation company as an exception to or departure from the customary course. Certainly, there is nothing in the evidence, written or oral, to support such an inference. The evidence, taken as a whole, leads to a conviction that the relation of Jardine and Smith to the transportation company, with respect to the furnishing of the repairs in question, was that of agents to their principal; that the acts and orders of Jardine and Smith in the premises were those of that company; and that, notwithstanding some testimony to the contrary, the libelant must be considered in law to have dealt directly with that company, and not with Smith in the character of master.

This case must, therefore, be treated as belonging to the class in which repairs or supplies are furnished to a ship in a foreign port on the direct order of the owner. Section 1 of the statute of Pennsylvania of June 13, 1836, as amended June 24, 1895, is as follows:

"Ships and vessels of all kinds built, repaired, fitted, furnished and supplied with necessities for navigation within this commonwealth shall be subject to a lien for all debts contracted by the builders, master, owners, agents or consignees thereof for work done or materials or supplies found or provided in the building, repairing, fitting, furnishing, supplying or equipping of the same in preference to any other debt due from the builders, master, owners, agents or consignees thereof." Laws 1895, p. 251.

It is, however, unnecessary to the decision of this case to consider the Pennsylvania statute. The libelant claims a lien as well under the general maritime law as under the act. No lien for re-

pairs will arise under the statute, unless they are furnished on the credit of the vessel. *The Samuel Marshall*, 4 C. C. A. 385, 54 Fed. 396. And, if the statute be applicable to a foreign ship, the giving of credit to her must equally be established, whether the proceeding be under the statute or the general maritime law.

The maritime law does not recognize any lien on a vessel for repairs furnished in a foreign port on the direct order of the owner in person, unless there is an agreement, express or implied, for a lien. The law as to supplies is the same. If there is such an agreement a lien will be recognized and enforced. Neither a formal contract nor an express agreement is necessary. If there be a common understanding between the repairer and the owner that the furnishing of necessary repairs is to proceed upon the basis of a lien or of extension of credit to the ship as well as to the owner or master, there is an implied contract for a lien. It is true that in *The Now Then*, 50 Fed. 944, the court was of the opinion that, when the repairs are made in a foreign port "on the orders of the owner, the presumption of credit to the vessel does not arise, and in that case a lien will not exist except by the express contract of the parties." But the circuit court of appeals, in affirming the decree, while generally approving the law as laid down by the court below, apparently did not go so far on this point; seeming to consider the rule to be that, "when the work is done by order of the master, a lien is implied, but for work done by order of the owner no lien will exist unless proved by the agreement of the parties." 5 C. C. A. 206, 55 Fed. 523. This language is applicable equally to an implied or an express agreement for a lien, and, in view of more recent decisions, it must be presumed that the court did not intend to confine its application to express agreements.

The latest utterance by the supreme court upon this subject was in *The Valencia*, 165 U. S. 264, 271, 17 Sup. Ct. 323, where it was said that "in the absence of an agreement, express or implied, for a lien, a contract for supplies made directly with the owner in person is to be taken as made 'on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived.'" In the same case the court recognizes that a lien would exist if there were either an "express agreement for a lien," or "circumstances justifying the inference that the supplies were furnished with an understanding that the vessel itself would be responsible for the debt incurred."

In *The Kalorama*, 10 Wall. 204, 214, the court said:

"Implied liens, it is said, can be created only by the master, but if it is meant by that proposition that the owner, or owners, if more than one, cannot order repairs and supplies on the credit of the vessel, the court cannot assent to the proposition, as the practice is constantly otherwise. Undoubtedly the presence of the owner defeats the implied authority of the master, but the presence of the owner would not destroy such credit as is necessary to furnish food to the mariners and save the vessel and cargo from the perils of the seas. More stringent rules apply as between one part owner and another, but the case is free from all difficulty if all the owners are present and the advances are made at their request, or by their directions, and under an agreement, express or implied, that the same are made on the credit of the vessel."

The existence of an express agreement may be shown by either direct or circumstantial evidence; and an express agreement is none the less express because circumstantial evidence is resorted to for its establishment. But an express agreement not being required, what circumstances will support or create an implied agreement for a lien?

In *Stephenson v. Thé Francis*, 21 Fed. 715, 719, 720, cited with approval in *The Valencia*, the court said:

"Supplies furnished to an owner in person, not being master, though in a foreign port, are presumptively furnished upon his personal responsibility only, where, as here, there is no reference made in the negotiations between the parties to the ship as a source of credit, and no other circumstances clearly indicate such a common intention. * * * When a known owner, not being master, procures necessary repairs or supplies in a foreign port, the question whether a maritime lien, i. e., an implied hypothecation of the ship, arises therefor, must depend upon the intention of the parties, to be gathered from the circumstances of the transaction. * * * In the state of the owner's residence, where he is presumptively present, or within easy communication, no mere maritime lien for repairs and supplies there furnished is by our law in any case allowed. In that case the presumption of law is conclusive that the owner or his representative is within reach; that he is able to supply his ship upon his ordinary responsibility; and that he intends to do so without burdening her with secret liens. In a foreign port, when the owner is present and procures the supplies in person, not being master, in the absence of any express reference to the ship as a source of credit, the same presumption as to the owner's means and as to his intention exists *prima facie*; but this presumption is not conclusive, as in the home port, and may be repelled by proof drawn either from the express language of the parties, or from any other circumstances satisfactorily showing that a credit of the ship was within the common intention; and when this intention appears the lien will be sustained."

This doctrine is recognized by *Brewer, J.*, in *The Glenmont*, 34 Fed. 402, 404.

In *Neill v. The Francis*, 21 Fed. 921, 924, the court said that, where supplies are obtained in a foreign port on the personal order of the owner, "in order to hold the ship the material-man must show either an agreement or some circumstances indicating a common intention to bind the ship." In *The Aeronaut*, 36 Fed. 497, 499, the court said that "upon personal dealings with the general owners, or with charterers who are owners *pro hac vice*, for supplies to be furnished within the same port or state where the contract is made, the legal presumption is that the dealings are not with the ship, or upon her credit, but upon the ordinary personal responsibility of the owners, with whom the dealings are had, and no lien is, in such a case, sustained, unless a credit of the ship is proved to be within the intention of both parties." In *The Stroma*, 53 Fed. 281, 283, 284, the court said that the known general owner may "expressly pledge the credit of his vessel in a foreign port for supplies, and there often are circumstances and facts which show that the credit of the vessel was pledged in fact, though not in words, and that such credit was within the common intent of both parties," and also recognized that "acts or circumstances from which it can be inferred that the credit of the ship was either within the contemplation of both parties, or was recognized by both," are sufficient to support a lien. In *The George Dumois*, 66 Fed. 353, the court dismissed a

libel for supplies furnished to a ship in a foreign port on the personal order of the charterer because it was "not satisfied from the circumstances of the transaction, as shown by the proof, that there was a common understanding or intention to bind the ship." On appeal the decree was reversed. 15 C. C. A. 675, 68 Fed. 926. But it was not reversed upon the ground that a common understanding or intention to bind the ship as shown by the circumstances would not be sufficient for the recognition of a lien. On the contrary, the appellate court required less, and, after saying that "we understand the rule to be that, where necessary supplies are furnished to a ship in a foreign port, and they are received by the master, and used by him in the services of the ship, a maritime lien results, unless it shall appear that the furnisher of supplies did not rely upon the ship, but trusted solely to the personal credit of the owner; and the burden of proof in such a case to defeat the lien lies upon the ship and her claimants," applied that rule to a case of supplies furnished to a vessel, in a port foreign to both the owner and the charterer, on the personal order of the president of the corporation charterer who was present at the port of supply. While it seems that this holding on appeal in *The George Dumois* is inconsistent with the doctrine of the supreme court in *The Valencia*, the position of the court below, as to the sufficiency of a common understanding or intention, is in perfect accord with that doctrine. In *The Columbus*, 14 C. C. A. 522, 67 Fed. 553, 555, where towage service had been rendered on the order of the agent of the owner of a foreign dredging plant, the court said: "The material inquiry is, not whether the libellant himself may have contemplated a claim of lien, but whether a lien was created by or resulted from the mutual understanding of the parties and the services rendered in pursuance of it." In *The Gracie May*, 18 C. C. A. 559, 72 Fed. 283, where supplies had been ordered in a foreign port by the reputed owner, the court said that "the question of credit [to the vessel] must depend upon the facts and the probabilities, without the aid of technical presumptions." In *The Advance*, 19 C. C. A. 541, 73 Fed. 503, the court recognized that "a contract evidenced by the express agreement or by the conduct of the parties" might support a maritime lien which would not otherwise be sustained.

It thus appears that "an agreement, express or implied, for a lien," "circumstances justifying the inference that the supplies were furnished with an understanding that the vessel itself would be responsible for the debt incurred," "circumstances satisfactorily showing that a credit of the ship was within the common intention," "an agreement or some circumstances indicating a common intention to bind the ship," "a credit of the ship proved to be within the intention of both parties," "circumstances and facts which show that the credit of the vessel was pledged in fact though not in words, and that such credit was within the common intent of both parties," "acts or circumstances from which it can be inferred that the credit of the ship was either within the contemplation of both parties or was recognized by both," "circumstances of the transaction, as shown by the proof, that there was a common understanding or in-

tention to bind the ship," "the mutual understanding of the parties," "the facts and the probabilities without the aid of technical presumptions," and a contract evidenced by "the conduct of the parties," have severally been considered sufficient to support a lien. A common understanding for a lien is equivalent to a common intent to bind the ship; for when parties deal under such an understanding the ethics of the law will conclusively presume a common intent. A mutual understanding for a lien is susceptible of two meanings. If it be mutually expressed between the parties, it is an express agreement, and, as such, is not requisite, according to *The Valencia*, to support a lien. If it be not so expressed or communicated it will amount only to a common understanding; and the phrase was doubtless used in *The Columbus* in the latter sense, which accords with what seems to be the doctrine in *The Valencia*. Persons entering into an express contract for the furnishing of necessary repairs to a vessel in a foreign port under a common understanding that there is to be a lien impliedly contract for such lien. Otherwise the law would tolerate injustice, in many instances amounting to fraud. It is not believed that justice as administered in courts of admiralty will permit such a result. There is another consideration in this connection entitled to weight. Does an implied agreement for a lien, in the case of repairs furnished to a vessel in a foreign port on the direct order of the owner, serve to create a lien *de novo*, on the one hand, or, on the other, merely to overcome the presumption that credit is not given to the vessel, but exclusively to the owner? If there is a conclusive presumption that credit is given solely to the owner, it would follow that there must be an agreement in fact for a lien, whether proved by express contract or by circumstantial evidence. But if the presumption is disputable, as it rests upon the assumption that credit is given exclusively to the owner, a common understanding that credit is given to the vessel as well as to the owner will overcome the presumption, and a lien will remain as a lien given by the maritime law and not as a lien created *de novo* by the contract of the parties. The obvious distinction is between the rebutting of a disputable presumption of the non-existence of a lien, and the creation of a lien. There can be little doubt that the presumption of the non-existence of a lien in such a case is disputable.

The lien given by the maritime law for necessary repairs to a ship grows out of the necessities or convenience of maritime commerce, and is "tacitly created by the law," and "an appropriation made by the law, of a particular thing as security for the debt or claim,"—"a *jus in re* constituting an incumbrance on the property by operation of law." *The J. E. Rumbell*, 148 U. S. 1, 10, 13 Sup. Ct. 498; *The Young Mechanic*, 2 Curt. 404, Fed. Cas. No. 18,180; *The Kiersage*, 2 Curt. 421, Fed. Cas. No. 7,762. It is commonly termed a tacit hypothecation. In *The Scotia*, 35 Fed. 907, 909, 910, the court, speaking generally of liens given by the maritime law, said:

"The lien or privilege in all these cases is not properly created by the master at all; nor does it rest merely upon his authority. It is created by the

law of the place of the transaction. Where the law gives the lien, the master's authority is, therefore, not in question, save as respects his right to do those acts, or to make those contracts, to which the law of the place attaches the lien. * * * These implied liens, therefore, if they exist at all, exist by virtue of the law applicable to the transaction, whether of contract or of tort."

The giving of credit to the ship is essential to the existence of a lien for repairs. The maritime law as recognized in this country does not in any case give a lien for repairs furnished to a vessel in a port of the state to which she belongs; for it is conclusively presumed that they were furnished, not on the credit of the vessel, but exclusively on the credit of the owner. In such case there is no implied hypothecation. But where necessary repairs have been furnished to a ship, in a port of a state to which she does not belong, on her credit, the maritime law gives a lien on the ship by tacit hypothecation to secure payment for such repairs. When necessary repairs are furnished to a vessel in a foreign port on the order of the master, nothing else appearing, there is a prima facie presumption that they were furnished on the credit of the vessel as well as of the owner, and an implied lien is given; but this presumption may be overcome and the existence of a lien negated by circumstances showing that those furnishing the repairs did not act in good faith toward the owner of the vessel or omitted to exercise reasonable circumspection touching the necessity of credit to the vessel. On the other hand, where necessary repairs have been furnished to a vessel in a foreign port on the direct order of the owner who is present, there is a presumption that the repairs were furnished, not on the credit of the vessel, but solely on that of the owner. But this presumption is not conclusive. It may be rebutted by circumstances. No case decided by the supreme court has been found in which such presumption has been either held or declared to be conclusive. It is true that in *Ferry Co. v. Beers*, 20 How. 393, 402, the court said that "where the owner is present no lien is acquired by the material men;" but this language evidently had reference to the doctrine that where the owner is present the authority of the master to pledge the credit of the vessel is suspended for the time being. Chief Justice Taney, in his dissenting opinion in *Thomas v. Osborn*, 19 How. 22, 38, said: "Now, if Leach is to be regarded as owner for the time when he was sailing the *Laura* under the agreement, then by the maritime law the repairs and supplies furnished at his request are presumed to have been furnished upon his personal credit, unless the contrary appears." The repairs and supplies had been furnished to a ship in a foreign port, and the language above quoted is in nowise inconsistent with either the reasoning or the decision of the court. *Brewer, J.*, in *The Glenmont*, 34 Fed. 402, 404, and *Brown, J.*, in *Stephenson v. The Francis*, 21 Fed. 715, 720, while holding that a tacit hypothecation does not exist for repairs or supplies furnished to a ship in a port of the state to which she belongs, recognized that the presumption that necessary repairs and supplies furnished in a foreign port and procured directly by the owner are furnished upon his sole credit is "not conclusive, as in the home port," and may be rebutted by circumstances. In view of the foregoing considerations and authorities, a common understand-

ing on the part of the libelant and the transportation company, gathered from all the circumstances of the case, that the furnishing of the repairs to the Ella was to proceed upon the basis of credit to the vessel as well as to the transportation company, would rebut the presumption of the non-existence of a lien arising from the course of direct dealings between the two companies. A contract in fact for a lien, established directly or by circumstantial evidence, is not required. To establish such a common understanding, proof beyond reasonable doubt, as in criminal cases, is not required, but, as in other civil cases, a mere preponderance, in its legal sense, of the evidence, direct or circumstantial.

After careful examination I am satisfied from the evidence that the repairs were furnished to the Ella upon a common understanding that credit was to be given to her as well as to the transportation company, and, consequently, that a lien was given by the maritime law. That the libelant understood and intended that the vessel should be bound for the repairs is clear. The claimant, though president of the transportation company, had never been at the yard of the libelant, and there is no evidence that he personally ever met or knew any of its officers. Indeed the evidence points the other way. Jardine was a comparative stranger to the libelant, although from time to time at its yard. Neafie, its president, testifies that he would not know him, if he saw him. There is no evidence that any of the other officers of the transportation company were at any time during a number of years prior to the furnishing of the repairs known to the libelant. The libelant, while aware that the transportation company was a foreign corporation, never inquired and knew absolutely nothing about its financial condition or standing. Seddinger, vice-president of the libelant, testifies that "we did not know the owners, we did not know whether they were worth ten cents or ten thousand dollars," and that "we made no inquiries about the standing of the company. We knew nothing about the company. We didn't know whether the officers or the individual members of the company were worth anything or not." Neafie fully corroborates Seddinger on this point and their testimony is not in any manner discredited. In fact, a close analysis of the figures given by Jardine in his testimony as representing the amount of the assets and liabilities of the transportation company during several years, in connection with his testimony as to the basis on which the valuation of the assets was made and as to the amount realized on the sale of all the property of that company, shows that the company was during the whole period of the furnishing of the repairs in question on the verge of insolvency. But, aside from that fact, it is, to say the least, extremely improbable that the libelant should, in furnishing the repairs, have relied for payment exclusively upon a foreign owner of unknown financial standing. It is equally improbable that, if the libelant intended wholly to disregard the vessel as security and rely solely upon the transportation company, it should have failed to make any inquiry as to the financial condition or standing of that company. The known course of business dealings raises a violent presumption against an intent on the part of the libelant to give credit exclusively to that company.

The evidence shows that prior to the furnishing of the repairs in question the transportation company was sometimes very dilatory in paying the libelant for repairs to the Ella, bills rendered remaining unpaid for many months. In view of this circumstance it is difficult to account for the fact that the libelant never made any inquiry as to the financial condition or standing of the transportation company before furnishing further repairs to the Ella, except upon the supposition that the libelant looked to the vessel for payment. The Ella since 1889 had been making her regular trips, and was several times each week within reach of process in Philadelphia. She could be taken by the marshal of the eastern district of Pennsylvania on a warrant of arrest in a suit in rem, or on an attachment in a suit in personam, or by the sheriff of Philadelphia county on a foreign attachment. Under these circumstances, to assume that the libelant did not rely upon the Ella as security, in furnishing the repairs, but gave credit solely to her owner, of unknown financial ability and dilatory in payment, is to impute to the libelant such recklessness as is seldom, if ever, displayed in business dealings.

But, in addition to the inferences to be drawn from the probabilities, there is the direct and uncontradicted testimony of the officers of the libelant that it gave credit to the Ella and looked to her for payment; that no inquiry was made as to the financial condition of the transportation company, because they regarded the vessel as security; that, if the libelant had intended to rely upon the credit of that company, inquiry as to its financial condition would have been made; and that the invariable custom of the libelant in furnishing repairs was to charge them to the vessel repaired and to look to it for payment. This custom doubtless was based upon the Pennsylvania statute of 1836, above referred to, together with the principles of the general maritime law. While the observance of the custom would not in all cases justify a claim of lien for repairs, it, nevertheless, in connection with the other testimony and upon the presumption of fair dealing, furnishes strong evidence of an understanding on the part of the libelant that the repairs were furnished on the credit of the Ella and of an intent on its part to bind her for them. The repairs in question were all charged on the books of the libelant to "Steamer Ella and owners." This mode of charging has been termed a "self-serving practice"; and the fact that the charge is so made, standing alone, has but little weight upon the question whether credit has been given to the ship as well as to her owner. But, in so far as it has weight, it tends to establish, and not to negative, the existence of a maritime lien. Rowen, chief engineer of repairs for the libelant, who has for forty-two years been employed by it and Neafie & Levy, and who has not been discredited in any manner, testifies that "as soon as a boat arrived at the wharf in need of repairs" his "duty is first to go to the office and find out the standing of the boat, and then if I get a good report to go and ask orders," etc.; that he would ascertain the boat's financial standing by "asking questions of Mr. Neafie, the president of the company;" that "if the boat was in debt in the office, probably they would not allow me to go on

with repairs and the position I hold forces me to ask that question of any boat that comes in there;" that when the Ella came for repairs he did not go to work on her until he had first gone to the office and found out her financial standing; and that, when the Ella came to the yard of the libelant in 1895 and 1896 for her general overhauling he did not go to work on her "without consulting the office" as to her standing. Whether Smith, who always went with the Ella for her repairs, knew of the fact that before repairs were furnished her financial standing was inquired into, does not appear. Under the circumstances he may or may not have known this fact. No inference on that point is here drawn. There is no room for doubt that the libelant furnished the repairs in question with an understanding on its part that the Ella should be bound for them and with intent to rely upon her as security.

The evidence also shows, to say the least, an understanding on the part of the transportation company that these repairs were to be and were furnished on the credit of the Ella. Aside from the evidence bearing directly upon this point the course of dealing between the libelant and that company for a number of years prior to 1895 gives rise to a strong presumption that such was the case. Smith testifies that whenever the Ella was at the yard of the libelant for repairs he was always with her; that he did not expect the libelant to look to him for payment for any repairs; that he had no funds to pay for repairs; that he "ordered them in the name of the boat;" that he was there as "representative of The Philadelphia and Smyrna Transportation Company;" that he means by "representative," master; that if he "went and got anything it was charged to the 'Ella';" that he "was there to overhaul the boat and to have done what should be done to her;" that it was his "business when I went to the yard to have the work done, and I had it done by ordering it from Neafie & Levy, such as I wanted to be done and was necessary to be done to the boat;" that "Messrs. Neafie and Levy have done our work for a good many years and it seems as though we didn't know anywhere else,—I mean the last few years. We always went there. But if I wanted anything anywhere else, I went and got it and had it charged to the steamer. * * * Anything that appertained to the boat. It would only be something for the boat. For instance, life preservers or a metallic life boat, charge it to the Ella. Of course, if I wanted to buy anything for the Philadelphia and Smyrna Transportation Company not pertaining to the boat, I would say to charge it to the transportation company;" and that since he became master of the Ella he has had no knowledge of any understanding or agreement between the libelant and the transportation company that repairs furnished to her by the former were furnished on the credit of the latter and not on the credit of the boat. It thus appears from the testimony of Smith, and there is nothing to contradict it, that whether repairs or supplies to the Ella were ordered from the libelant or elsewhere, he had them charged to the vessel. It must be assumed in the absence of evidence to the contrary, that in his testimony he spoke as a seaman

and not as a bookkeeper, and, therefore, that he understood and intended that such repairs or supplies should be furnished on the credit of the vessel. This assumption is further justified by his express recognition of the distinction between things appertaining to the vessel and things not so appertaining. The former he had charged to the Ella while he had the latter charged to the transportation company. In view of the relations between Smith and Jardine with respect to the furnishing of repairs to the Ella since 1889, it is not an unreasonable inference that the latter was cognizant of the fact that repairs were ordered by Smith and furnished by the libelant on the credit of the vessel, and that Jardine either authorized or acquiesced in the use of that credit to obtain needed repairs. But the case does not rest solely upon that inference. There are many circumstances which, considered collectively, remove all doubt on this point. Not only were the bills for repairs, rendered by the libelant to the transportation company, made out against "Steamer Ella and owners," but the correspondence relating to those bills contained practically a repeated assertion by the libelant of a lien upon the vessel. Libelant's Exhibits 13, 13a, 13b, 13d; Respondent's Exhibits B, G15, C. It is sufficient to refer to only one of these letters as they all alike treat bills for repairs as charges against the vessel. The libelant wrote, under date of January 20, 1891, to the transportation company: "We are in receipt of your favor 19th inst., covering your check for \$500.00 on acct. of our bills against your str. 'Ella' which we have placed to her credit," etc. Libelant's Exhibit 13. The same course was pursued with respect to the bills rendered by Neafie & Levy to the transportation company against the steamer John E. Tygert. Respondent's Exhibits G2, G6, G7, G9. This correspondence taken in connection with the testimony of Smith, the relations of Smith to Jardine, and the manner in which bills were rendered to the transportation company, affords persuasive evidence of an understanding on the part of that company that, prior to the furnishing of the repairs in question, it was dealing with Neafie & Levy and the libelant on the credit of the vessel, and, therefore, on the basis of a lien. With a single exception, the evidence does not disclose that either the libelant or Neafie & Levy ever rendered to the transportation company any bill made out to it personally, and not against the Ella or the John E. Tygert. Sometimes repairs to vessels are charged against them by name as a matter of convenience in keeping accounts, although there is no intention of asserting a lien. But this consideration loses much of its force when, as here, the owner is operating only one vessel and practically all of the indebtedness has accrued through the furnishing of necessary repairs to that vessel. All the bills from and including 1890 to the bringing of this suit were for repairs furnished by the libelant or Neafie & Levy to the Ella, with possibly one exception relating to certain grate bars. Neafie & Levy rendered a bill for these bars dated March 15, 1890, amounting to \$5.85. Whether the bars were furnished to the Ella for her use or to the transportation company for some other use is not disclosed. The libelant having

succeeded to the rights and liabilities of Neafie & Levy, wrote August 6, 1891, [Libelant's Exhibit 13C,] to the transportation company in relation to the bars, as follows:

"Philadelphia, Aug. 6th, 1891.

"Philada. & Smyrna Trans. Co., A. E. Jardine, Sec.—Dear Sir: In reply to yours 5th inst. we send you duplicate bill for Dec/90 of \$242.02 for str. 'Ella.' The item of \$5.85 was for grate bars charged to your company not to the 'Ella,' hence was not on the 'Ella's' statement. The account Jan. 1/91 stands thus:

Ella	\$2232 05
Phila. & S. T. Co.....	5 85

\$2237 90

"Yours, truly,

The Neafie & Levy S. & E. B. Co.,
"Chas. Halyburton, Treas."

This letter presented in sharp contrast a charge made against the transportation company personally and charges made against the Ella. It is unreasonable to suppose that the distinction was not recognized by that company. The customary form of correspondence was employed during and after the furnishing of the repairs in question. Libelant's Exhibits 1, 2, 7.

All this correspondence is in perfect accord with, and strongly tends to show, an understanding on the part of the transportation company that the repairs were to be furnished on the credit of the Ella. In view of the course of dealing and correspondence prior to May, 1895, it is not to be assumed, in the absence of evidence, that there was a departure therefrom with respect to the repairs in question. That these repairs were furnished with an understanding on the part of the transportation company that a lien was to be acquired is shown not only by its former dealings with the libelant, but by evidence bearing more immediately upon the transaction in question. While there was a clear understanding on the part of the libelant that the repairs were furnished on the credit of the Ella, neither the claimant or Jardine, nor any other person connected with the transportation company, has in his testimony denied the existence of such an understanding on the part of that company. In fact the testimony of both the claimant and Jardine shows that they had such an understanding. The libelant, July 28, 1896, after pressing the transportation company for payment for the repairs, took a note from the latter to cover their price. The claimant was asked: "Did the acceptance of this note by the Neafie and Levy Ship and Engine Building Company relieve you from the supposition that they would make any claim for a lien upon the boat?" and he replied: "I didn't know that they had any lien against the steamboat, because I thought they had taken the note and that was in settlement of their claim, and I didn't know whether the note had been paid or not." The claimant impliedly admits that the libelant had a lien at sometime for the repairs, because he gives as the only reason why he did not know that there was a lien his supposition that it had taken the note in settlement of its claim. He nowhere states that the repairs were furnished without any understanding on his part or on that of the transportation company that there was to be a lien. By fair implication he admits that the re-

pairs had been furnished on the credit of the Ella. Jardine wrote a letter to the libelant August 31, 1896, [Libelant's Exhibit 3,] in which he said:

"We want our steamer to run but parties here will not allow it fearing trouble from you and Reakirt & Bro. & Co., the only ones having any bills against the boat. * * * Will you not be kind enough to write me a letter so I can show to bank, in which you agree not to attach or interfere with in any way the steamer 'Ella' before Jany. 1, 1897."

This letter was written after the execution, August 21, 1896, of the bill of sale of the Ella by the transportation company to the claimant, which Jardine testifies was an absolute bill of sale. In view of this fact, Jardine, in stating that there were bills against the Ella upon which she might be taken, necessarily recognized that the libelant had a lien on the vessel good as against any title acquired by the claimant under the bill of sale; for his understanding, as shown by the letter, was that, by reason of the transfer to the claimant, no general creditors had the right to attach the Ella as the property of the transportation company. While it is true that a lien will not be created by mere recognition after the furnishing of the repairs for which it is claimed, such recognition is potent evidence that the repairs were furnished on the credit of the vessel. Certainly Jardine had an understanding to that effect when he wrote the letter. If he had it then, when did he first acquire it? The transportation company through Jardine wrote again to the libelant September 14, 1896, [Libelant's Exhibit 4,] saying:

"In reference to my conversation with you in regard to steamer 'Ella,' Mr. Hoffecker is perfectly willing for me to have the use of the boat but does not want her stopped in Philadelphia. * * * We do not wish you to do anything to release your lien on the boat and only ask that you stay proceedings and allow the boat to run for the balance of this year or until your note becomes due."

The libelant, through Neafie, wrote, [Libelant's Exhibit 5,] in reply to this letter on the following day, saying:

"If we agree to your request, what security have we that our claim will be paid when demanded, and what security have we that the steamer will not be further jeopardized by expenses incurred in running the boat, such as wages, wharfage, repairs and etc.; and what further guarantee can you give us, that if we postpone our demand, that our lien upon the boat shall not be in any manner whatever, jeopardized; or what security have we that other creditors may not come in and make a foreign attachment for ordinary debts against the company, and also that the present status of our lien shall be in nowise affected?"

Jardine replied to this letter, [Libelant's Exhibit 6,] on the next day, saying:

"You seem to get the matter wrong. The steamer Ella belongs to Jno. H. Hoffecker and is subject to no attachment for debts of this company other than yours and Reakirt, Bro. & Co. Mr. Hoffecker is willing to charter Ella to us to run provided you will not attach her in Phila. as your lien and that of Reakirt's are the only ones against the boat. * * * You do not release yr. claim in any way but only stay proceedings, so we can have the use of the steamer 'Ella.'"

This correspondence shows two things: first, an unqualified recognition of a lien on the Ella for the repairs in question, and, secondly, that the libelant was not informed until September 16,

1896, of the execution of the bill of sale to the claimant, August 21, preceding. The letter of the libellant to the transportation company of September 15, 1896, bears no mark of disingenuousness, but is such as one, conscious of having furnished the repairs on the credit of the Ella, naturally would have written under the circumstances. The correspondence on the part of Jardine was such as one, conscious of the existence of a lien for repairs, would have written. The parties thus having a clear understanding at the time of this correspondence that there was a lien on the Ella, it must be assumed, unless satisfactorily shown to the contrary, that the repairs were furnished on the basis of a lien by the common or mutual understanding of the parties at the time. No satisfactory evidence to the contrary is found in the case. It is true F. Albert Von Boyneburgk, a witness for the libellant, states, that at a meeting of the creditors of the transportation company, held in Philadelphia, September 11, 1896, he and Seddinger were present and that "we claimed that our claims were preferred claims on account of their being on the boat solely. As regards this matter Jardine was not thoroughly posted but he concluded that we were right in our interpretations." This circumstance, for several reasons, is insufficient to overcome the evidence showing a common understanding for a lien. It may be that at a meeting of the general creditors of the transportation company, called and held for the purpose of effecting some arrangement for the continuance of its business, Jardine was disinclined promptly and publicly to acquiesce in the assertion of liens against the Ella to the prejudice of the unsecured creditors; but there can be no doubt that Jardine at that time understood that the libellant was entitled to a lien, for, while the circumstance testified to by Van Boyneburgk occurred September 11, the first letter of Jardine to the libellant clearly recognizing the existence of a lien was written August 31, preceding. There is absolutely nothing in Jardine's testimony which negatives the existence of an understanding on the part of the transportation company that the repairs were to be and were furnished on the credit of the Ella. While he was examined as to the letters of September 14 and 16, 1896, he was not examined as to the letter of August 31, 1896. With respect to the letter of September 16 he was asked: "Did you undertake to give as your opinion that there was a technical lien, that these gentlemen had under the admiralty law, a lien upon that boat." He answered: "I don't propose to know anything about admiralty law, but only from the facts as stated that they had this lien against this boat, and if she went to Philadelphia they could attach the boat." He was then asked: "Then when you speak of them having a lien, did you or not take it from what they had said to you?" to which he replied: "I can't say that I did, it was just an opinion formed in regard to transactions we have had with them." He was then asked: "What transactions do you mean?" and answered, "They claimed that the coal, the repairs were a lien against the boat." He further states that it was by reason of the claim that there was a lien upon the Ella for repairs he asserted what he did with respect to the lien.

He also, in reply to the question: "Then anything that you state about their having a lien was merely a repetition of their assertion that they had a lien?" answered: "Yes sir; what is claimed to be the custom of a lien." It will be observed that Jardine does not, in explaining the letter of September 16, state that his understanding as to the existence of a lien was based solely upon the letter of the libelant to the transportation company of September 15, 1896, but on the contrary states that it was "an opinion formed in regard to transactions we have had with them" in which it was claimed that "the repairs were a lien against the boat," and that the transactions referred to related to the claim of the libelant. He also refers in this connection to the assertion of "what is claimed to be the custom of a lien." This testimony is perfectly consistent with an understanding on the part of Jardine, when the repairs in question were ordered, that they were to be furnished on the credit of the Ella. He was with Smith in the office of the libelant in May, 1895, at the time repairs involved in the spring overhauling for that year were discussed and ordered. Smith states that he always had repairs charged against the vessel. Further, Jardine was thoroughly familiar with the course of dealing and correspondence between the parties during prior years. He must have known the custom of the libelant to look to vessels as security for repairs furnished to them; for he speaks of an assertion by the libelant of "the custom of a lien." Nothing was said in the correspondence, just referred to, about any such custom. There is no evidence in the case to show that at any time since May, 1895, and prior to the correspondence beginning August 31, 1896, anything was said or done to present to the mind of Jardine "the custom of a lien." The only reasonable deduction from the evidence is that Jardine prior to May, 1895, was familiar with the custom of the libelant to charge repairs to the vessel and look to her for payment, and that he as manager of the transportation company dealt with the libelant for the furnishing of the repairs in question on the basis of and in accordance with that custom.

There is one circumstance entitled to great weight upon the question of lien or no lien. The correspondence during August and September, 1896, shows a clear recognition by the transportation company of a lien for the repairs in question. In view of that correspondence the burden rested upon the claimant to negative the existence of an understanding on the part of the transportation company that the repairs were to be and were furnished on the credit of the Ella. Both the claimant and Jardine were witnesses and must have been sensible of the importance of showing, if such were the fact, that there was no such understanding. Yet neither of them, nor any other person, has testified that there was no such understanding, whether mutual or common, at the time the repairs were ordered or during the furnishing of them. Silence in such a case amounts to admission.

Jardine states that he had not been authorized by the transportation company either to create a lien for the repairs or to say

to the libelant that it had a lien therefor. But this is of no importance, as he had been appointed or was recognized by the transportation company as its general manager. No want of authority on his part could affect the rights of innocent third persons. As to them his acts and statements must be treated as those of the company he represented.

There are several circumstances disclosed in the evidence which the proctor for the claimant contended negated the existence of a lien. Much stress was laid upon the facts that the transportation company had been dealing for many years with the libelant and Neafie & Levy; that there was a running account for repairs; that promissory notes of the transportation company had been received by the libelant on several occasions for the price of repairs; that the transportation company had credit with certain business houses in Philadelphia and with certain banks elsewhere prior to and during the period in which the repairs in question were furnished; and that the libelant solicited business from the transportation company. But, taking the evidence as a whole, these circumstances are entitled to little, if any, weight. They are all consistent with the existence of a lien. That the dealings between the parties continued for many years does not tend to show that the libelant who was in utter ignorance of the financial standing of the transportation company intended to give exclusive credit for repairs to that company, while the Ella was making her regular trips and in reach of process in Philadelphia. If the libelant had at any time prior to May, 1895, brought suit in personam against the transportation company for the price of repairs furnished to the Ella, an inference might be drawn, but there is no evidence of any such suit. Nor is the fact that there was a running account between the companies of any significance under the circumstances of this case. It was not a mutual account, but simply an account charging the price of repairs furnished by libelant, on one side, and showing, on the other, payments by the transportation company for repairs. So, the acceptance of promissory notes of the transportation company is equally without significance; the evidence showing that such notes were not negotiated by libelant, were not considered payment unless paid, and were taken always with the understanding on the part of the libelant, at least, that a lien for repairs should not be affected thereby. Nor can the possession by the transportation company of credit in Philadelphia or elsewhere avail the claimant. The dealings in this case having been directly between the libelant and the owner of the Ella, the possession or non-possession by the transportation company of credit elsewhere is utterly immaterial, unless it furnishes the ground upon which the libelant might be considered as having given credit exclusively to the transportation company. But the libelant had no knowledge of the existence of such credit. With respect to the solicitation by the libelant of business from the transportation company, it is enough to say that it consisted only of such language, usual in business correspondence, as "soliciting your further favors," or like phrases, and has no perceptible

bearing upon the question whether repairs to a vessel are furnished on the exclusive credit of the owner or on the credit of the vessel as well as that of the owner. Nothing in the mode of keeping the accounts between the parties militates in any degree against the giving of credit to the Ella for the repairs.

The evidence, with proper inferences drawn from it, shows a common understanding on the part of the libelant and transportation company that these repairs were to be and were furnished on the credit of the Ella as well as her owner, and, further, that each of these companies was aware or had good reason to believe that the other possessed such an understanding, and dealt upon the basis of a lien. The evidence discloses, to use the language of the court in *The Valencia*, "circumstances justifying the inference that the supplies were furnished with an understanding that the vessel itself would be responsible for the debt incurred." There was, at least, an implied agreement for a lien. The *prima facie* presumption that, in direct dealings between the ship owner and the repairer in a foreign port, the credit of the owner is exclusively relied upon, has been rebutted. Consequently, a lien existed under the maritime law by reason of the furnishing of the repairs in question.

The transportation company, having been pressed by the libelant for payment for the repairs, gave to the libelant its promissory note, July 28, 1896, at four months, for \$1145.78, the amount of the bill, including certain interest thereon. About the beginning of August, 1896, the transportation company failed financially. The note has never been negotiated by the libelant. During the taking of the testimony it was tendered to the claimant, as president of the transportation company, and to Jardine, as secretary and treasurer, and both the claimant and Jardine refused to accept its tendered surrender. Again, at the hearing, the libelant offered to surrender the note, but its offer was not accepted. The mere acceptance, by a person entitled to a maritime lien for repairs, of a promissory note of the owner of the ship repaired, does not defeat the lien. There is a presumption that the note is taken only as collateral security; and this presumption continues unless it affirmatively appears that the note was taken with an intention that it should extinguish the lien. In this case the evidence satisfactorily shows that the note was taken with an understanding that it should not affect the lien. The lien on the Ella having been created on account of the repairs and not having been waived or extinguished by the promissory note, can this lien be sustained as against the claimant?

The claimant avers in the answer that he "was the true and bona fide owner of the said steamboat 'Ella,' her boilers," etc., and it is urged that he, in taking title to the Ella by bill of sale August 21, 1896, was an innocent purchaser for value, and that there was such laches on the part of the libelant as to require a dismissal of the libel. The evidence, however, shows that the claimant was not an innocent purchaser for value, but took title to the vessel only as security, and had notice, actual or constructive, of the

existence of the lien. In August, 1896, before the bill of sale was executed, the transportation company was insolvent and the Ella had been seized by the sheriff of Philadelphia county in foreign attachment proceedings. The claimant testifies that the consideration for the transfer to him was made up of two items; first, \$1000, which had previously been loaned by him to the transportation company, and, secondly, \$2932.87, paid by him to the sheriff to secure the release of the vessel with an understanding that he should receive a bill of sale from that company. He states:

"The Sheriff in Philadelphia seized the boat for a claim of Percy Heilner & Co., and I was asked to go to Philadelphia to look into the situation of it, and when I found what was necessary to be paid * * * I said I would have nothing to do with it unless an arrangement could be made by calling a meeting and transfer the boat to me as security for what I was going to pay. * * * At the meeting they took into consideration that they [the transportation company] owed me besides that," etc.

The bill of sale having been executed as security both for the \$1000 previously loaned and for the \$2932.87, the claimant properly testified that there was no understanding for the re-transfer of the Ella to the company upon the repayment of the sum paid by him to the sheriff. Jardine testifies that the bill of sale "was given absolutely covering other considerations," which consisted of a sum exceeding \$1000 owed by the transportation company to the claimant, and that it was not intended that the bill of sale should be security only for "the money paid out by Mr. Hoffecker." If by this statement Jardine meant that the transfer to the claimant, though absolute in form, was by way of security for the \$1000 as well as for the advances to the sheriff, his statement agrees with the testimony of the claimant. But if Jardine meant that the transfer was absolute, and not by way of security only, he is discredited on this point not only by the correspondence but by the testimony of other witnesses. In the letter of September 16, 1896, [Libelant's Exhibit 6], to the libelant, he said: "As to insurance. As Mr. Hoffecker has about \$3500 in the boat [the Ella] he prefers to carry the insurance himself for his protection." Seddinger testifies that at the meeting of creditors, held September 11, 1896, Jardine presented a statement of the assets and liabilities of the transportation company, and among the latter was the sum of \$3000, which the claimant paid to secure the release of the vessel in Philadelphia, and, further, that Jardine then stated that the bill of sale was given to the claimant to hold as security for the payment of that sum. Von Boyneburgk testifies that at that meeting Jardine "said that that bill of sale was given for the money which was given as a loan and as soon as it was paid for then the boat would be clear of Mr. Hoffecker. The sum mentioned was three thousand dollars." The claimant bore a fiduciary relation to the transportation company of which he was president. It is in the highest degree improbable that he intended to purchase from the company for the sum of \$3932.87 a vessel which subsequently brought at marshal's sale \$6200. The evidence is against the existence of such an intention, but, if it were not, such equita-

ble principles as obtain in a court of admiralty would under the circumstances require the transfer to be treated merely as security for the repayment of money. Neither a bill of sale nor a mortgage of a vessel, given to secure an antecedent indebtedness, will confer upon the vendee or mortgagee the rights of a purchaser for value or affect the existence or enforcement of a maritime lien. The *Alfred J. Murray*, 60 Fed. 926; *Id.*, 11 C. C. A. 177, 63 Fed. 270. Therefore, no reliance can be placed upon the transfer to the claimant in so far as it was based upon the \$1000 loan. But money advanced in consideration of the execution of a bill of sale or mortgage of a vessel will constitute the vendee or mortgagee a purchaser for value, and if the money has been advanced without notice, actual or constructive, of the existence of a maritime lien, the vendee or mortgagee will, in proceedings to enforce such lien, be treated as an innocent purchaser for value. A maritime lien, however, is not in any case directly defeated by an innocent purchase for value. The effect of such a purchase is that proceedings for the enforcement of the lien must be instituted without unreasonable delay, and what is unreasonable delay must be tested by what constitutes a fair opportunity by the exercise of reasonable diligence to arrest the vessel. *The Lyndhurst*, 48 Fed. 839; *The Bristol*, 11 Fed. 156, 162; *The Laurretta*, 9 Fed. 622. But in this case in the eye of the law the claimant cannot be treated as clothed with the rights of an innocent purchaser for value. Before the bill of sale was executed he knew that the libellant had furnished repairs to the *Ella*, and, as president of the transportation company, he countersigned the note for \$1145.78, understanding that it was given for these repairs. He erroneously supposed that the acceptance of the note discharged the lien or that the note had been or would be paid. He "did not keep any record of the note, whether the note was paid." He testifies: "There is no salary attached to the office [of president] and I could hardly be expected to go there and have supervision when there was a secretary and treasurer and manager." While he states, that, before taking the bill of sale, he had an attorney look into the matter of claims against the *Ella*, it nowhere appears that he made any inquiry of the libellant, or even asked Jardine whether the note had been paid. Where one claims title to a vessel under a bill of sale from a corporation, of which he was at the time president, he is, for the protection of innocent third persons, chargeable with knowledge of all material facts which would have been disclosed to him had he exercised the duties of his office with reasonable circumspection, and no mistake of law can avail him. The knowledge of Jardine was the knowledge of the transportation company, and should in fact have been the knowledge of the claimant. In view of these considerations, the claimant is not entitled, even with respect to the money paid by him to the sheriff, to the protection accorded to an innocent purchaser for value. Upon the point of laches both the equities and law of the case are with the libellant. It dealt fairly with the transportation company from beginning to end. It did not demand a note for the repairs. Seddinger states, and his testimony

is not contradicted, that the libelant did not ask for or expect to receive the note; that it asked for a settlement of its account; that it expected to receive cash; but that the transportation company sent a note, and the libelant accepted it for the accommodation of the former. There can be no doubt, on the evidence, that the transportation company was insolvent when the note was given. Within a few days thereafter the Ella was in the hands of the sheriff. Yet the libelant, in possession of a four months note which it did not demand, was left by the transportation company in utter ignorance of its condition until August 29, 1896, [Libelant's Exhibit 9,] and, by the claimant, in like ignorance of the execution of the bill of sale, until the second or third week in September. The libelant was not informed that the claimant was the owner of the vessel until its receipt of the letter written by Jardine September 16. The charge of laches does not come with good grace from the claimant, and cannot be sustained. The libelant was under the circumstances justified in repudiating the note and in proceeding in rem. The fact that the libel was filed before the note became due is one which, at most, could only affect the matter of costs. *The Pioneer*, 53 Fed. 279; *The Papa*, 46 Fed. 576. In this case it can have no such effect. Jardine, testifying May 5, 1897, states that the transportation company then owned no property. Five libels in rem for wharfage, wages and supplies, were filed against the Ella in September, 1896, before the libelant in this case proceeded. It was not necessary that he should longer wait.

The claimant seeks to obtain \$5124.46 from the registry of this court, although the total indebtedness of the transportation company to him amounted, on his own showing, only to \$3932.87, including both money loaned and money paid to the sheriff, and notwithstanding the fact that the bill of the libelant is conceded to be just and reasonable. The difference between these two items is \$1191.59,—more than the principal sum demanded by the libelant. There is no equity in this position. It is not stated in the libel that the repairs were furnished to the Ella in a foreign port or port of a state other than that in which she was owned. No exceptions to the libel were filed. Leave is granted to the libelant to amend the libel in this particular (*The Samuel Marshall*, 49 Fed. 754, 757); and, upon the filing of such amendment and the deposit on or before December 20, 1897, of the note of July 28, 1896, with the clerk to remain subject to the order of this court, a decree will be made in favor of the libelant for the amount of its demand with interest from May 30, 1896.

PIONEER FUEL CO. v. MCBRIER et al.

(Circuit Court of Appeals, Eighth Circuit. December 6, 1897.)

No. 882.

1. ADMIRALTY APPEALS—FINDINGS OF FACT.

Quære: Whether the act of February 16, 1875 (18 Stat. 315) requiring circuit courts to find the facts in admiralty cases, and limiting the review of the cause on appeal to the supreme court to the questions of law arising on the record, applies to causes decided by the district courts and reviewed on appeal by the circuit courts of appeal under the judiciary act of 1891. But, in any event, the cause goes to the circuit court of appeals for review, rather than for trial.

2. DEMURRAGE—DELAY IN UNLOADING.

Where, by the bill of lading, the cargo is to be delivered "free of handling" at the private dock of a consignee known to have special facilities for unloading, the vessel will be entitled to demurrage for unnecessary delay of the consignee in beginning the discharge, although the total time consumed, including the delay, is not longer than would have been occupied in discharging at a public dock of the same port with the inferior facilities there afforded.

3. SAME.

The right of a vessel carrying cargo "free of handling" to a lien for demurrage for delay of the consignee in beginning to discharge is not affected by the fact that the delay arose from the refusal of the consignee to receive the cargo because damaged on transit by an excepted peril, and the fact that during the delay the consignee was negotiating with the owner to purchase the damaged cargo at a reduced price.

4. SAME—WAIVER OF LIEN—DISCHARGING CARGO.

Discharging cargo after giving notice of a claim for demurrage is not a waiver of the lien, where such cargo is placed on the dock, and kept separate from other goods, so as to be capable of identification.

Appeal from the District Court of the United States for the District of Minnesota.

This is an appeal from a decree of the district court of Minnesota awarding to the libelants \$500 demurrage damages. The decree was entered in that court on October 13, 1896, and the facts found are as follows: On July 13, 1895, the steamship Nyanza, owned by libelants was chartered by John King and J. G. McCullough to convey a cargo of 2,012 tons of hard coal from Buffalo, N. Y., to Duluth, Minn., and there deliver the same to the Pioneer Fuel Company, the claimant. King and McCullough were the agents of the owners of the coal, who were at that time unknown to the libelants and to the master of the steamship. On July 15th the steamship came into collision with another vessel, whereby the steamer was damaged, and sank with its cargo; but it was promptly raised, repaired, and pumped out, and thereupon proceeded upon its voyage with the larger portion of its cargo, reaching Duluth on the evening of July 23d. Notice of its arrival was immediately given to the consignee, the fuel company. On the morning of July 24th the steamship was ready to have its cargo discharged, and the agent of the consignee examined the cargo, and directed the master of the steamship to bring it to the dock of the consignee, which was accordingly done. There were already at such dock two vessels to be unloaded, having precedence of the steamship, but the last of them was completely discharged of its cargo, and the steamship was in its proper place at the dock in readiness to have its cargo immediately discharged at 11 o'clock in the forenoon of July 25th, and the master of the steamship then demanded of the consignee that it discharge the cargo. The consignee, with its mechanical appliances upon the dock, could fully have discharged the cargo before 6 o'clock on the evening of July 26th, but refused and neglected to do so, claiming that the coal had been injured by water and iron rust, and, instead of proceeding to discharge the cargo, entered into negotiations with the owner for the purchase thereof at a reduced price. On

July 27th the master notified the consignee in writing that the cargo had been in readiness for delivery since July 24th at 7 o'clock a. m., and that by reason of the neglect of the consignee to unload, or provide facilities for doing so, the owners of the vessel would look to the consignee and to the cargo for demurrage at the rate of \$200 a day, beginning July 24th. On July 31st the consignee, having purchased the coal from the owners, notified the master of the steamship that it was ready to unload, and between the hours of 7 o'clock a. m. and 7 o'clock p. m. of August 1st, it completely unloaded and discharged the steamship of its cargo. After the purchase by the consignee, the master and owners of the vessel requested the consignee to preserve the identity of the cargo, notifying it that they should hold the cargo and their lien thereon for demurrage. When unloaded, the coal was placed on the dock in a large bin, or inclosure, and, while near to two other piles of coal, was so situated that its identity was not lost, and its removal could have been effected without disturbing any of the other coal. On August 2d this libel was filed, and the coal seized. The court further found that by reason of the neglect and failure of the shippers and consignee to unload and discharge the cargo the steamer was unnecessarily detained five secular days, and that the damage by reason of such unnecessary delay amounted to \$100 a day, or \$500 in the aggregate. There was, in the first instance, some dispute as to the matter of freight, and the findings cover the question of freight as well as that of demurrage, but this has been settled, and the only matter now in dispute is that of demurrage.

E. L. McMillan, for appellant.

H. R. Spencer (F. E. Searle, on the brief), for appellees.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

BREWER, Circuit Justice, after stating the case as above, delivered the opinion of the court.

Courts in admiralty, like courts of equity, hasten to consider the substance of right, and do not tarry long on mere matters of form. Hence we shall not stop to discuss certain questions of practice suggested by counsel for appellant, merely remarking in passing that we see nothing in any ruling in respect thereto which wrought injury to the substantial rights of the appellant. Obviously, if only the findings of fact are before us for consideration there can be little doubt of the justice of the decree. There is a distinct finding of an unreasonable detention, of the time of such detention, and the damages caused thereby. Nor is there anything in the other findings which diminishes the significance of this one, or operates to relieve from the conclusion which it compels. So that, if this were a common-law action coming from a trial court, which, without a jury, found specially these facts, the propriety of the judgment would be beyond dispute.

It may be doubtful whether the act of February 16, 1875 (18 Stat. 315), is applicable to this case, or, indeed, whether it has not been entirely superseded. The first section of that act required circuit courts, in deciding admiralty cases, to find the facts, and provided that the review in the supreme court upon appeal should be limited to a determination of questions of law arising upon the record. It relieved the supreme court from the consideration of any mere questions of fact. The *E. A. Packer*, 140 U. S. 360, 11 Sup. Ct. 794; *The City of New York*, 147 U. S. 72, 76, 13 Sup. Ct. 211, and cases cited in the opinion. In favor of the contention that it is applicable to

the present case, and limits the extent of our inquiry, are the decision in *Re Cooper*, 143 U. S. 472, 511, 12 Sup. Ct. 453, in which it was held applicable to a case coming from the district court of Alaska, on the ground that that court was one exercising the powers of a circuit court, and the fact that the act of 1891, creating courts of appeals (26 Stat. 826), provides, in section 11, that "all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals." The purpose of the act of 1891 was to distribute between the supreme court and the newly-formed courts of appeals the entire appellate jurisdiction from the circuit and district courts of the United States, and not to provide new methods of procedure. *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118; *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. 517; *American Const. Co. v. Jacksonville Ry. Co.*, 148 U. S. 372, 13 Sup. Ct. 758. Also, by section 14 of the act of 1891, section 3 of the act of 1875 was expressly repealed, and it is worthy of consideration whether, the attention of congress having been called to the act of 1875, as shown by the repeal of the third section, it can fairly be assumed that it intended to repeal by implication either of the other sections. On the other hand, it must be noticed that the act of 1875 does not, in terms, apply to the present case, for that simply directed the circuit courts sitting as courts of admiralty to find the facts, and did not name the district courts. The courts of appeals in the First, Second, and Ninth circuits, have expressed the opinion that the act of 1875 does not apply to admiralty cases appealed from the district court to the court of appeals. *The Philadelphian*, 21 U. S. App. 90, 9 C. C. A. 54, and 60 Fed. 423; *The Havilah*, 1 U. S. App. 1, 1 C. C. A. 77, and 48 Fed. 684; *The State of California*, 7 U. S. App. 20, 1 C. C. A. 224, and 49 Fed. 172. But it is unnecessary to definitely determine this question, for an examination of the testimony convinces us that there is no satisfactory reason for disturbing the findings. It must be remembered, also, in this connection, that the court of appeal stands, in respect to admiralty cases at least, not in the old relation of the circuit to the district courts, but rather in that of the supreme to the circuit courts, and any case brought to this court from either the circuit or district court comes here for review, rather than for trial, and whatever limitations or qualifications may be applicable to admiralty cases do not abridge the important fact that this is a reviewing and appellate tribunal. *The Mabey*, 10 Wall. 419.

It is contended, in the first place, that the finding of the court that there was an unreasonable detention cannot be sustained, because it appears that there were no public docks at the port of Duluth with capacity sufficient to receive and support this cargo, and equipped with coal-discharging machinery, and that to have made arrangements for discharging the cargo at one of those docks would have taken from eight to twelve days; that, including the dock of claimant, there were but five private docks, and that no one of them would have taken and received the coal for storage; that, as the cargo

was in fact discharged within eight days after its arrival, it was discharged as soon as it could have been at any public dock. But this contention overlooks the fact that the contract of shipment as shown in the bill of lading was for delivery to the claimant, and not generally for delivery at the port of Duluth; that, though the contract was not made with the claimant, but with the owners of the cargo, yet in making such contract and fixing the price of carriage the libelants, as owners of the boat, may well be presumed to have taken into consideration the exact place and conveniences for unloading, and the time which naturally would be occupied in so doing. If the contract had been for shipping generally to the port of Duluth, the conditions of delivery at the public docks would doubtless have to be taken into consideration; but when the shipment is to a particular party having known, special conveniences for unloading, that fact enters into the contract, and determines the question of reasonableness in the discharge of the cargo. The steamer contracted with the owners to take their coal and deliver it to the claimant at Duluth, "free of handling." It knew what conveniences the claimant had for unloading. It knew the time which would reasonably be occupied in unloading at the claimant's dock, and with that knowledge it contracted for a certain price of carriage. It had a right to expect that the owners would see that arrangement was made with the claimant for receiving and unloading the cargo, and, if they failed to make such arrangement, and there was, consequently, a longer detention than was reasonably necessary for unloading at claimant's dock, it was entitled to demurrage.

These considerations also obviate any objections that are suggested by reason of the fact that claimant did not own the coal, that it had made no contract with the boat, and that it was under no obligation to the owners of the coal to accept and discharge the steamer of its cargo. The demurrage insisted upon is not a personal claim against the Pioneer Fuel Company for a breach of its contract, but arises out of the breach of the contract made with the owners of the coal for whom the carriage was undertaken. The vessel had nothing to do with the question of the ownership of the coal, or any contract made or to be made in reference to a sale. It did not contract to carry the coal to Duluth, and hold it there while the owners should make arrangements for a sale. Its contract was to carry and deliver it to the claimant, the Pioneer Fuel Company, and, of course, impliedly, at its dock, where it was in the habit of receiving such shipments. It had no right to know (and, as a matter of fact, did not know) whether the coal had been sold to the claimant, or whether it was to be received by the claimant for purposes of sale. Those were matters between the claimant (the consignee) on the one hand, and the shippers (the owners) on the other. The contract was one of carriage free of handling; that is, the shippers were to see to the matter of loading and unloading. It was a duty resting upon them, and any failure on their part to promptly discharge this duty gave to the boat a right to recover damages. It would be strange, indeed, if, making a contract like this to carry a cargo free of handling, a steamer could be compelled to

hold that cargo, and remain in the port of delivery, waiting until such time as the owners could make with the consignee or with others suitable arrangements for the sale of the cargo. It is true, the vessel was sunk in transit, and the cargo was somewhat damaged by water, but it was expressly stipulated in the bill of lading that the dangers of navigation were excepted. There was nothing in the condition of the coal after the sinking, or after its arrival, to interfere with the prompt delivery; and the delay in unloading was not at all caused by any difficulty in unloading or lack of conveniences therefor, or want of place to store the coal, but simply because of the fact that the claimant, the consignee, finding the coal damaged, entered into negotiations with the owners for a purchase at a reduced price. The delay was wholly at the instance of the owners and the consignee, for their benefit, and not at all at the instance or for the benefit of the vessel.

It is further claimed that these damages are not recoverable, because when the claimant finally purchased the coal it notified the master of the vessel that it would not be responsible for freight or demurrage. It subsequently agreed to advance the freight, and, after this action was commenced, did so. But a notice of this kind did not affect the claim for demurrage. Whatever arrangements might be made between the consignee and the owners, whether for a purchase by the consignee at a fixed price or even for a donation by the owners to the consignee, are immaterial, so far as the claim of the vessel for demurrage is concerned. And this claim is not at all interfered with although full notice is given to the master of the vessel of the terms and conditions of the contract between the owners of the cargo and the consignee.

It is also insisted that the vessel consented to the delay, and waived any claim for demurrage; but this is a mistake. On the 27th of July the master of the vessel served a written notice upon the claimant that the cargo had been ready for delivery ever since July 24th at 7 a. m., and that the vessel would look to the cargo for demurrage at the rate of \$200 per day, beginning July 24th; and one of the owners of the boat also gave personal notice to the same effect. It is true that the agent of the boat at Duluth was aware of negotiations looking to a sale of the coal to the claimant, and took some part in assisting in those negotiations; but, in the face of the written and verbal notices given by the master and one of the owners of the vessel, it cannot be held that there was any waiver of the right to demurrage.

Finally, it is said that the lien was lost because the cargo was in fact delivered, but the rule is settled that the mere unloading of a cargo does not discharge the lien. That may be only a conditional delivery, and, unless there be circumstances to show an abandonment of the lien, as where other security is taken, or unless the cargo when delivered is so mixed with other goods as to be incapable of separation and identification, the lien will continue. In this case it appears that there was distinct notice from the vessel to the claimant that the lien on the cargo would be insisted upon, and the coal, when unloaded, was placed in a pile by itself, and so situated with

respect to other coal on the dock as to be identified and removed without disturbance of the other coal. In such cases it is clear that the lien has not been waived by the mere fact that the goods have been unloaded from the vessel and placed upon the dock. Bags of Linseed, 1 Black, 108, 114; 151 Tons of Coal, 4 Blatchf. 368, Fed. Cas. No. 10,520; 600 Tons of Iron Ore, 9 Fed. 595; Costello v. 734, 700 Laths, etc., 44 Fed. 105; Cuff v. 95 Tons of Coal, 46 Fed. 670.

It is claimed by the libelants that the amount of demurrage allowed was not sufficient, and they insist that, although they took no appeal from the decree, the appeal on the part of the claimant brings the whole case into this court for a rehearing, and upon the facts as presented this court is at liberty to increase the amount of the award, —citing *Irvine v. The Hesper*, 122 U. S. 256, 7 Sup. Ct. 1177, in which it was held by the supreme court that such was the rule on an appeal from the district to the circuit court. But the appeal from the district to the circuit court simply transferred the case from one court to another for trial, and it may be questioned whether that rule applies in a case brought to an appellate court for review. But, be that as it may, we do not find in the testimony sufficient to justify us in disturbing the conclusions of the district court in this respect. The fact of damage, and the actual amount thereof, must be clearly shown. *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510; *Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co.*, 40 U. S. App. 157, 23 C. C. A. 564, and 77 Fed. 919, and cases cited in the opinion. Upon a careful examination of the testimony we are not satisfied that we should be justified, even if we had the authority, in disturbing the conclusions reached by the trial court.

These are all the questions we deem worthy of consideration. Upon the record, as it stands, we find no error calling for a reversal or modification, and the decree of the district court is affirmed.

THE E. V. MacCAULLEY.

THE IVANHOE.

RILATT et al. v. THE E. V. MacCAULLEY et al.

(District Court, E. D. Pennsylvania. January 7, 1898.)

1. TOWAGE—LIABILITY OF TUG OWNERS.

Tug owners are not insurers of the safety of their tows, but are only responsible for the exercise of such care as the service requires, and cannot be held liable for a loss in the absence of proof of carelessness. Error of judgment respecting the weather at the time of starting, or in other respects on the voyage, is no ground of liability.

2. SAME.

Where the captains of tugs engaged to tow a dry dock from Hoboken to Philadelphia waited three days while the wind was eastward and the weather bad, and on the following morning, finding the wind in the northwest, the sky clear, and the storm signals taken down, started on the voyage, but encountered rough weather, resulting in the loss of the tow, *held*, that their failure to observe or heed the fact that the wind had passed around from the east northward instead of southward, was not negligence, as it did not sufficiently appear that a change in the one way rather than the other indicated a shorter period of good weather.

3. SAME—DEFECTIVE HAWSER.

Alleged defects in the hawser are not sufficient to charge the tug with negligence, where it appears that the hawser did not break until the tow was sinking, and therefore was free from any defects contributing to the disaster.

This was a libel by Rilatt Bros. against the tugs E. V. MacCaulley and Ivanhoe, to recover damage for the loss of a tow.

Henry Flanders and Edward F. Pugh, for libelants.

John F. Lewis and Francis C. Adler, for respondents.

BUTLER, District Judge. The suit is for damages, alleged to have resulted from carelessness in towing a dry dock from Hoboken, on a voyage to Philadelphia, the dock being lost in a storm on the way.

There is no difficulty about the law applicable to the case. The respondents were not insurers, but were responsible for the exercise of such care as the service undertaken required. They cannot be held liable for the loss sustained in the absence of proof that it resulted from carelessness. Error of judgment respecting the weather at the time of starting, or in other respects on the voyage would be unimportant.

The libelants' case was put at the hearing on three specifications of alleged carelessness; others charged in the libel were not urged, and will not therefore be considered. The first of the specifications pressed is that the respondents should not have started when they did; the second, that the hawser was insufficient for the service; and the third, that a harbor should have been sought before the storm was encountered. Should the first specification be sustained? The respondents had waited three days, while the wind was eastward and the weather bad. The next morning, finding the wind in the northwest, the sky clear and the storm signals taken down, they started. The charge of carelessness in thus starting is based on an allegation that the wind passed around from the east northward instead of southward. If the allegation is true, (and it rests on the testimony of the libelants' agent Griffen, who does not appear to have communicated this fact to the masters of the tug), I do not think it sufficient to convict them of carelessness. They could not be expected to remain up all night for the purpose of observing how the wind passed to the northwest; and even if they had been aware that it passed northward I do not think they would have been guilty of carelessness in starting, in view of the circumstances that the sky was clear, the wind in the northwest, the storm signals down and other vessels going out. I do not attach much importance in this respect to the case of *The Vandercock*, 65 Fed. 251. Whether the duration of good weather will be longer when the wind passes westward from eastward in one direction than when it passes in another is not a question of law, but of fact about which there is certainly room for difference of opinion. Probably a majority of intelligent persons would say that the direction in which it passes is unimportant. At least one experienced witness says it certainly is not important on the Jersey coast. At any rate there is no evidence in this case sufficient to prove that the passage northward is such an indication of bad weather as should render one

who disregards it chargeable with carelessness. The captains of the tugs had been careful not to start until the weather cleared and the wind went to a quarter indicative of good weather. They had no motive to start until they believed the storm had passed; on the contrary their own safety depended on the exercise of care in this respect. It was impossible to tell how long the weather would continue good; it might be of short duration whether the wind went round in one direction or another. These captains had long experience in navigation on this coast, and were especially qualified to judge of the propriety of starting. The officers in charge of the signal service believed the weather safe for vessels going out, and therefore took down the storm signals which had been up; and many vessels started that morning. It is true that the tow was unwieldy; but I do not think the respondents can justly be held guilty of carelessness in starting under the circumstances.

Were they careless as respects the hawser—was it unsafe? It was an eight-inch line, new within a year. That it was large enough, if in good condition, I do not doubt. The expert testimony is clear in this respect. Was it in good condition? It drew out of the thimble off Sandy Hook, but this, as the testimony shows, frequently occurs with good hawsers; and when refastened it was safe in this respect and held, even when the tow sank. Griffen says it did not pull out of the thimble but broke at this point. The weight of the testimony is, however, against his statement. It did break when the tow was virtually submerged, just before sinking. But I do not deem this evidence of faultiness. At that time the waves drove the tow back and forth, subjecting the hawser to jerking, and sawing on the bits such as would, I think, necessarily break it even if in excellent condition. Griffen, who was on the tow, testifies that he noticed when, as he says, the hawser broke off Sandy Hook, the strands at the broken end, and saw they were worn. He is contradicted by many witnesses in the statement, that it broke at this point, and his testimony that he then observed its worn and unsafe condition is improbable. At this time a harbor was within convenient reach, and it seems incredible that he should have gone on at the risk of his life without calling attention to the danger thus manifest, if his testimony is true. Two witnesses, Gokey and Williams, testify that the captains of the tugs declared before starting on the voyage, that the hawser was "very bad." This also seems improbable. It is certainly unlike the conduct of such men when entering upon such a service. The captains, who have no more interest in the subject than Gokey and Williams, deny positively making such a statement. They and a number of other witnesses called by the respondent, testify that the hawser was good, and safe for the service. After careful examination of all the evidence on this subject, I think a finding that the hawser was not safe would be unwarranted. Indeed, I think the weight of the evidence sustains a conclusion that it was. It held under the strain of both tugs and the tempestuous sea until Griffen, who as has been stated was on the tow, saw that it must go down, and demanded to be taken off. At this time, as he distinctly testifies, the dock was doomed; no hawser would have saved it. It must break loose, go to pieces,

or take the tugs with it. The tug which was cast off to rescue Griffen was not again attached because, as I suppose, it was seen that such attachment would be useless. The only probable effect of making it would have been to hasten the catastrophe. As the dock was sometimes driven towards the tug attached the latter would hasten forward to tighten the line, and then a counter wave would drive the dock back, and the jerk thus caused on the line would produce a strain that would have been likely to part it sooner if the weight and force of the two tugs had been encountered at the forward end. That it endured the strain to which it was subjected by the storm, so long as it did seems to demonstrate that it was in good condition. It held until the situation was such that no hawser would have saved the tow. It was lost as a consequence of the storm, and not of the condition of the hawser. This conclusion is, I think, fully warranted by the testimony on both sides. Nor do I think the respondents were remiss in not turning back to seek a harbor because of indications of bad weather after starting, or when the storm arose. There were no such indications, in my judgment, of a reliable nature, until the storm was imminent, as required them to seek a harbor, and afterwards turning back against the wind would, I think, have augmented the danger.

The libel must be dismissed.

THE JOHN AND WINTHROP.

KRUEGER et al. v. THE JOHN AND WINTHROP.

(District Court, N. D. California. December 29, 1897.)

No. 11,402.

SEAMEN'S WAGES—DEFENSES.

In a suit for seamen's wages, where the defense is that libelants were suspended from duty and imprisoned by the master, on suspicion of an attempt to burn the vessel, it is not sufficient that the master acted in good faith, and under the belief that libelants were guilty, if, in fact, they were not guilty of such a purpose.

This was a libel by F. A. Krueger and others against the American bark John and Winthrop to recover seamen's wages.

The defense to the action was that the libelants had shipped for an entire whaling voyage on the bark John and Winthrop, and while on such voyage attempted to burn and destroy the vessel, and for that offense the captain, after such investigation as he thought sufficient, suspended the libelants from duty and imprisoned them on board of the vessel. Upon the trial the captain testified that such action was, in his judgment, necessary for the safety of the vessel. The captain did not, however, of his own knowledge, know that the libelants were in fact guilty of the offense charged against them.

H. W. Hutton, for libelants.

Geo. W. Towle, Jr., for respondent.

DE HAVEN, District Judge. The evidence in this case is not such as would warrant the court in finding that the libelants, or either of them, attempted to burn and destroy said bark John and Win-

throp, and thus to break up the voyage for which they shipped as seamen on board of said vessel. The fact, if it be a fact, that the captain, in suspending the libelants from duty and imprisoning them on board the ship, acted in good faith, under the belief that they were guilty of attempting to destroy the vessel, is not of itself sufficient to defeat the claims of the libelants in this action. The good faith of the master in that matter would be important, if the libelants were seeking to recover damages for assault or false imprisonment; but in this action, based on the contract set out in the shipping articles, the libelants are entitled to recover if they are not in fact guilty of the charge of attempting to set fire to the vessel. There will be a decree for the libelants.

THE MEXICO.

In re COMPANIA TRANSATLANTICA.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

No. 39.

1. COLLISION—PRESUMPTIONS—CARGO INSURERS—LIMITATION OF LIABILITY.

The rule that where fault on the part of one vessel, sufficient to account for the collision, is established, the burden is then on her to clearly show fault on the part of the other, applies as against underwriters of the cargo of the vessel so in fault; and it makes no difference that the other vessel has sought the benefit of the statutes for limitation of liability.

2. SAME—STEAMERS AT SEA.

The fact that one of two colliding steamers had the reversing gear of her engine clamped fast to the rock arm, so that from one to five minutes was required to release it after notice to reverse, *held* a gross fault, rendering her liable.

3. SAME.

Where two steamers approached each other on the open sea at night, *held*, on the evidence, that the one having the other on her starboard bow, after crossing the bow of the privileged vessel, so as to have her green light constantly in view, began porting, and continued to do so until she struck the latter on the starboard side, and was consequently in fault; and *held*, further, that the privileged vessel was not in fault for not reducing her speed, or for starboarding so as to reduce the angle of collision. 78 Fed. 653, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

Petition for limitation of liability.

This proceeding was instituted by the petitioner in the district court, Southern district of New York, in consequence of a collision which occurred between the steamer Mexico and the steamer Nansemond, December 21, 1895. The Nansemond, as a result of the collision, sank, with her cargo, and all became a total loss. The Mexico sustained no damage. In May, 1896, libels were filed by the owners of the Nansemond, and by the underwriters of a portion of her cargo, against the Mexico, in the Southern district of New York, and thereafter petitioner filed its petition for limitation of liability. The value of the petitioner's interests in the Mexico and in her freight was duly appraised, and a bond given for the amount. Under the monition issued in the proceeding, claims were filed on behalf of the owners of the Nansemond and her cargo. The cause coming on to be heard, the district court held the Nansemond solely in fault for the collision, and entered decree accordingly. 78 Fed. 653. Appeal from said decree is prosecuted by the un-

derwriters of the principal portion of the Nansemond's cargo; the owner of the Nansemond having withdrawn from the appeal. The assignments of error bring up only the charges of fault against the respective vessels. The Mexico was an iron vessel, 331 feet in length. She was bound on a voyage from Puerto Cabello to Savanilla, and had reached a point about southerly from the easterly end of Oruba Island. Up to the time of sighting the Nansemond the Mexico's course was N., 70° W., corrected, or about W. by N. $\frac{3}{4}$ N. There was no reason, except the avoiding of other vessels, why she should alter this course until many miles further on her way. The Nansemond was a wooden steamer, 165 feet long. She was bound from Maracaibo to Curacao. For some hours before sighting the Mexico, the Nansemond's course had been up from the mouth of the Gulf of Venezuela. N. E. by E. It was her practice (she ran regularly between the ports named), after getting Oruba light abeam, to turn to the starboard, laying a new course of E. $\frac{1}{2}$ S. The collision occurred between 2 and 3 a. m. The night was dark, and not good for seeing lights. The stem of the Nansemond came in contact with the starboard side of the Mexico abaft amidships, with an apparent angle of about 45° between the Mexico's starboard side and the Nansemond's port side.

Wilhelmus Mynderse, for appellants.

J. Parker Kirlin, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). It might be quite sufficient, in this case, to affirm upon the opinion of the district judge. Indeed, when the record is examined,—especially the testimony given by the only survivors from the deck of the Nansemond,—it is difficult to understand upon what theory the decision of the district court could be reversed. The Nansemond, aside from any faulty navigation, was concededly in fault because her reversing gear had been made fast by a clamp to the rock arm, which would require from one to five minutes to release it after notice to reverse. Counsel for the Nansemond concedes that, when the vessels came in sight of each other, she had the Mexico on her starboard bow. She was therefore the burdened vessel, conceding her own fault in the matter of the reversing gear; and the burden was upon her to show some fault on the part of the privileged vessel, if the latter is to be made to share the loss. "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption, at least, adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor." *The City of New York*, 147 U. S. 72, 13 Sup. Ct. 211; *The Ludvig Holberg*, 157 U. S. 60, 15 Sup. Ct. 477. Cargo underwriters stand in no better position, nor is this salutary rule of evidence in any way modified by the circumstance that the privileged vessel, when proceeded against in rem by some sufferer from the collision, has sought the benefit of limitation of liability under the statutes of the United States, even though her petition in such proceedings may aver that she has committed no fault. *The Plymothian* and *The Victory* (Nov. 29, 1897) 18 Sup. Ct. 149. The story of the Mexico is that the masthead and green lights of the Nansemond were sighted on the port bow of the Mexico; that they

narrowed on the port bow, and drew across until they were on the starboard bow; that the Nansemond hard a-ported her wheel suddenly, closing in her green light and exposing her red light, which seemed to be near by, whereupon the Mexico ordered her helm hard a-starboard, to ease the blow. The navigation thus attributed to the Nansemond is indeed extraordinary. Having crossed the Mexico's bows, and thus brought the latter's green light into view of those on the Nansemond, she is charged, not only with porting to such light, but with following the movement of the wheel with a hard a-port; thus swinging around from a position of safety on the Mexico's starboard bow till she came back upon the course of the Mexico, striking her on the starboard side, and at right angles to such course. The angle of collision was reduced from 90° to 45° by the starboarding of the Mexico "to ease the blow." However extraordinary this story, it is fully corroborated by the evidence of the two survivors from the deck of the Nansemond. Her captain and lookout were lost, but the boatswain (who was acting as second officer in charge of the watch) and the wheelsman have both escaped, and have testified in the cause. Landeborg, the wheelsman, left the wheel at 2 o'clock; but, a few minutes after, he relieved the new wheelsman, Thode, who wished to go to the toilet. He (Landeborg) was then alone in the wheel house, and the boatswain, Hellburg, outside. The captain was in his room, back of the wheel house. Before he went to the wheel to relieve Thode, witness saw a yellow light (the top light of a steamer) a little bit on the starboard bow. He reported it to the boatswain, who went to call the captain. The latter came out of his room, took the glasses, and went outside to look at it, and then stood at the window, and said, "A little bit port," which order the witness obeyed, putting the wheel over three spokes. Then the captain took a walk around, and told him again to port more, and he put it over three spokes more. Then, later, the other vessel being close by, the captain, who was standing in the window, called out, "Hard a-port," and ran up to witness, and helped to put the wheel over hard a-port. This witness added that he "saw nothing but the masthead light until the ships struck one another. Then he saw the rest of the lamps and the green light." The witness Hellburg was boatswain and acting second officer of the Nansemond. He was a native of the island of Curaçao, and was examined through an interpreter, one Vom Golderen, a steward employed on the same line of steamers to which the Nansemond belonged. Vom Golderen was from the neighboring island of Bonaire, apparently entirely familiar with the language which Hellburg spoke, and had conversed with him, on the voyage up, about the details of the collision. A second interpreter, representing the Mexico, was also present. There is certainly no reason shown for supposing that the witness was misunderstood or misinterpreted. Although not an educated man, he was apparently intelligent, 48 years of age, and had followed the sea for over 10 years. His testimony is as follows: The captain left the deck, and went to his room, about 1 o'clock. Witness was in the pilot house when Landeborg came to relieve Thode, and was looking through the pilot-house window. The vessel was then on a course

N. E. by E., and it was the witness' intention, when Oruba light got abeam, to call the captain, with a view to changing the course to starboard. When Landeborg came to the wheel, he called attention to a light ahead. Witness took the glass and looked. He saw a white light about a point and a half on the starboard bow (he estimates the distance at four or five miles), but could not see any side lights at that time. He then called the captain, who was asleep on the settee in his room, and who put on his slippers and came out at once. Both came on deck together. The captain went into the pilot house. The boatswain stood outside. The captain looked with the glasses, said it was a steamer, and told the man at the wheel to port. To the question, "When the captain gave this order to port, what lights could you see on the other steamer?" the witness answered, "Then I saw the green light." This witness himself heard only one of the three orders to port given by the captain, and subsequent testimony makes it uncertain whether or not he intended, by the answer above quoted, to say that at the moment of time when the captain gave the first order the witness saw the green light. It seems more probable that what he meant to say was that by the time the captain, having given his order, had come out of the wheel house, witness made out the green light. But he testifies positively, and with no contradiction or qualification, that he (witness) saw no red light from the Mexico, that he saw the green light a few minutes after he saw the white light, and that from the time he first saw the green light he kept on seeing it; that is, "from two o'clock until the collision" (the witness' own phrase), which he estimated was 20 minutes. Moreover, it is quite apparent from his evidence that, although "not allowed to say anything" about the navigation, the witness wanted to make some suggestion on the subject of this continued porting. It is difficult to understand why the captain of the Nansemond should have navigated as he did. Even assuming that when he first looked he saw the Mexico's red light, it must have been a very brief interval before the green light came into view and the red disappeared; and yet although, after the green appeared, it never subsequently disappeared, the captain persistently kept on porting to it. In view of this testimony from the Nansemond, it is not necessary to undertake to account for the apparent movements of that vessel, described by the Mexico's witnesses, on any theory that the Mexico was herself swinging. There is in the narrative given by those on the deck of the latter vessel the usual discrepancies as to distance, time, the bearing of lights, etc., but all agree in the statement that she made no change of course until in the jaws of collision. All the testimony, without a single exception, shows that, when sighted, the Nansemond must have been in such a position as to indicate positively to those on the Mexico that the latter was the privileged vessel, under the starboard-hand rule; and we are not to assume that they at once undertook to get out of the way of the burdened vessel, instead of keeping their own course, without some evidence to indicate that such was the fact. In view of the testimony from the Mexico, corroborated by the direct and positive evidence of Landeborg, the Nansemond's pilot, and of Hellburg, her boatswain, that the Mexico did not

change her course, down to the collision, the charge that the Mexico improperly starboarded her helm is not sustained by proof; and under the decision of the supreme court in *The Britannia and The Beaconsfield*, 153 U. S. 130, 14 Sup. Ct. 795, it certainly cannot be held to be a fault that she did not reduce her speed or stop. No other faults are charged against her, and we therefore concur with the conclusion of the district judge, that the Nansemond was solely in fault. The decree of the district court is affirmed, with costs.

THE GEORGE S. SHULTZ.

THE LITTLE SILVER.

CRAMER v. CLANCY et al.

NEW YORK & M. P. S. S. CO. v. SAME.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

No. 15.

1. COLLISION RULES—STEAMER WITH TUG AND TOW—NEW YORK HARBOR.

Rules 19 and 23, providing that when steam vessels meet on crossing courses, so as to involve risk, the one having the other on her starboard side shall keep out of the way, and the other shall hold her course, are applicable in the waters of the North river opposite New York, and are binding on a steamer or tug, though incumbered with a tow on a hawser; and the burdened vessel does not acquire any right of way by signaling first, unless the privileged vessel assents to the signal.

2. SAME.

If the burdened steamer persists in crossing the bow of the privileged steamer in the face of danger, intending to force the latter to give way, she will be primarily responsible for a resulting catastrophe; and the privileged vessel will not share in such responsibility, unless she persists in her course and speed after it becomes apparent that the burdened vessel has gone so far as to make it impossible to keep out of the way by changing course, stopping, or reversing.

3. SAME—NEGLIGENT LOOKOUT.

A privileged steamer meeting a tug and tow in the North river held guilty of contributory fault where the tug insisted on crossing her bows in the face of danger, in that, because of a negligent lookout, she did not perceive that the tug had a tow, and therefore continued her course and speed, so as to collide with the tow. 74 Fed. 574, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal by both claimants from a decree of the district court, Southern district of New York, holding both the Shultz and the Little Silver in fault for a collision between the Little Silver and libelants' schooner, Amos Briggs, in tow of the Shultz. 74 Fed. 574. The collision occurred about 11 a. m. on October 21, 1895, in the North river, between the New Jersey Central Ferry, on the Jersey side, and the Battery. The facts sufficiently appear in the opinion.

Charles C. Burlingham, for the Shultz.

Mr. Park, for the Little Silver.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The Shultz, which is a moderate sized tug, about 70 feet long, with the schooner Amos Briggs (about 110

feet long over all) in tow, on a hawser of 25 fathoms, had come down the North river, on the New Jersey side, and, when abreast of Communipaw Ferry, headed across for the East river. The tide was strong flood, and the wind fresh from N. W. The Little Silver is a side-wheel steamer, running from Monmouth Park, N. J., to Little Twelfth street, North river. She was coming up from the lower bay, making about 14 miles an hour, and heading so as to clear pier 11, on the New York side. The Shultz crossed the bows of the Little Silver, but, her engines being reversed, the hawser between herself and her tow was slackened; and the Little Silver, which at no time changed her course, passed across it, between the tug and tow, colliding with the schooner.

That the Shultz was grossly in fault is manifest upon her own evidence and upon that from her tow. They were on crossing courses, and the Shultz had the Little Silver upon her starboard hand at the time when it became necessary for them to navigate according to regulations if they were to avoid risk of collision. This is the testimony of the independent witness from the tug Townsend. There is nothing to contradict it, and it is apparent from their points of departure and respective destinations that such must have been their relative positions. The engineer of the Shultz placed the models to show their positions, "putting the Little Silver a little aft of his beam, and heading for the bow of the Shultz." The master of the Shultz also placed the models indicating that the Little Silver was "nearly seven points on his starboard bow." Counsel for the Shultz contends that the vessels were in the position known as the "seventh situation" of the inspectors' rules. Of course, by the time the Shultz had crossed the bows of the Little Silver sufficiently far to leave the latter heading directly for her and just abeam, the vessels would be in the seventh situation; but the obligation to navigate according to rules arose before that time, and the pilot of the Shultz knew that it had, for it was while they were on crossing courses, with the Little Silver on his starboard hand, that he blew his first signal. He said: "I saw him coming up the bay a good safe distance, and I blew him two whistles."

Counsel further contends that "fault is not chargeable against a vessel for having another on her own starboard hand." That is true enough, but she is in fault if she does not navigate in accordance with the regulations governing the movements of vessels thus placed. Rule 19 of section 4233 of the United States Revised Statutes provides: "If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." That rule has since its first enactment been in full force in harbors, rivers, and inland waters. The acts of March 3, 1885, and August 19, 1890, did not affect its application in such locality; and the act of February 19, 1895, expressly re-enacted it. Rule 23 of the same section (4233), equally applicable, provides that "where, by rule * * * 19, * * * one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications

of rule 24," which provides for special circumstances. It might be supposed that, after all the years which have elapsed since their passage, the application of these two rules would be the very A B C of practical navigation. The burdened vessel is to "keep out of the way." How it shall do so is not prescribed. It may, of course, turn to starboard sufficiently to allow the privileged vessel to pass, and then proceed under the stern of that vessel. This is the path of safety. It may "keep out of the way" by crossing the bows of the privileged vessel, but, in undertaking this maneuver, it is chargeable with the knowledge that the other vessel is by express rule required to keep her course. Unless, then, the burdened vessel has time and space thus to cross in safety without the help of the privileged vessel, prudent navigation would forbid her making such attempt. If she make the attempt, and thereby brings about collision, she is in fault for not keeping out of the way of the privileged vessel. The inspectors' rules give her the opportunity of agreeing with the privileged vessel that this usually risky maneuver shall be attempted, and that the privileged vessel will co-operate to that end. Such agreement would constitute a special circumstance, within the meaning of rule 24. This agreement is effected when the burdened vessel's signal indicating an intention to cross in front of the privileged vessel is accepted by a corresponding signal from the privileged vessel. But the burdened vessel which without such agreement undertakes to navigate as if she had the privilege, and the other the burden, assumes all responsibility for the consequences resulting from such failure to conform to regulations. All this has been explained in the opinions of the courts over and over again. It is sufficient here to refer to the decision of this court in *The John King*, 1 C. C. A. 319, 49 Fed. 469.

It is a fair inference, however, from the testimony in the different collision records that come before this court, that the practice is not uncommon among masters of steam vessels in these waters to navigate in utter disregard of any burden imposed upon them by rule 19. In some cases it seems to be assumed, wholly without authority, that a tug which has a tow is always privileged, no matter what her position. In other cases it has apparently been supposed that the master who first signaled was privileged to prescribe how the other vessel must navigate, sailing rules to the contrary notwithstanding. This curious theory seems to have been based on a misreading of one of the inspectors' rules. It was exploded in *The John King*, *supra*. In other cases it seems to be supposed that some "courtesy" is due to a pilot of long experience, or to the senior of some flotilla belonging to a common owner, by his juniors in service, and that his vessel is always "privileged," no matter where she may be placed relatively to some other vessel. Signaling upon some theory of "courtesy," instead of in conformity to rule, had much to do with the confusion which brought both vessels into trouble in *Le Champagne* and *The Lisbonense*, 3 C. C. A. 546, 53 Fed. 293. In other instances the personal equation of the individual master has to be taken into account. It might be surmised

a priori, and experience proves the truth of the surmise, that there will be found no inconsiderable number of masters who will never shoulder any burden of navigation which the rules lay upon them if they can force the privileged vessel to assume it, or at least to share it with them. These are the men who hold on a course which they know to be expressly forbidden by the rules, until the very last moment, hoping thus to coerce the other and privileged vessel to yield the right of way. The dread of injury to his vessel or to himself, his crew or passengers, will no doubt often induce the master of the privileged vessel to yield,—a timidity no doubt augmented by the many decisions which have held privileged vessels in fault for not doing something themselves to avert catastrophe. If, however, the master of the privileged vessel declines to be bluffed out of his right of way, the lawless navigator will usually at the eleventh hour conform his navigation to rule. If there be still time to save the situation, no harm is done. If the offending master has miscalculated, and held on too long, and collision results, he is usually vociferous in support of the proposition (which is no doubt correct) that if the privileged vessel had only stopped or changed her course, and left him free to go where he chose, no catastrophe would have ensued. This class, if it exist,—and we do not doubt it does,—is a standing peril to navigation. Excuse should be difficult for any master who, with full knowledge that he is the one who, under the rules, should change his course or speed or both, begins his navigation in the presence of approaching risk of collision by insisting that the other vessel shall make such changes.

As was said before, it is indisputable upon the evidence that, when the necessity of navigating to avoid risk of collision arose, the Shultz had the Little Silver on her starboard hand. It must be assumed that the master of the Shultz knew that, under the rules, the Little Silver had the right of way, and that it was the duty of the Shultz to keep out of her way; that, although it was left to his judgment as a navigator to decide what movements to make in order to keep out of the way, the movements, whatever they were, were to be undertaken by him as master of the burdened vessel. From the very outset, however, he acted as if his vessel were privileged, and as if the duty of keeping out of the way were laid upon the Little Silver. He testifies:

"I first saw him [the Little Silver] coming up the bay a good safe distance off, and I blew him two whistles. * * * I couldn't tell how far off he was then, in number of feet, but I know it was a good distance to go clear either way he wanted. * * * I blew two whistles, by which I meant that he would go under the stern of the schooner [my tow]. I got no answer, * * * and gave an alarm signal. When I blew the alarm signal, he was a nice safe distance off to go clear if he wanted to. * * * There were not any boats in the way of the Little Silver that I saw. She had the whole river clear to the westward. * * * At the time I gave my two signals [two-whistle signal], the Little Silver would have had to change her course a very little to clear my tow. Q. Did you have that vessel when you first saw her on your starboard hand, do you think? A. Yes. Q. Whose duty was it to keep out of the way? A. The Little Silver, after I was way by him, I think. Q. And you didn't signal until you went by him? A. I

signaled when I had him well on my starboard. He could go clear of her if he saw her."

The fault of the Shultz is glaring. The decree should be affirmed as to her, with interest, costs, and 10 per cent. damages.

As to the Little Silver the district court held:

"The pilot of the Little Silver did not hear the signals of the Shultz, nor did he notice the schooner in tow of the Shultz, nor slacken his great speed till quite near her. A tow of barges crossed to the westward, between the Little Silver and the Shultz and her tow, a few moments before the collision; and the hawser to the schooner was not perceived until the barge had passed, and the Little Silver was within about 200 feet of the hawser."

The evidence sustains this finding.

The district court further held:

"The Little Silver, though the privileged vessel, is also clearly to blame, because she was so easily manageable, and might without difficulty have avoided the schooner after it was perfectly clear that the Shultz was not going astern of her, and was unable to avoid collision. The evidence shows that the Little Silver could come to a dead stop in advancing about 600 or 700 feet. When at that distance, it was self-evident that the Shultz, with the schooner upon a hawser, could not avoid collision by anything the Shultz could do if the Little Silver kept on. It was the duty, therefore, of the Little Silver, on perceiving that fact, to reverse. Had she done so, the collision would have been avoided. That she did not do this is plainly in consequence of a deficient lookout, in not having perceived the schooner astern of the tug, as she ought to have seen her, long before the west-bound tug intervened. The lack of a proper lookout was thus the real cause of the collision on the Little Silver's part. Each being to blame, both must be held answerable for the libelants' damages, with costs."

The collision was so manifestly brought about by the improper navigation of the Shultz that we would be inclined to excuse the Little Silver for some minor fault if the case could be brought within the rule in *The City of New York*, 147 U. S. 72, 13 Sup. Ct. 211, and *The Ludvig Holberg*, 157 U. S. 60, 15 Sup. Ct. 477. Had the district judge adopted a rule, suggested by him elsewhere, and held the Little Silver to respond to the extent of one-half the damages only if the Shultz was unable to pay the whole, such a division, although novel, would commend itself strongly, as being most equitable. But the finding of fault is clearly sustained by the proof. The period of uncertainty as to what the burdened vessel meant to do which is referred to in *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, *The Northfield*, 154 U. S. 629, 14 Sup. Ct. 1184, and *The Delaware*, 161 U. S. 469, 16 Sup. Ct. 516, had passed. It was plainly manifest to the pilot of the Little Silver that the Shultz had gone so far on her improper course that it was absolutely impossible for her, either by changing course or stopping or reversing, to keep her tow out of the way of the Little Silver. By reversing, however, the latter could avoid collision with the tow. She did not reverse, and the only excuse offered is that she did not know there was a tow; but, if she had had a proper lookout, she would have discovered this fact before the west-bound tow of barges temporarily obscured her view of the Shultz and tow. We feel constrained, therefore, to affirm the decree against the Little Silver, with interest, but without costs. The decree against the Shultz is affirmed, with interest, costs, and 10 per cent. damages.

RUOHS v. JARVIS-CONKLIN MORTGAGE TRUST CO. et al.

(Circuit Court, E. D. Tennessee. January 27, 1898.)

REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—MUST EXIST WHEN SUIT IS BEGUN.

Where a bill is filed in a state court against a trustee in a mortgage, who is a citizen of the same state as complainant, and others who are citizens of other states, to restrain a sale under the mortgage, a subsequent resignation of the trust by the trustee does not render the cause removable by the remaining defendants on the ground of diversity of citizenship.

This was a bill for an injunction, filed in the state court by Ruohs against the Jarvis-Conklin Mortgage Trust Company and others, and brought to this court by removal proceedings. Heard on motion to remand.

Brown & Spurlock, for complainant.

W. G. H. Thomas and W. T. Murray, for defendants.

SEVERENS, District Judge. The complainant in this case filed a bill in the state court of Tennessee, alleging that he was the purchaser of one of these tracts of land, and that he had purchased without notice of any incumbrances upon the property, although, in fact, one of these very mortgages that the court has just been dealing with in another case had been executed by Ruohs' grantor, and had been recorded in the proper books of registration. He claimed, as I gather from the pleadings, that that mortgage was invalid upon some or all of the grounds which have been taken in the other case. Trust Co. v. Willhoit, 84 Fed. 514. He set forth that a party by the name of Duffey, who professed to be acting in the interests of the mortgagees as trustee in the deed of trust, had advertised the property for sale, and was about to sell, and that the consequence would be to create a cloud upon his title. Now, in this case, the mortgagor, the party executing the deed of trust, the mortgagee, or rather the trustees named in the deed of trust, the beneficiaries, and Duffey, who was also assuming to act as trustee, were made defendants. The relation of Duffey to the transaction seems to have been this: The deed of trust made Conklin trustee, but authorized him, upon his own resignation, or becoming incompetent, to appoint another trustee, and, in the case of the disability of that second trustee, he (meaning Conklin, according to the proper construction of the deed of trust) should name another trustee to execute the trust. Conklin had, in fact, substituted in his own place, by appointment under that deed of trust, Mr. Jarvis, and Jarvis in turn, assuming that he, instead of Conklin, under the terms of the deed of trust, was authorized to appoint a substitute, appointed Duffey the substituted trustee. That was, no doubt, a mistake in the assumption in reference to the party who was competent to substitute the trustee; but, nevertheless, that was the course which the parties pursued, and Duffey, attempting to act as trustee, was advertising the property for sale, and the bill made him a defendant. After the bill was filed, and service was obtained, Duffey went into the county court, and there resigned his trust, and the relinquishment was accepted by the court. That having been done, two days later the

other defendants filed a petition in the state court, and procured a removal of the cause into this court, and, on that case coming on for hearing, a motion was made to remand it. I have had a little embarrassment in dealing with that motion, because it seems to have been brought on before the former judge, and it is said that he expressed an opinion against the motion. The grounds on which that opinion was based are not very clearly indicated by the opinion. It seems to have been upon the assumption that at the time of the filing of the petition Duffey had dropped out of the case, or become a formal party merely, and that, as the other defendants were all nonresidents of the state, the case might be removed into the federal court. I think he must have overlooked the consideration that Duffey could not, by resigning his office as trustee, get out of the case, and cease to be a party, as well as the further consideration that, in order to entitle the defendants to remove it, the case must have been such, in respect of the citizenship of the parties, at the commencement of the suit, as that it might have been removed. The defendants could not thereafter convert it into a removable one. Believing, then, that he overlooked these propositions, to which he would undoubtedly have given heed had they occurred to him, I feel at liberty to do what I think must be done; that is, remand the case. This Mr. Duffey, as indicated by the allegations of the bill (and it is to these we must refer), was an indispensable party in obtaining the relief which the complainant sought. Under color of this deed of trust, and with the assent and at the instance of the beneficiaries under the deed of trust, he was attempting to foreclose the mortgage as a valid one. We have to look to the claims as asserted in the bill, and the state of affairs as they appear from the allegations of the bill; and it does not seem to be at all disputable that, with the case thus made out by Mr. Ruohs in his bill, Duffey was an indispensable party. He was doing the very thing that brought on the necessity for the injunction which is prayed for. For these reasons, I will direct an order that the case be remanded to the state court.

JARVIS-CONKLIN MORTGAGE TRUST CO. v. WILLHOIT.

(Circuit Court, E. D. Tennessee. February 27, 1897.)

1. MORTGAGES—DEFENSES—BONA FIDE PURCHASERS.

That the notary who took the acknowledgment of a mortgage was disqualified by reason of interest cannot be set up in defense to the mortgage in the hands of a bona fide purchaser of the notes secured, where there was nothing on the face of the instrument, or known to him collaterally, to give notice of such infirmity.

2. FOREIGN CORPORATIONS—STATE REGULATION—VALIDITY OF CONTRACT.

Laws Tenn. 1891, c. 122, regulating the doing of business by foreign corporations, prohibiting them from doing business in the state until they have complied with the conditions imposed, and providing that a violation of the act shall be punishable by a fine not exceeding \$500, does not render invalid as between the parties a contract made in the state by a corporation of another state which has not complied with the statute.

This is a suit for the foreclosure of a mortgage by the Jarvis-Conklin Mortgage Trust Company against Willhoit.

Brown & Spurlock, for complainant.

W. G. H. Thomas and W. T. Murray, for defendant.

SEVERENS, District Judge. The defenses to the mortgages (several cases having been heard, and the questions being substantially the same in all of them) are threefold. The first is presented upon this situation of the facts: The acknowledgment of the mortgages in question was taken by one who had some agency in the soliciting or procuring of the loans covered by the mortgages. He seems to have been an intermediary between the borrower and the lender, and he, as notary, took the acknowledgment in, I believe, all of these cases. It is contended on the part of those who here resist the mortgages that an acknowledgment so taken is void. It is contended that he was not in such a situation of indifference as that he was competent to take the acknowledgment. These mortgages were given to secure notes which have passed into the hands (in every instance) of bona fide holders for value, and without notice of the infirmity (if it be such) in the mortgage, arising from the fact of a person, who was incompetent to take the acknowledgment, having taken it. Now, my opinion on that branch of the case is, very clearly, that, inasmuch as there was nothing upon the face of the mortgage to indicate to anybody that there was incapacity in the notary to take this acknowledgment, and the note secured by the mortgage having passed into the hands of bona fide holders, this objection to the validity of the instrument cannot be taken for any purpose by those who executed the instrument. To hold otherwise would, in my opinion, establish a facility for the grossest frauds, and, besides, would leave the consequences of there being a possible question of the competency of the officer taking the acknowledgment open to attack, and the validity of the title of vendees and mortgagees be exposed for all time (unless it be barred by the statute of limitations) to collateral attacks. I think it would be a doctrine that would be extremely injurious to the public; that would unsettle titles, and make them insecure, and the subject of distrust; and, without making any holding upon this subject other than that which the present situation requires, namely, that bona fide holders of paper secured by a mortgage fair upon its face, and duly recorded, there being nothing whatever, either upon the face of the instrument, or known collaterally, which should impair the validity of the instrument, must be protected, I hold that this defense cannot be sustained.

With respect to the defense of usury, I have already definitely expressed my opinion. It is contended that the notes secured by the mortgages (while they are drawn and purport to bear interest at the rate of 6 per cent.) in a certain contingency would draw interest at the rate of 12 per cent. This construction is reached by what seems to the court a rather technical interpretation of the provisions of the notes, which, taken together, under the general rule of construction that all parts of an instrument are to be brought into view when construing any part, clearly show that no such intention was present to the minds of the parties to the instrument; and I am clearly of the opinion that the taking of 12 per cent., under any cir-

cumstances or any condition, was not thought of by the parties to the instrument, and, if the court is able to say that on an examination of the instrument, it is able to say that that is the proper construction of it, upon the presumption that the parties intended a valid contract.

Another question, and the most serious one, is the objection raised to these mortgages on the ground that they are transactions between a nonresident corporation (of the state of Missouri in this instance) and local borrowers of money in Tennessee. The nonresident corporation had never complied with the provisions of the act found in chapter 122 of the Acts of Tennessee for 1891, which provides that every nonresident corporation shall first become registered in this state before it shall be authorized to do business; and the act then affirmatively provides, in the next section, that the corporation shall not do business in the state until these conditions have been complied with. I state the gist of the matter, without professing to state the exact terms of the statute. The statute then goes on to prescribe that any one violating the provisions of that act shall be punished by a fine of not less than \$100 nor more than \$500. It is contended by counsel for the defendants that these provisions, if they do not contain an express prohibition of such a transaction as this, nevertheless do, by clear and necessary implication, declare that such a transaction may not lawfully take place, and that the instrument is rendered invalid by the effect of such express or implied prohibition. This general rule, which is thus contended for, is undoubtedly an accepted doctrine, namely, that where a statute expressly or by necessary implication prohibits an act to be done or a contract to be made, the thing done, the contract made, or professed to be made, is invalid, is null. But there are exceptions to that doctrine, and they have been enforced in the supreme court of the United States in a number of cases, and it is clear that not all such cases as might otherwise come within the comprehension of the general rule are within its operation and effect. The case which was referred to—*Harris v. Runnels*, 12 How. 79—arose in an action which involved a suit for the recovery of the purchase price of slaves which had been introduced into the state of Mississippi, and there sold, in the face of an express statute forbidding any such transactions, and imposing a penalty upon those who should engage in them. It was held, nevertheless, by the supreme court, upon an examination of that statute, and with particular reference to one feature of the statute which exists here, and has also existed in several cases which have been decided by the supreme court of the United States since, namely, that the act limited the penalty which could be enforced upon its violation. That was the case in the Mississippi act which prohibited the introduction and sale of slaves. That is the condition of the act that is appealed to in the present case. The penalty is limited to the sum of \$500,—the utmost. Now, it was said in that case—the case of *Harris v. Runnels*—that that was a matter to be taken into consideration in determining the intended effect by the legislature of the act; that is to say, whether it was intended to forbid the act, and punish its violation by a fine, and that simply, or whether it was intended to go

further than that, and utterly invalidate the contract. It was pointed out there—it may be pointed out here—that these mortgages (for instance, the one in the Ruohs Case, 84 Fed. 513) are 20 times the amount of the utmost fine that could be imposed under this Tennessee statute. The result of holding the instrument invalid would be thus not only to leave the parties subject to prosecution for the collection of the fine, but it also involves the imposition of a penalty of 20 times that prescribed by the statute, and that by a court of equity, one of whose maxims is to avoid such things—to avoid forfeitures. In the case of *Harris v. Runnels*—a leading case upon this subject—it was held that the party was entitled to recover the price for which the slaves were sold, and that the statute went no further than to provide for the punishment of any one who violated its provisions. That case has been followed in several instances by the supreme court, one of which is the case of *Fritts v. Palmer*, reported in 132 U. S. 282, 10 Sup. Ct. 93. There are other cases which have involved the same question,—one in 153 U. S. 318, 14 Sup. Ct. 852 (*McBroom v. Investment Co.*). In the case of *Railroad Co. v. Evans*, 14 C. C. A. 116, 66 Fed. 809, which went up from this locality, Judge Lurton delivered the opinion, which is in line with these decisions of the supreme court to which I have referred, and the pivot—the main pivot—on which that case turned was the decision of the court upon this very question. The court referred to the case of *Fritts v. Palmer* at great length. In the case of *Fritts v. Palmer*, the question arose under the constitution of Colorado. The statutes of that state forbade foreign corporations from doing business in the state until they had complied with certain conditions precedent. Nevertheless, a foreign corporation did become the grantee of a tract of land within the state. The vendor afterwards transferred, by quitclaim deed to another party, such title as he had, and the question arose between the persons claiming under the quitclaim deed and the corporation, which had been the first grantee, the corporation not having taken any step whatever towards complying with the conditions by which it was allowed to do business in the state. The supreme court held that clearly, as between the parties to the conveyance, the instrument was valid, and conveyed the title; that the state alone was competent to make any complaint of the infringement by the corporation of that statute; that it was a question in which the state at large was interested; that the statute had been passed at the instance or for the benefit of no particular individual or individuals, but was passed in the interest of the state, and, that being so, the state was the only competent party to prevent the corporation from transacting business, in violation of that statute, in the state. There are other cases which illustrate this doctrine, reported in the decisions of the supreme court. For instance, there is a class of cases that has grown up from the taking by national banks of real-estate securities, and then becoming the purchasers of the land, or of taking out and out deeds in payment in satisfaction of their debts, in direct contravention of the acts of congress providing for the creation of national banks, that the banks should be incompetent to do that, that it should be unlawful. It was in express terms forbidden, yet, some

of the national banks having done so, it was held that it did not invalidate the transaction as between the parties, although the United States might be in a position to object to such transactions, and to take such a course as it deemed proper in vindication of the statute. There are quite a number of these cases, taken altogether, which bear directly upon this subject. Now, if there were any express decision of the supreme court of Tennessee bearing upon such a question as I have before me, I should feel concluded by that decision in the interpretation of the act. Certainly I should if that interpretation had been put upon it before the creation of these obligations. How it would be if a subsequent interpretation had been put upon it which seemed to be practically an impairment of the obligation of the contract, it is not necessary to determine. I have no occasion to deal with that at present. But there is no express decision of the supreme court which is in conflict with the views which have been taken by the supreme court of the United States and by the circuit court of appeals for this circuit on this question, and I have no doubt but that this court ought to regard itself as bound to hold that this statute does not, in its application to the present case, invalidate the mortgage or mortgages; that, as between the parties, the transaction was effectual. For these reasons, I shall overrule the several objections which have been taken to the validity of this mortgage, and pronounce a decree in favor of the complainants.

BATES v. INTERNATIONAL CO. OF MEXICO.

(Circuit Court, S. D. California. January 11, 1898.)

No. 139.

1. RECEIVERS —POWER TO APPOINT—PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

Under Code Civ. Proc. Cal. §§ 714, 720, providing for proceedings supplementary to execution, in the nature of a creditors' bill, and section 564, authorizing a receiver, after judgment, to carry the judgment into effect, a court may appoint a receiver for a judgment defendant in such supplementary proceedings.

2. EXECUTION—SUPPLEMENTARY PROCEEDINGS—SERVICE OF ORDER.

Code Civ. Proc. Cal. §§ 1015, 1016, provide for service of papers on the attorney of record of a party, but that such provisions shall not apply to service of process, or of any paper to bring a party into contempt. *Held*, that where a corporation against which judgment had been rendered in a contested case withdrew from the state, and transferred all its property therein, and it appeared that it was conspiring with the transferee to defeat collection of the judgment, service of an order requiring it to appear in proceedings supplementary to execution, made on its attorney of record in the case, would be sustained as legal and effective.

3. SAME—FOREIGN CORPORATIONS.

The provision of Code Civ. Proc. Cal. § 714, that no judgment debtor must be required to attend before a judge or referee out of the county in which he resides, has no application where the defendant is a foreign corporation.

This was an action in which Frank E. Bates recovered a judgment against the International Company of Mexico. The present hearing

was in proceedings supplementary to execution, in which, on petition of Clarence L. Barber, assignee of the judgment, the court appointed a receiver for the defendant corporation. Defendant moves to vacate such order.

C. L. Barber and White & Monroe, for complainant.
Wm. J. Hunsaker, for defendant.

ROSS, Circuit Judge. The International Company of Mexico is a private corporation organized under and pursuant to the laws of the state of Connecticut, and having its principal office in the city of Hartford, of that state. It acquired large property interests, principally in Lower California, Mexico. Subsequently the Mexican Land & Colonization Company, Limited, was incorporated under the laws of Great Britain, having its principal office in the city of London. On the 4th day of May, 1889, an agreement in writing was entered into between the International Company of Mexico (therein and hereinafter called the American Company) and the Mexican Land & Colonization Company, Limited (therein and hereinafter called the English Company), by which, among other things, the American Company should transfer and sell, and the English Company should accept a transfer of and purchase: First, all and singular, the concessions belonging to the American Company, or claimed by it, or by any person or corporation in trust for it; second, all the lands, estates, properties, chattels, choses in action, and effects, in the widest sense, owned or held by the American Company, or by any person or persons in trust for it, and, in so far as transferable, all the rights, privileges, and franchises of the American Company; third, the benefit of all contracts or engagements to which the American Company is on the day of the date of the agreement entitled, including all moneys, debts, and trust interests owing or belonging to the American Company on any account, or by any means whatsoever, or to which any persons or corporations are, as trustees for it, entitled; fourth, all the stock, shares, obligations, and rights of any kind held by the American Company of, in, and against any of the companies and undertakings whose names are set out in the second schedule annexed to the agreement, with any stocks, shares, bonds, debentures, and obligations, and rights of any kind, in and against any other companies, which the American Company is entitled to, or any person or corporation may be entitled to in trust for it; fifth, all the debentures of the American Company, created but unissued; sixth, the good will of the business carried on by the American Company, and all other, if any, its property and undertakings, of any kind or description whatsoever or wheresoever, either held by itself, or by any person or corporation in trust for it,—subject, however, to a certain mortgage lien or charge, not important to mention. The consideration for such transfer and sale the agreement declared to be the undertaking by the English Company of all the responsibility and liability of the American Company to pay the said debentures and the interest thereon, and the undertaking by the English Company of all the obligations, debts, engagements, and liabilities properly incurred by, or existing against,

the American Company, and the allotment to the several persons who at the date of the agreement constituted the stockholders in the American Company, or to nominees of such persons, respectively, of shares of the English Company, at the rate of one share of the English Company, of the nominal value of £10, for each share held by such persons, respectively, in the American Company, of the nominal value of \$100; such shares of the English company being issued to the said several persons, respectively, as fully paid up, and being the shares numbered from 1 to 200,000, both inclusive: provided, that, before the English Company shall be required to allot any such person any shares, such person shall deliver or transfer to the English Company, or its nominees, his shares in the American Company, with a good title, free from incumbrance,—and with certain other provisions not necessary to be stated. Another clause of the agreement between the two companies was that the American Company should forthwith take the necessary steps for the winding up of its affairs and the dissolution of the company, and proceed therein as quickly as possible, acting in all such proceedings with the approval of the English Company, and that from and after the execution of the agreement the American Company should not, except under the direction of the English Company, directly or indirectly, carry on its business or undertakings, or incur any further liabilities in connection therewith, and should appoint, and by the agreement did appoint, Sir Edward George Jenkinson, K. C. B., its general manager, with full power to carry on its business and manage its affairs, including power to appoint submanagers, servants, and workmen, subject to the stipulations contained in the agreement, and to superintend the arrangements for the dissolution and winding up of the American Company. Another provision of the agreement declared that from its date all business carried on should be considered as carried on for account of the English Company, which latter company should pay the expense of the conveyance of the property to it. The ninth clause of the agreement is in these words:

"The American Company will forthwith, on the execution hereof, and at latest within one month (time being of the essence of the contract), hand over to the English Company, or its agents, its common seal, and all charters, concessions, books, accounts, correspondence, papers, documents, and vouchers, of every kind or description, connected with, or relating to, the American Company."

And the eleventh clause declares that the American Company, and all persons claiming through it, will forthwith and from time to time, until dissolution, execute and do, and concur in, all instruments and things necessary "for vesting the whole of the said property in the English Company, or its nominees."

Among the obligations of the American Company thus assumed by the English Company were some held by one Frank E. Bates, for the alleged breach of which Bates commenced suit against the International Company of Mexico in the superior court of San Diego county, Cal., which action was, on the motion of the defendant thereto, transferred to this court, on the ground of diverse citizenship of the parties. Service of process in that action was had upon the legal representa-

tive of the defendant in the city and county of San Diego, where it at the time had an office and an agent. The defendant to the suit appeared by counsel, and, after a trial upon the merits before a jury, a verdict was rendered in favor of the plaintiff in the action, and against the defendant thereto, for the sum of \$120,600 damages, upon which verdict judgment was entered in favor of the plaintiff and against the defendant for that sum, together with \$682 costs, amounting in the aggregate to \$121,282, lawful money of the United States, with interest thereon at the rate of 7 per cent. per annum until paid. No writ of error was taken, and the judgment became final and conclusive. Upon it a writ of execution was on December 12, 1892, duly issued to the United States marshal for the Southern district of California, which execution was duly returned by the marshal wholly unsatisfied on the 31st day of December, 1892. On the 23d day of January, 1896, Clarence L. Barber presented to this court a verified petition, setting out, among other things, the facts already stated, and further alleging the assignment to him, for value, of the judgment entered in the case of Bates against the International Company of Mexico, and his ownership thereof, and, further, that that action was defended by both the American and the English Companies, although the latter was not formally made a defendant thereto; that no appeal from that judgment or writ of error has been taken, and the judgment has become final; that no payment has been made on the judgment, and that the American Company has no property or assets of any kind, except the promise to pay its obligations and liabilities made by the English Company in the agreement already mentioned; that all of the stipulations of that agreement have been fully performed, except the payment of the petitioner's demand, and the failure to dissolve the American Company; that most, if not all, of the property constituting the subject-matter of the agreement between the two companies, is situated in the republic of Mexico and in Great Britain, and has been wholly appropriated by the English Company, and largely transferred by it to other parties; that the petitioner has demanded payment of the judgment so assigned to and owned by him, from both companies, which demand both of them have refused to comply with, and that the petitioner has demanded of the American Company that it enforce that provision of the agreement of the English Company to pay the amount of the said judgment, and offered to indemnify the American Company against all costs and expenses incurred in that behalf, but that the American Company refused to comply with that demand; that the two companies, according to the information and belief of the petitioner, are fraudulently colluding with each other to defeat the petitioner's judgment, and to deprive him of all remedy thereon; that the American Company has no office or secretary in the state of Connecticut, and has withdrawn from the transaction of business in that state; that it has not been wound up, nor have any proceedings been taken for winding it up; that, on account of its practical withdrawal from that state, it is difficult to get adequate process upon it; and that the English Company interposes all obstacles lying in its power to prevent affiant from recovering upon the said judgment. The petitioner therefore asked, among other

things, for an order to be made and served on the American Company, requiring it to appear and answer concerning its property before the judge of this court at a time and place to be specified; that the petitioner be authorized to bring suit in the name of the American Company, or otherwise, to recover upon the said judgment, or that a receiver be appointed to enforce the agreement between the English and American Companies for the benefit of the petitioner and all other creditors, if any, of the American Company; that the American Company be required to assign the said agreement to such receiver, and all causes of action it may have against the English Company; that such receiver be directed to sue the English Company in behalf of the creditors of the American Company, or for such other order or relief as may be conformable to sections 714-720 and 564 of the Code of Civil Procedure of the state of California. Upon that verified petition, and the records of the court in the action of Bates against the International Company of Mexico, this court on the 2d day of March, 1896, made and entered an order to the effect that the International Company of Mexico appear and answer concerning its property before the judge of the court on the 16th day of March, 1896, at 10:30 o'clock in the forenoon of that day, at the court room of the court, and that a copy of the order be served upon the attorneys of record for the defendant in the action on or before March 5, 1896. At the time thus appointed, and upon proof of the service of the order upon the attorneys of record of the defendant to the action, and upon proof of the facts already stated (no appearance being made by or for the defendant to the action), an order was entered authorizing and empowering the said judgment creditor, Clarence L. Barber, to institute any and all necessary and proper action or actions against the said Mexican Land & Colonization Company, Limited, in any and all proper courts, in his own name, or in the name of the said American Company to his use, for the enforcement of the said agreement of May 4, 1889, and the recovery of said judgment, and the moneys due and to become due thereon, and also appointing the said Clarence L. Barber receiver of the defendant, the International Company of Mexico, with power and authority to bring any and all suits, and to take any and all proceedings, necessary and proper for the collection of the said judgment.

Application is now made, on behalf of the International Company of Mexico, for an order vacating and setting aside the order of March 16, 1896, upon the following grounds: (1) That the court had no jurisdiction to make the order appointing the said Barber receiver; (2) that the order made March 2, 1896, directing a copy thereof to be served upon the attorneys of record for the defendant in the action, was made without authority of law, and is void; (3) that no service of that order was made on the defendant to the action; (4) that it appears from the papers in the case, and upon which the order was based, that the defendant to the action did not have any property within this judicial district; (5) that it appears therefrom that the defendant to the action was a nonresident of the state of California and of this judicial district, and that it was not doing business therein, and that the defendant did not have a business or managing agent within this state, or within this judicial district; (6) that each

of the orders of this court mentioned were obtained by false and fraudulent statements and representations made by the said Barber. The present motion is based upon the records and files in the case, and upon the affidavit of Edward D. Robbins, and the deposition of George Fuller. The affidavit of Mr. Robbins shows that he is a director, vice president, and acting president of the American Company, and resides in the county of Hartford, state of Connecticut; that three other directors of the American Company also reside in the county of Hartford, state of Connecticut; that the American Company has not been dissolved, and is an existing corporation, against which the said Barber has pending in one of the superior courts of the state of Connecticut a suit, commenced by him August 2, 1895, by which he seeks to recover the amount of the Bates judgment.

I do not think that the pendency of the suit last referred to has any bearing upon the question now presented. The facts heretofore shown to this court, and which form the basis of its order of March 16, 1896, remain uncontroverted. It is not disputed that the American Company turned over all of its property of every character to the English Company under the agreement of May 4, 1889, and that one of the considerations for such transfer was the assumption by the latter of all of the obligations and liabilities of the former, and the promise of the English Company to pay them. It is not disputed that among the liabilities thus assumed by the English Company were the claims which form the basis of the action in this court of Bates against the International Company of Mexico. It is not disputed that both of the companies contested that action, and that the judgment given therein subsequently became final and conclusive, and was assigned to Barber by Bates. It is not disputed that both companies refused to pay the judgment. It is not disputed that the American Company refuses to take any steps to compel the English Company to perform its agreement to pay the liability of the American Company established by the judgment in Bates against the International Company of Mexico, after a contest upon the merits by both companies, and notwithstanding an offer by the judgment creditor to indemnify it against all costs in that behalf incurred. Nor is it disputed that the English Company controls the American Company, as in and by the agreement of May 4, 1889, it was provided should be done. The charge of the judgment creditor that the two companies are combining and colluding to avoid the judgment in his favor, and to defeat its payment, seems, therefore, well founded. Are the courts powerless to prevent such a scheme from being effective? Perhaps so. But certainly the court giving the judgment should go to the extreme limit of its authority to compel obedience to its provisions. It is provided by sections 714 and 720 of the Code of Civil Procedure of California as follows:

"Sec. 714. When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he do not reside in this state, to the sheriff of the county where the judgment roll is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the court, requiring such judgment debtor to appear and answer concerning his property before such judge, or a referee

appointed by him, at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides."

"Sec. 720. If it appears that a person or corporation alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just."

By section 564 of the same Code it is provided that a receiver may be appointed "after judgment, to carry the judgment into effect."

The supreme court of California held in the cases of *Adams v. Hackett*, 7 Cal. 201, and *Bank v. Robinson*, 57 Cal. 520, that these proceedings were intended as a substitute for the creditors' bill in equity; and in the case of *Hathaway v. Brady*, 26 Cal. 586, the same court held that in such supplementary proceedings a receiver may be appointed. In *Manufacturing Co. v. Shatto*, 34 Fed. 380, Judge Nelson appointed a receiver on similar proceedings.

It is insisted, however, on the part of the judgment debtor, that the service of the order to answer concerning its property provided for by section 714 of the California Code of Civil Procedure, on the attorney of record for the defendant in the action in which the judgment was given, was no service at all, for the reason, as is contended, that the attorney's right of representation ceased with the entry of the judgment. It is further insisted that the order was of such a character that, to be effective, it must have been served on the judgment debtor personally. As the case shows that the judgment debtor had, prior to the issuance of the supplementary proceedings, entirely withdrawn from the state, and had put all of its property into the hands of another corporation, this is tantamount to saying that it could entirely evade the proceedings provided for by the statutes of the state supplementary to execution, where such execution is returned unsatisfied in whole or in part. Section 1015 of the Code of Civil Procedure of California provides that:

"When a plaintiff or a defendant, who has appeared, resides out of the state and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, of writs and other process issued in the suit, and of papers to bring him into contempt."

And the next section (1016) is as follows:

"The foregoing provisions of this chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt."

Conceding that the order on the judgment debtor under consideration was of such a nature that ordinarily its service is required to be upon an officer of the corporation, still, under the circumstances disclosed by the record in this case, I am of the opinion that it was sufficient to serve it upon the judgment debtor's attorney of record. In *Golden Gate Hydraulic Min. Co. v. Superior Court*, 65 Cal. 187, 3 Pac.

628, where, among other things, it was insisted that it was essential to the validity of the service of an order to show cause upon a corporation why it should not be adjudged guilty of a contempt of court, that such service must, under the provisions of sections 1015 and 1016, supra, be made upon "the president or other head of the corporation, secretary, cashier, or managing agent thereof," the supreme court of the state said:

"It may be conceded, in the view we take, that the order to show cause is 'a paper to bring a party into contempt,' within the meaning of sections 1015 and 1016, and that ordinarily the service of such paper, like that of summonses, must be upon 'the president or other head of the corporation, secretary, cashier, or managing agent thereof.' But in the case at bar it was made to appear to the court, by satisfactory evidence, that diligent efforts had been made to serve an officer or managing agent, that the officers of the corporation had attempted to resign their offices, and that they had concealed themselves to avoid service of the order, whereupon the court ordered that service be made upon one or more of the attorneys of defendant. The question to be considered is: When a party charged with contempt in disobeying a legal order willfully conceals himself, to avoid service of an order to show cause why he should not be adjudged guilty of a contempt, is the court powerless to proceed, or to prevent the continued disregard of its lawful order? It is obvious that the provisions of the Code referred to do not contemplate such concealment. Certainly, it is not to be tolerated that a party may defy the court, and continue to violate a restraining order until personal service can be had of 'the paper to bring him into contempt.' Every court has inherent jurisdiction to punish a contempt, and the 1209th section of the Code of Civil Procedure, in its enumeration of the acts which are contempts, includes 'disobedience of any lawful order,' etc. And section 187 of the same Code, which is but declaratory of the common law, reads: 'When jurisdiction is, by the constitution or this Code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code.' The defendant in the action had intrusted its attorneys with the protection of its interests and the defense of its rights. We can see no abuse of authority on the part of the court in directing that the order to show cause should be served on an attorney, since it was made to appear that the defendant, by reason of its own acts, could not be served personally. The process was 'suitable,' and the mode adopted by the court 'conformable to the spirit of the Code.'"

The reasoning of the court in the case cited (which I think sound, and which was approved by the same court in the subsequent case of *Eureka Lake & Yuba Canal Co. v. Superior Court*, 66 Cal. 311, 5 Pac. 490) is equally applicable to the facts here.

Counsel for the moving party is, I think, mistaken in saying, as he does, that the attorney of record for the International Company of Mexico ceased to represent that corporation in the action immediately upon the entry of the judgment against it. The deposition of Mr. Fuller was taken upon this motion. In it he testifies that, subsequent to the entry of that judgment, he obtained, on the part of the judgment debtor, several extensions of time in which to prepare a bill of exceptions, and advised the defendant of the time within which the bill of exceptions must be prepared, and that such extensions of time were procured in pursuance of an understanding with the defendant company that it should have the opportunity to appeal, in the event it wished to do so. It further appears from the deposition of Mr. Fuller that prior to the month of March, 1892, he was under a regular

retainer from the International Company of Mexico, but that in that month it was arranged between himself and Sir Edward Jenkinson, who was then president of the International Company, and chairman of the board of directors of the Mexican Land & Colonization Company, Limited, that after the 1st day of April, 1892, Mr. Fuller should not be paid a regular, stipulated salary for attending to the law business of those companies in California, but should be paid for each item of service as it arose, and that for the Bates case he should have a certain sum, to include all services up to the rendition of the verdict and judgment in that case, whenever those events should occur, but that that sum should not include his services on appeal to the circuit court of appeals, beginning with the preparation of the bill of exceptions. It further appears from the deposition of Mr. Fuller that it was understood between himself and Sir Edward Jenkinson that, in the event the Bates case should be taken to the appellate court, he (Fuller) should represent the International Company of Mexico, and that he should attend to all other law business of both companies in the state of California, indefinitely. The concluding clause of section 714, *supra*, that "no judgment debtor must be required to attend before a judge or referee out of the county in which he resides," does not, I think, apply to a foreign corporation. Under the circumstances appearing in the case, I think the service of the order in question upon Mr. Fuller should be held sufficient; and the present motion to vacate the order of March 16, 1896, is denied.

HAWKINS et al. v. BRITISH & A. MORTG. CO. OF LONDON, Limited.

(Circuit Court of Appeals, Fifth Circuit. January 25, 1898.)

No. 610.

MORTGAGES—RESCISSION FOR FRAUD—EVIDENCE CONSIDERED.

A foreign mortgage company, through correspondents acting in its behalf, made a loan on a farm, and two years later accepted a deed for the land in satisfaction of the debt. When the loan was made the land was examined for the company by its local correspondent, and also a general examiner, both of whom were familiar with the value of lands in the vicinity. When the conveyance was taken an examination was made by another general representative. *Held*, that under such facts the company could not maintain a suit against the mortgagor and a former mortgagee, who received the proceeds of the loan, for a rescission, on the ground of a conspiracy between them to defraud it by means of overvaluation.

Appeal from the Circuit Court of the United States for the Middle District of Alabama.

This was a suit by the British & American Mortgage Company of London, Limited, against Thomas W. Hawkins and Peter A. Buyck. There was a decree for complainant, from which the defendants appeal.

H. C. Tompkins, for appellants.

W. A. Gunter, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. The appellee, the British & American Mortgage Company of London, Limited, was for several years before the 18th day of February, 1891, engaged in loaning money on farm lands in Alabama and the neighboring states. It appears to have had some responsible controlling agency located in the city of New Orleans, though the embodiment of its authority there is somewhat shadowy. A firm of brokers, Shattuck & Hoffman, had much to do with its transactions. Their exact relation to the appellee, in 1891, is a subject of dispute, but applications to the company for loans appear to have had to pass through this firm of brokers. They had correspondents in different localities in the states where loans were to be effected, selected by them, and through whom, also, applications in their immediate locality had to come to the brokers in New Orleans for presentation to the shadow of the company in New Orleans. A Mr. English had some kind of a roving commission, giving high rank in the confidence of the company, to look after the investments of the appellee in several states, including Alabama. He appears to have lived in Columbia, S. C. Upon his getting disabled to attend to the business, he, in response to a letter from Shattuck & Hoffman, opened negotiations with one Dr. E. S. E. Bryan to take his (English's) place, and, on his (English's) recommendation, Dr. Bryan received the appointment, and entered upon the work. Some time before 1891, Shattuck & Hoffman selected J. H. Judkins to be their correspondent for Elmore county, Ala. He was their recognized correspondent, and advertised in the papers, they paying one-half of the advertising, and he the other, the advertisements being in these words: "Loans negotiated on improved farms. Apply to J. H. Judkins, Attorney." He was furnished printed blanks, upon which applications for loans were to be made, and which embraced very many questions, or, as he as a witness says, "A very great many," and he adds that "nobody could answer those questions at first, otherwise than by previous examination and study of these blanks, without destroying a great many blanks." On February 12, 1891, J. H. Judkins wrote from Wetumpka, Ala., to Shattuck & Hoffman, New Orleans: "Herewith I send application of Thomas W. Hawkins for \$13,500, together with abstract of his title." On the next day Shattuck & Hoffman replied: "From representations we have from you and from the inspector, we have induced the lenders to make an exception in this case to their usual rule, and to follow your suggestion to lend Mr. Hawkins \$12,000, with \$2,000 insurance on the residence, for five years, to be taken out, if possible, in the London & Liverpool & Globe." In a letter, date not given, Judkins wrote: "Inclosed find Hawkins' contract for fees, left out by mistake." On February 16, 1891, Shattuck & Hoffman wrote to Judkins: "We have the abstract, but no statement from you as to whether he accepts \$12,000 or not. Please advise us." On the same day, February 16th, Judkins wrote Shattuck & Hoffman: "Mr. Hawkins accepts your offer to negotiate \$12,000, and will take policy with the Liverpool & London & Globe for \$2,000, for five years, as you require. Contract for fees was forwarded by the next mail after the application was forwarded, having been left

out by oversight. I suppose you have it. You may submit the title." The agreement about fees appears to have been in the words of a printed form furnished by Shattuck & Hoffman, or by the appellee, through Shattuck & Hoffman. The deed of mortgage from Thomas W. Hawkins and his wife, Evaline A. Hawkins, to the British & American Mortgage Company of London, Limited, and five several promissory notes, aggregating the amount of \$12,000, all bearing date 18th of February, 1891, were forwarded to Judkins, and duly executed by the borrower. Four of these notes were for \$1,200 each, due, respectively, the 1st of November, 1891, 1892, 1893, and 1894. The commissions of Shattuck & Hoffman were deducted from the amount, and a check for the balance, payable to the order of J. H. Judkins, was sent to him, who was charged to see that all prior liens, whether mortgage or for purchase money, on the property, were paid off and canceled; and upon this being done he was to take out his commissions, and pay the balance, if any, to the borrower. The property was subject to a prior mortgage, at that time held by the appellant Peter A. Buyck. All of the property offered as security had also been owned by said appellant, and conveyed by him at different times to the other appellant, Thomas W. Hawkins, and was subject to a lien for unpaid purchase money in favor of the appellant Buyck. The amount of this lien for unpaid purchase money is not definitely given, but it appears that, for the amount of money which came to Hawkins from his negotiation with the appellee, Buyck canceled the mortgage, and released the land from the lien for purchase money; thus clearing the title of all incumbrances prior to that of appellee's mortgage. Buyck was at that time, and still is, engaged in the banking business in Wetumpka, Ala., where the personal negotiations were conducted, and the check that was sent to Judkins was indorsed and delivered to Buyck.

In the fall of 1891, Hawkins paid the interest which had accrued on the loan, and \$600 on the principal of the \$1,200 note then matured. On the 1st of November, 1892, Hawkins was not able to meet the payment of interest and the principal then maturing, of which inability he duly notified Shattuck & Hoffman; suggesting, however, that he had expectation of receiving money from Texas to enable him to pay the interest, and offering to place in the hands of Judkins a quitclaim deed to the premises on which the loan had been negotiated, to be held by him in escrow until his expectations from Texas were realized or disappointed; which suggestion was acceded to and acted on, and in a few months Hawkins did get money from Texas, and made payment of the interest, and was suffered to make a trial for another year on the farm. In the fall of 1893 it was apparent that Hawkins could not meet his payments, and he again offered to make surrender of the property in satisfaction of the debt, which was accepted by the company, deed duly passed, possession surrendered, and the company took charge of the property. The appellee rented to Hawkins the small farm and residence. The large farm it rented to other parties for the year 1894. On March 5, 1895, the bill in this case was filed. It charges the appellants with a conspiracy to defraud the appellee by combin-

ing to procure upon the property described in the bill a larger amount of loan than the value of the property would support, negotiating in the name of Hawkins, who was insolvent, and intending to abandon the property to the lender. It tenders a reconveyance, and prays that the contract of loan, and the mortgage to secure the same, and the acceptance of the deed from Hawkins to the lands in satisfaction of the same, may be rescinded, vacated, and annulled, and that the defendants, and particularly Peter A. Buyck, who is alone solvent, may be charged in personam with the amount of the loan and interest thereon, and be required to pay the same to orator, and that the land be restored to the defendants (appellants) upon the discharge of orator's debt and interest. When the suit reached a hearing, the circuit court passed a decree substantially granting the complainant all the relief it sought. The suit is here on appeal from this decree.

The appellants' assignment of errors embraces 16 specifications, the first 8 of which relate to the rulings of the circuit court on the introduction of testimony; the others, to the different features of the decree in favor of the appellee. The view that we take of the case makes it unnecessary to notice the first 8 of these specifications of error, and authorizes us to treat the remaining 8 as a general assignment that the court erred in sustaining the appellee's case. We think the circuit court did err in passing its decree in favor of the complainant. A most careful examination of all the proof does not discover any fact that existed at the time, and prior to the making of this loan, that was not then known, or certainly should have been known, to the "correspondent" (if that word is preferred, rather than "agent") through whom the appellee negotiated the same. It is not shown that the history of the title, as given in the application for the loan and in the accompanying abstract of title, is erroneous in any particular. The only claim that the proof can be said to make that any misrepresentation was indulged is that the estimate of value put upon the property by the applicant for the loan was grossly excessive. It distinctly appears upon the face of the printed form which the brokers and the correspondents were required to use in soliciting or receiving applications for loans that the company did not rely solely, or even chiefly, on the representations made or to be made by the borrower. On that application was a caution that an overvaluation would cause the loan to be refused on that ground. It is clear that these "correspondents" (we adhere to that word, as the appellee does not like the word "agent") had constantly associated with them in this and like transactions an inspector and appraiser, a Mr. Boothe, a man of experience and of reputation, against whom no charge is made, who carefully examined this property, and made report of his estimate of its value. Along with him went the lawyer, J. H. Judkins, the local correspondent, who is also a farmer, and acquainted with the value of farm property, and both these chosen men thoroughly inspected the premises before the application for the loan was accepted and the money passed. It clearly appears that in the year 1890, the year just preceding the negotiation of this loan, a full cotton crop had been made on the place.

Cotton then bore a good price, and the property was in fine condition. In 1891 and 1892 that section of the country suffered from drouth, and the cotton crop in that locality failed to a large extent. An unprecedented fall in the price of cotton, and other causes, have greatly affected the value of farm property in that as well as in other sections of the country. At the time Hawkins surrendered the property in satisfaction of the debt, it was reasonably worth, to one who wanted such property, the amount remaining unpaid on the mortgage. Hawkins had dealt with the property, and with the appellee's correspondents Shattuck & Hoffman, in a way to meet their approval and commendation of his frankness and fair dealing. The property was not hid away in a remote corner of the country, but was within three or four miles of Montgomery, the capital of the state, where the inspector, Boothe, lived, and only a few miles from the office of the appellee's correspondent J. H. Judkins. There was no difficulty in the appellee's ascertaining all that anybody could know as to the value of the property at the time it accepted the same in satisfaction of the debt. At that very time the appellee's man Dr. Bryan took charge of the property, inspected it thoroughly, reported on its condition and value fully; and Shattuck & Hoffman, under date of January 3, 1894, wrote to Bryan, saying: "We note what you write about the place, and are glad to hear that the company will not have to make a loss on it." No action upon the part of either of the appellants at the time of these transactions, or prior thereto, pertinent to the same, which was not fully known to the appellee, or to its chosen and recognized correspondents, or would not have been discovered by the most reasonable inquiries, has been shown by the proof in this case. The appellee received the title and possession of the property, and retained it, and experimented with it, more than a year before the bill in this case was filed. It is true that, from the very nature of the case, charges of conspiracy and fraud cannot often be established by direct proof; but it is equally true that such charges should never be sustained without, at least, proof of facts and circumstances sufficient to satisfy the common understanding that the parties charged have wronged the complainant. We refrain from discussing the testimony in detail, because it so abundantly satisfies us that it does not sustain the appellee's suit that we prefer not to burden our opinion with a more particular discussion of it. The decree of the circuit court is reversed, and the suit is remanded to that court, with directions to set the decree aside, and pass a decree dismissing complainant's bill at the complainant's cost, the appellants to recover all costs of this court, except the cost of printing the transcript.

YARDLEY v. SIBBS et al.

(Circuit Court, E. D. Pennsylvania. December 11, 1897.)

No. 23.

1. FRAUDULENT CONVEYANCES—RIGHTS OF CREDITORS.

A conveyance to a third party upon a secret trust for the benefit of the grantor and his nominees, for the purpose of hindering, delaying, or defrauding his creditors, is void as against such creditors; and judgments obtained by them subsequent to such conveyance are liens upon such of the premises so conveyed as have not, prior to such judgments, been conveyed to innocent purchasers for value.

2. SAME—INNOCENT TRUSTEE.

In such a case, where the declared objects of the trust are legitimate, and the purpose of the grantor to hinder, delay, or defraud his creditors is not disclosed nor known to the trustee, the latter cannot be made to account to the creditors for the proceeds of sales made by him in accordance with the terms of the trust, and for which he has accounted to his cestui que trust prior to notice to him of his grantor's fraudulent purpose.

This was a proceeding in equity, brought by Robert M. Yardley, as receiver of the Spring Garden National Bank, against Samuel S. Sibbs, R. E. Shulenberger, executor of the estate of Samuel Boyce, deceased, Anna M. Jackson, and Albert F. Boyce.

From the pleadings and proofs the facts appear to be as follows:

The Spring Garden National Bank, a corporation organized under the national bank acts, was declared insolvent and closed on May 8, 1891. Subsequently a receiver was appointed. Samuel Boyce was then the owner of 23 shares of the capital stock of the bank, and of certain real estate and ground rents. On July 23, 1891, Boyce conveyed the real estate and ground rents to Samuel S. Sibbs by a deed absolute on its face, and reciting a full consideration. On the same day Sibbs executed a declaration of trust, reciting that the consideration named in the deed had not been paid, and declaring that he held the premises in trust for Boyce for life, with remainder to sundry persons nominated by Boyce. The deed was duly recorded. The declaration of trust was not. On December 2, 1891, the comptroller of the currency ordered an assessment of \$100 a share on all the shareholders in the bank. On or about December 5, 1891, Sibbs, under Boyce's direction, placed mortgages on certain of the real estate, and sold the ground rents held by him in trust, and turned over the proceeds to Boyce. On February 25, 1892, suit was brought against Boyce to recover the amount of the assessment on his stock. Judgment was obtained March 26, 1892, for want of an affidavit of defense. A *fi. fa.* was issued thereon, and returned *nulla bona*. Boyce died October 23, 1895, leaving a will, by which he appointed R. E. Shulenberger his executor, and devised and bequeathed all his property to Anna M. Jackson and Albert F. Boyce, the remaining defendants. The bill averred that the conveyance of July 23, 1891, was made by Samuel Boyce with intent to hinder, delay, and defraud his creditors. Sibbs filed an answer, denying the existence of such an intent, and also denying any knowledge of such intent on his part, and averring that he had acted in good faith, and had only carried out the purposes declared in the declaration of trust, and that at the time of the conveyance to him Boyce was possessed of other real estate, specifically described, which was more than sufficient to discharge his debts. This answer was supported, so far as his personal responsibility was concerned, by Sibbs' testimony. The bill prayed (1) that Sibbs be required to account in this proceeding for the proceeds of the sale of the trust property; and (2) that the deed of conveyance from Boyce to Sibbs be declared void as against the complainant, and that the latter's judgment be declared a lien on the property conveyed thereby.

Harry B. Gill, for complainant.

Frank M. Cody, for respondents.

DALLAS, Circuit Judge. As to all the real estate which is the subject-matter of this litigation, with the exception of the two ground rents of \$36 each, the complainant is entitled to relief in substantial accordance with the second prayer of his bill. The ground rents had been sold, and the other real estate had been mortgaged by Sibbs, and the entire proceeds of these several transactions were paid over by him to his grantor, Samuel Boyce, before this suit was brought. These facts are fully established; and the evidence also shows that beyond question the conveyance by Boyce to Sibbs was, as to Boyce and as against his creditors, fraudulent and void. Did Sibbs take with knowledge, or with notice, actual or constructive, of the fraudulent purpose of Boyce? I cannot, upon the evidence, find that he did, or that he made any of the above-mentioned payments to Boyce with such knowledge or notice. The sworn answer of Sibbs explicitly and positively denies that he had such knowledge until after he had paid all the money to Boyce, and, when examined as a witness, he repeated this statement. His testimony, and certain letters which were written by him long after he had acquired knowledge of Boyce's object in transferring title, is the only material evidence upon this subject. I have examined it with care, and do not find in it anything which, in my opinion, would warrant me in holding that, as respects the money, or any portion of it, received by Sibbs, and paid over by him to Boyce, the former should be required to account to the creditors of the latter or to this complainant. The evidence is not, in any particular or as a whole, in necessary conflict with the absolute denial by Sibbs of inculpatory knowledge or actual notice; and, though some of the circumstances shown might, no doubt, have led a more astute person to regard Boyce's conduct with suspicion, I do not think that the facts disclosed are sufficient to charge Sibbs with constructive notice of Boyce's unlawful design. Let a decree be drawn in accordance with this opinion.

BROWN v. WALKER et al.

(Circuit Court, S. D. Iowa, C. D. January 11, 1898.)

JUDGMENT ON MANDATE—BILL FOR RELIEF AGAINST—LEAVE OF APPELLATE COURT.

Leave from the supreme court is not necessary to authorize a circuit court to entertain a bill to restrain the enforcement of its own judgment against the complainant, though such judgment was rendered on a mandate of the supreme court, where the ground alleged is that the complainant, though nominally a party to the action in which the judgment was rendered, was not in fact a party, and is not bound by the judgment; the purpose of such bill not being to review any question determined by the supreme court.

This is a bill by Anna L. Brown against James H. Walker and others to enjoin the enforcement of a judgment obtained by defendants against complainant. Heard on motion for preliminary injunction.

N. T. Guernsey, for complainant.

H. S. Robbins and Mr. Cavanaugh, for defendants.

SHIRAS, District Judge. The material facts of this case are as follows: In September, 1889, T. E. Brown, then a resident of Des Moines, Iowa, for the purpose of aiding the firm of Lloyd & Co., of Washington Territory, in obtaining credit, addressed a letter to James H. Walker & Co., of Chicago, Ill., in which he stated that \$15,000 of bonds of the city of Memphis, which he had previously loaned Lloyd & Co., should remain as security for any claim held by Walker & Co. against Lloyd & Co. The latter firm became insolvent, and failed to pay their indebtedness to Walker & Co., and thereupon these parties brought a suit in equity in this court against Anna L. Brown, Willis S. Brown, and Edward L. Marsh, as administrators of the estate of T. E. Brown, to enforce an equitable lien upon the bonds as a security for the debt due the firm of Walker & Co. After the filing of the bill, it appeared that the bonds in question had been made a gift to Anna L. Brown by her husband, T. E. Brown, and thereupon an amendment to the bill was filed, making her a party to the suit in her individual right, and an appearance in her behalf was entered, and an answer was filed by Kauffman & Guernsey as her attorneys. When the amended bill was thus filed, Anna L. Brown was in England, and no personal service was had upon her of a subpoena or other notice of the filing of the amendment making her a party in her own right. That case was carried to the supreme court of the United States, and by that court it was held that Walker & Co. were entitled to an equitable lien on the bonds for the amount due them from Lloyd & Co., and the case was remanded to this court, in which a decree in accordance with the mandate from the supreme court was duly entered. See *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453. The decree as entered establishes the right of Walker & Co. to a lien upon the bonds, as against Anna L. Brown in her individual right, as well as against the estate of T. E. Brown; and, as it appeared that, pending the proceedings, the bonds had been sold by Anna L. Brown, a personal judgment for the proper amount was entered against her. Thereupon the present bill was filed by Anna L. Brown against James H. Walker, ———— Cummins, and Howard, co-partners, averring that the decree entered as above stated is not binding upon her, because she had no notice of the filing the amendment to the bill making her a party individually thereto; that the appearance entered on her behalf by Kauffman & Guernsey was without authority; that she has not, in fact, had her day in court; that, under the facts, her right to the bonds is superior to any claim on behalf of Walker & Co.; that execution is about to be issued on the judgment entered against her, and therefore she prays the issuance of a temporary injunction restraining the enforcement of the judgment until after the hearing on the merits, and that upon the hearing the judgment be set aside, and she be admitted to make defense to the claim of Walker & Co.

The principal question at issue upon the motion for a preliminary injunction is whether this court can entertain the bill filed without leave being granted by the supreme court. On behalf of defendants it is contended that this proceeding is merely ancillary to the original suit, being in effect a petition for rehearing or a bill of review, and that this court has not the right to entertain a proceeding, the purpose

of which is to set aside a decree ordered by the supreme court, and that the only mode of procedure is to apply in the first instance to the supreme court for leave to file the bill, and that court, if it deems the showing sufficient, will grant the leave, and by its order will determine whether the bill should be filed in the supreme court or in this court. Upon the oral argument of the matter the court was inclined to the view that, out of caution, the safer course would be to require the application for leave to file the bill to be made in the supreme court; but upon further reflection it does not seem necessary that the additional delay and expense should be incurred. It is clear that the supreme court would not undertake the hearing of the questions of fact that lie at the foundation of this proceeding, but would remit the matter to this court for hearing in the first instance; and therefore the sole question is whether it is within the power of this court to entertain this proceeding without leave being granted by the supreme court.

If the purpose of the bill was to obtain a rehearing upon some issue properly presented and decided in the original case, there would be force in the suggestion that, as the decree entered was so entered in obedience to the mandate of the supreme court, it was beyond the power of this court to entertain a petition for rehearing or bill of review, the purpose of which is to obtain a change or modification in the terms of the decree ordered by the supreme court. That is not the immediate purpose of the present proceeding, which is based upon the averment that Anna L. Brown was not in fact a party to the original case, that she is not bound by the decree entered, and that she has the right to restrain Walker & Co. from enforcing the decree against her. This issue was not involved in the case when it was submitted to the supreme court, and therefore it cannot be said, in any proper sense, that the purpose of this proceeding is to secure a rehearing upon any issue or matter decided by the supreme court in the original case. What is made to appear is that Walker & Co. have obtained a decree in this court, based upon a mandate from the supreme court, which in form is against Anna L. Brown, and that she now purposes to show that this decree is not binding upon her because she had never been brought in as a party to that suit. It is true that, in one sense, this proceeding is ancillary to the original case, in that the need for bringing it is caused by the entry of the decree against the present complainant; but the proceeding is, nevertheless, independent, in that the relief asked is based upon an issue not before the supreme court, and which has not been considered or determined by any court. In the cases of *Pacific R. Co. v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 4 Sup. Ct. 583; *Johnson v. Christian*, 125 U. S. 644, 8 Sup. Ct. 989, 1135; *Kingsbury v. Buckner*, 134 U. S. 675, 10 Sup. Ct. 638; and *Robb v. Vos*, 155 U. S. 38, 15 Sup. Ct. 4,—the supreme court clearly recognizes the right of a party to file a bill in equity for relief against judgments or decrees on the ground of fraud, want of notice, or other ground of equitable relief; and it is not suggested that in such cases it is necessary to apply for leave to the court in which the decree or judgment was rendered.

The conclusion reached is that this court can entertain the present proceeding without previous leave being granted by the supreme court, and that process for the enforcement of the judgment against Anna L. Brown should be stayed until the question presented by the bill herein is determined. It is therefore ordered that, upon the complainant herein filing a bond in the sum of \$2,500, with sureties to be approved by the clerk of this court, conditioned for the payment of all costs and damages awarded against complainant by reason of said stay of process, the said defendants James H. Walker et al. are restrained from issuing process for the enforcement of the judgment in their favor until the further order of this court.

PLATT v. PHILADELPHIA & R. R. CO. et al.

(Circuit Court of Appeals, Third Circuit. January 7, 1893.)

No. 24.

1. RAILROAD RECEIVERS—CAR RENTALS.

When a receiver is appointed for a railroad company holding rolling stock under a car-trust lease, whereby title remains in the lessor until the rental has paid the purchase price, the lessor is entitled to reasonable compensation for the use of such rolling stock by the receiver, even though the cars are afterwards returned to the lessor.

2. SAME—ADOPTION OF CAR-TRUST LEASES.

A railroad receiver does not adopt car-trust leases simply by taking possession of the cars, and using them temporarily. He is entitled to a reasonable time to ascertain whether it will be profitable or desirable to adopt the leases. And where an experimental arrangement is made under the court's sanction, by which the receiver retains the cars, and pays the rentals during several months with receiver's certificates, this does not amount to an adoption of the lease, in the absence of more definite and final action.

3. SAME.

Where a receiver temporarily using cars held by the company under a car-trust lease, with the sanction of the court, turns over the operation of the road and rolling stock to another company, which agrees to pay "all the expenses of operation," the latter company becomes liable to the owner of such cars for reasonable compensation for their use, as the agent or representative of the receiver.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an appeal by the Central Car-Trust Company from a decree of the circuit court of the United States for the Eastern district of Pennsylvania, entered in the suit of Thomas C. Platt against the Philadelphia & Reading Railroad Company and others.

J. S. Clark, for appellant.

Thomas Hart, Jr., for appellee Philadelphia & R. R. Co.

Before ACHESON, Circuit Judge, and KIRKPATRICK and BRADFORD, District Judges.

ACHESON, Circuit Judge. It has been decided that, where a railroad company holds rolling stock under a car-trust lease, title thereto remaining in the lessor until the rental has paid the pur-

chase price, the lessor is entitled to reasonable compensation as rental for the use of such rolling stock by the receiver of the railroad company, even though the cars are afterwards returned to the lessor. *Myer v. Car Co.*, 102 U. S. 1; *Kneeland v. Trust Co.*, 136 U. S. 89, 103, 10 Sup. Ct. 950; *Thomas v. Car Co.*, 149 U. S. 95, 112, 13 Sup. Ct. 824. The soundness of this doctrine as a general principle is not controverted by the appellees, nor is it denied by them that, if the appellant's case is within the rule, remuneration on the basis of mileage earnings, as here claimed, would be a fair compensation. It is, however, denied that the above-stated rule is applicable here. The appellees earnestly contend that the receiver of the Pennsylvania, Poughkeepsie & Boston Railroad Company (Henry H. Kingston) adopted the car-trust contracts which subsisted between that company and the Central Car-Trust Company, the appellant, and that the receiver thereby assumed the payment of the future accruing installments of the purchase price of the cars. It is not alleged, and under the evidence it cannot be claimed, that the receiver thus adopted these contracts by any express undertaking. The acts of the receiver and the orders of the court which appointed him—the circuit court of the United States for the district of New Jersey—are relied on as showing such acceptance and adoption of the contracts.

Certainly, the receiver was not bound to adopt these car-trust contracts; and it is quite clear that he did not assume the liabilities of the railroad company thereunder simply by taking possession of the cars, and using them temporarily, under his order of appointment. *Oil Co. v. Wilson*, 142 U. S. 313, 322, 12 Sup. Ct. 235; *U. S. Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 299, 14 Sup. Ct. 86. The receiver undoubtedly was entitled to a reasonable time to ascertain whether or not it would be profitable or desirable for him to assume the obligations of these contracts, and to elect whether he would adopt them, or reject them, and return the cars to the trust company. *Id.* This record discloses that the receiver himself never undertook to exercise in this matter any right of election he may have had. He acted altogether under orders of the court. He was appointed on February 17, 1891, and four days thereafter, on February 21st, he presented to the court a petition setting forth the facts with respect to these car-trust contracts, and in the succeeding month of March he filed two other petitions relating to the same general subject-matter. On April 7, 1891, the court, under the prayers of these petitions, or some of them, made an order authorizing the receiver to issue receiver's certificates to meet the car-trust lease warrant or rental note which fell due March 1, 1891, and the lease warrants or rental notes which should fall due each month thereafter up to and including November 1, 1891. In fulfillment of this order, the receiver and the Central Car-Trust Company, on April 15, 1891, entered into a written contract, whereby it was agreed that the receiver would pay, and the Car-Trust Company would accept as cash, receiver's certificates in payment of the lease warrants or rental notes from March 1 to November 1, 1891, inclusive; and this

arrangement was carried out. In one of his said petitions the receiver represented to the court that he believed that after November 1, 1891, the net revenue in his hands would be sufficient to meet the subsequently maturing installments of the purchase price of the cars. Evidently, in this belief and expectation, the order of court for the issue of these receiver's certificates was made, and the contract of April 15th was entered into. The arrangement between the receiver and the Car-Trust Company which the court sanctioned was temporary and experimental. Under all the circumstances, then, we cannot regard these acts of the receiver and the orders of the court as an absolute adoption of the car-trust contracts. The order of court of April 7 and the contract of April 15, 1891, merely carried forward the car-trust contracts to November 1, 1891. After that date the receiver's relation to these contracts was the same as when he was appointed. Now, the expectation that the net revenues of the railroad after November 1, 1891, would pay the after-accruing installments of the purchase price of the cars wholly failed of realization. Instead of a net surplus, there was a deficit, and on December 28, 1891, the receiver presented to the court a petition for authority to issue certificates to cover five additional monthly installments of car rental. The court held this application under advisement, but it was never granted.

In this state of affairs, the receiver of the Pennsylvania, Poughkeepsie & Boston Railroad Company and the Philadelphia & Reading Railroad Company, under the sanction and order of the court, entered into the agreement of April 28, 1892. By the terms of that agreement the Philadelphia & Reading Railroad Company became the "agent and representative" of said receiver to conduct "the operation of the line of railroad of the Pennsylvania, Poughkeepsie & Boston Railroad Company and its accessories and the traffic thereon," and the Philadelphia & Reading Railroad Company assumed and agreed to pay "all the expenses of the said operations" after May 1, 1892, "taking therefor the entire receipts and revenues to be derived from the said operations and traffic." The rolling stock held by the receiver (Kingston) under the car-trust contracts passed with the Pennsylvania, Poughkeepsie & Boston Railroad into the possession of the Philadelphia & Reading Railroad Company on May 1, 1892, and was retained and used by that company at first, and then by its receivers, until August 31, 1893, when by its election and notice the agreement of April 28, 1892, was terminated. The master has found that the Philadelphia & Reading Railroad Company took possession "of said equipment, and operated the same, with knowledge of the interest of the Central Car-Trust Company therein." It further appears that from May 1 to December 31, 1892, the Philadelphia & Reading Railroad Company paid monthly to the receiver of the Pennsylvania, Poughkeepsie & Boston Railroad Company mileage earnings made by this rolling stock upon the railroad of the latter company, and the said receiver paid the same over to the Central Car-Trust Company. The claim

in dispute is for compensation on the basis of mileage earnings for the use of these cars by the Philadelphia & Reading Railroad Company and its receivers from January 1 to August 31, 1893. The capable master disallowed this claim, not without hesitation. His conclusion is thus stated in his report:

"Though with some doubt, arising from the failure of the parties to specifically express their intention as to any liability of the Philadelphia & Reading Railroad Company for any compensation for the use of this equipment upon the Pennsylvania, Poughkeepsie & Boston Railroad, I do not think that the Philadelphia & Reading Railroad Company, or its receivers, are liable for such compensation to Mr. Kingston, receiver, or to the Central Car-Trust Company."

We are unable to concur in this view. The Philadelphia & Reading Railroad Company took possession of this rolling stock knowing of the appellant's interest therein. It is not to be doubted that the company acted with the fullest knowledge of the facts. At any rate, inquiry was its plain duty. Now, certain it is that, as against the appellant, the company took no greater rights in this leased rolling stock than those of Mr. Kingston, the receiver. As the receiver could not use these cars without making reasonable compensation to the owner, neither could his representative, the Philadelphia & Reading Railroad Company. Then the latter company stipulated to pay all "the expenses of the said operations." We agree with the master that the term "operating expenses" does not embrace the "lease warrants,"—the unpaid installments of the purchase price of the cars. But we think it clear that the stipulation does cover the reasonable compensation to which the owner of these cars was entitled for the use of them, whether such use was by the receiver himself or by his agent and representative. This expenditure was part of the operating expenses. Under the circumstances it must have been within the contemplation of both the parties to the agreement of April 28, 1892, that the Philadelphia & Reading Railroad Company should pay the compensation for the use by it of this rolling stock, for Mr. Kingston, the receiver, turned over the whole railroad property he held under his receivership to that company, and that company was to receive the entire revenue. Finally, if there could be any doubt upon the face of the agreement as to the liability of the Philadelphia & Reading Railroad Company, that doubt was resolved against the company by what the parties did under the agreement from month to month from May 1 to December 31, 1892. Their long course of dealing with respect to mileage earnings definitely fixed the meaning of the agreement in accordance with the appellant's contention.

We have not at all overlooked the allegation now made of a mistake of fact running through all the monthly settlements. In explaining the supposed error, the comptroller of the Philadelphia & Reading Railroad Company in his testimony states that "it is very unusual for any road to report mileage of its own cars on its own road, and, they being Pennsylvania, Poughkeepsie & Boston cars, it did not occur to me that the clerk, in making up the mile-

age account, included the movements of those cars on their own road." These cars, however, did not belong to the Pennsylvania, Poughkeepsie & Boston Railroad Company, as the comptroller here erroneously assumes, but they were the cars of the Central Car-Trust Company, and that company, as we have seen, is entitled to reasonable compensation for their use, whether such use was by the receiver or by his representative. The allegation of mistake in the monthly settlements rests upon a misapprehension as to the rights of the parties. The decree of the circuit court is reversed, and the cause is remanded to that court, with direction to enter a decree in favor of the Central Car-Trust Company.

LOUISVILLE TRUST CO. v. LOUISVILLE, N. A. & C. RY. CO. *et al.*

(Circuit Court of Appeals, Seventh Circuit. February 5, 1898.)

No. 420.

1. MORTGAGE FORECLOSURES—PARTIES—GENERAL CREDITORS.

Mere general creditors are neither necessary nor proper parties to a suit to foreclose a mortgage; and if permitted by the court merely to file an intervening petition, without tendering any issue or asking leave to file an answer or other pleading, such intervener has no standing in court to question the validity of the foreclosure sale.

2. SAME—DE FACTO CORPORATION.

A general creditor, whose claim arose under a contract with a *de facto* consolidated corporation, cannot question the validity of the consolidation for the purpose of invalidating the corporation's mortgage bonds.

Appeal from the Circuit Court of the United States for the District of Indiana.

On August 24, 1896, John T. Mills, Jr., filed a judgment creditors' bill in the circuit court of the United States for the district of Indiana against the Louisville, New Albany & Chicago Railway Company, and procured the appointment of a receiver, who took possession of the property. On November 12, 1896, the Farmers' Loan & Trust Company and John H. Barker, trustees, filed their bill of complaint to foreclose a mortgage upon the property of the railway company, known as the "consolidated mortgage," securing \$4,700,000 of 6 per cent. consolidated bonds. The foreclosure was based upon an allegation that default was made in the payment of the interest upon the bonds secured by said mortgage maturing on October 1, 1896. On the same day the Central Trust Company of New York and John H. Stotsenburg, trustees, filed their bill of foreclosure against the railway company to foreclose the mortgage known as the "general mortgage," securing an issue of \$2,800,000 5 per cent. general mortgage bonds. This foreclosure was based upon an allegation of default in the payment of interest on the said bonds maturing November 1, 1896. On November 12, 1896, the two foreclosure bills were, by order of the court, consolidated with the creditors' bill in one cause, to proceed under the title of the Farmers' Loan & Trust Company of New York and John H. Barker, complainants, against Louisville, New Albany & Chicago Railway Company. On December 14, 1896, the Central Trust Company of New York and James Murdock, trustees, filed their bill of foreclosure against the railway company to foreclose the mortgage known as the "equipment mortgage," securing bonds whereof \$709,000 of principal were alleged to be outstanding; the said equipment mortgage being a first lien upon a large amount of equipment, and a subordinate lien upon the property of the railway company covered by its other

mortgages. The foreclosure was based upon allegations of default in the payment of the interest maturing on December 1, 1896. On December 21, 1896, the last-mentioned suit was consolidated with the other consolidated suit under the same title. On December 24, 1896, the Farmers' Loan & Trust Company and John H. Barker, as trustees, filed an amended and supplemental bill, which related to the property of the Orleans, West Baden & French Lick Springs Railway Company and the Bedford & Bloomfield Railroad Company, which last-mentioned companies had conveyed their properties, by way of mortgage, to the said trustees, as additional security for the consolidated bonds. On January 13, 1897, the Orleans, West Baden & French Lick Springs and Bedford & Bloomfield Companies were made parties defendant to the bill of the Farmers' Loan & Trust Company and John H. Barker. The defendant railway corporations filed an answer to the several bills of foreclosure, which did not put in issue any of the material allegations of said bills. The Central Trust Company, Stotsenburg, and Murdock, trustees, filed an answer to the bill of the Farmers' Loan & Trust Company and Barker, admitting the allegations of the bill and amended and supplemental bill of those complainants. On January 23d, the pleadings of all the parties defendant to the original bills being upon file, and there being no material allegation of any of the foreclosure bills in issue or denied, and no proofs being necessary in order to render a decree upon the foreclosure bills, application was made to the court for a decree of foreclosure and sale. On the same day, the Louisville Trust Company filed an intervening petition. This petition merely alleged the incorporation of the Louisville Trust Company, the fact that it was the holder of 125 bonds of \$1,000 each, made by a corporation known as the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, and alleged to have been guarantied by the Louisville, New Albany & Chicago Railway Company, which remained unpaid, and the interest upon which was in default; that the Louisville, New Albany & Chicago Railway Company was authorized to make the guaranty, and that its right and power to do so had been adjudged in a suit in the circuit court of the United States for the district of Kentucky; that the Louisville, New Albany & Chicago Railway Company was indebted to the petitioner in \$125,000 and interest; and it prayed that the petition might be filed, and an order entered authorizing petitioner to appear in its own behalf, and in behalf of all others holding similar claims, and take such steps and proceedings as it might be advised by counsel. This intervening petition did not contain allegations tending to controvert any matters contained in the foreclosure bills, and tendered no issue whatever. Upon said petition, an order was made that the Louisville Trust Company and the Kentucky National Bank be admitted to appear in the proceedings in the cause, each on its own behalf. No answer or other pleading of any kind was tendered to the court or was ever suggested. On the same day, the court made and entered the decree of foreclosure and sale. The decree directed foreclosure of the several mortgages, but reserved full power to adjudge with respect to the income of the receivership and the rights of creditors in and to the same. On February 27, 1897, more than a month after the decree was entered, the appellant filed another petition. In this petition various charges and allegations were made tending to negative the right of the trustee to foreclose their mortgages, and the prayer of the petition was to the effect that the decree of foreclosure and sale should be set aside; that the consolidations by which the mortgagor company was created should be adjudged to be void; that its mortgages should be declared to be invalid; that the assets and liabilities of the railway company should be ascertained; and that the amount of such assets should be declared to be a fund to be distributed among general and unsecured creditors; and, further, that an order be entered commanding some of the parties to the consolidated cause, but not all, to appear within a time to be fixed by the order of the court, and to plead or make answer to the allegations of the petition. No such order was ever made or applied for. But on March 9, 1897, the day before the day fixed for the sale under the decree, it appears that the petition of February 27, 1897, came on to be heard, and was argued by counsel, and that the court refused to vacate the decree of foreclosure and sale, or to postpone or adjourn the sale. The sale was duly made to F. P. Olcott, Henry W. Poor, and Henry C. Rouse, as a committee for the

bondholders. On the day of the sale, viz. March 10, 1897, application was made to confirm the sale and the master's report; and, all the parties to the foreclosure bills appearing and consenting, an order of confirmation was entered. The Louisville Trust Company, on May 1, 1897, filed its petition of appeal and assignment of errors, and said petition was allowed. The appeal is taken from the decree of foreclosure and sale, and from the order denying the application to set the same aside.

St. John Boyle and Swager Sherley, for appellant.

Adrian H. Joline, for appellees.

Before JENKINS and SHOWALTER, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge, after stating the facts as above, delivered the opinion of the court.

There are several reasons why the decree in this case should not be disturbed.

1. The intervening petitioner, who is the appellant here, had no standing in the court below. At best, it was only a general creditor of the defendant company, having and claiming to have no interest in or lien upon the real estate and franchises of the company which formed the subject of the foreclosure suits. The petitioner claims to be the owner and holder of certain bonds issued by the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, the payment of which was guaranteed by the defendant the Louisville, New Albany & Chicago Railway Company, which bonds remain unpaid. It is well settled that, in a foreclosure proceeding like this, unsecured creditors having no judgment or other lien upon the real estate cannot be made defendants. They are neither necessary nor proper parties. *Bronson v. Railroad Co.*, 2 Black, 524; *Stout v. Lye*, 103 U. S. 66; *Herring v. Railroad Co.*, 105 N. Y. 340, 12 N. E. 763; *Jones v. Winans*, 20 N. J. Eq. 96.

In the case of *Bronson v. Railroad Co.*, supra, it is said:

"But was it ever seriously maintained that a general creditor, having no specific lien, had a right to interfere in the contests between his debtor and third parties? * * * If the right was conceded to one creditor, it would have to be to another; and where the creditors are numerous, as in the case of railroad bondholders, the exercise of the right would lead to great embarrassment."

In the New Jersey case cited, a general creditor had presented a petition, asking to be made a party defendant in a foreclosure case, and the chancellor said:

"The petitioner has no judgment or other lien on the land. He is in the position in which any creditor at large of Winans stands. No such creditor is a necessary party to a bill to foreclose; nor could he be properly made a defendant. There is no authority or precedent for such an order as is asked for in this case, and it is against the settled principles on which the practice of the court is founded."

In the case at bar, no doubt, the circuit court exercised a discretion in allowing the appellant to come in, in order that it might be in condition to keep an eye on the proceedings, and to be ready to protect its interests in any surplus that might remain after the bondholders and other secured creditors were paid. The petitioner, after being

allowed to file its petition, did not tender any issue nor ask leave to file any answer or pleading, so that there was no occasion for the complainants to offer any evidence to substantiate the allegations of the bill, but a decree of foreclosure was regularly and properly rendered upon the bill and answers. Now, the appellant comes to this court, and asks for all the benefit and advantage that it might have had if it had asked and obtained leave to put in an answer, and had produced evidence to defeat the equities of the bill. We know of no precedent for such a practice. It would be a travesty upon equity proceedings. The case stands here as though the equities of complainants' bill had been established by competent and sufficient evidence in the court below. The appellant's original petition alleged nothing whatever against the foreclosure or the validity of the mortgages, or the equities of the complainants' case, but merely set up facts which would entitle the petitioner to share in any surplus or assets not covered by the mortgages. It was filed on the same day that the decree was entered. The complainants were not notified that there was any dispute as to the merits of the foreclosure. What should the complainants do? Must they delay the foreclosure, and coax the petitioner to put in an answer disputing their right to the relief sought? There was nothing secret about the foreclosure proceedings. They had been pending for some time, and the case was ripe for a decree, which was regularly entered upon bill and answer.

2. The sole ground of objection to the complainants' case in the court below, as set forth in the petition of appellant, and which was filed after a decree was taken, and which was addressed to the discretion of the court asking to have the decree set aside, was the total invalidity of the various bonds and mortgages, because the defendant corporation, which is a consolidated company, was never regularly consolidated, and that under the law of Illinois and the decision of the supreme court in the case of *American Loan & Trust Co. v. Minnesota & N. W. R. Co.*, 157 Ill. 641, 42 N. E. 153, a railway corporation of Illinois could not be consolidated with a railway corporation of another state. In answer to this claim, it is alleged on the part of the appellees that there was no property of the defendant company in Illinois except some leasehold interests, and that an examination of the case in the Illinois supreme court shows that it has no application to such a case as this, and that it is well-settled law that in an action to foreclose a mortgage securing bonds of a consolidated corporation of two different states, where from the time of consolidation it exercised the franchises of a consolidated corporation without objection from the state or the stockholders who appeared and voted as its stockholders at its annual meetings, it is a de facto corporation, and both such de facto corporation and its stockholders and creditors who claim to be general creditors of the same de facto corporation are estopped to assert its unauthorized existence as a corporation to avoid the bonds, which no doubt furnishes a complete answer to the contention, provided it were essential to meet that contention here on the merits as though it had been litigated and passed upon in the court below, and an appeal taken from the decision. The

case of *Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry. Co.*, 67 Fed. 49, is directly in point upon this question. See, also, *Dallas Co. v. Huidekoper*, 154 U. S. 654, 14 Sup. Ct. 1190. Both the appellant and appellees have dealt with this defendant corporation as though it had a legal existence. One who deals with a corporation as existing in fact is estopped to deny, as against the corporation, that it has been legally organized. *Close v. Cemetery*, 107 U. S. 466, 2 Sup. Ct. 267.

In the recent case of *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642, a similar question was presented, and the petitioner's right to allege the invalidity of bonds denied. In that case, which, like this, was one of several bills consolidated, the parties were allowed to come in and defend, on the ground that some of the cases consolidated were not foreclosure cases, but suits brought by unsecured creditors in the nature of creditors' bills, it being conceded that in a foreclosure bill a general creditor could not contest the validity or the amount of the mortgage lien. The bondholders, however, had made themselves parties to the creditors' bill by a committee, and had set up their claims and liens, and on this ground the creditors were allowed to attack the validity of the bonds secured by mortgage. But the court, when it came to the question of the creditors' alleging the invalidity of the bonds on the general ground that the corporation had no valid existence, distinctly denied such right. On that question, Taft, Circuit Judge, in his opinion says:

"Let us consider first the averment that the Toledo, St. Louis & Kansas City Railroad Company is neither a corporation de jure nor a corporation de facto. Can such a defense be urged by one purporting to be a creditor of the pretended corporation? If the bonds are null and void because the corporation issuing them was a nullity, clearly the debts of the petitioners and the complainant are in no better condition, and the court has nothing upon which to exercise its jurisdiction. * * * So long as they (the petitioners) owe their right to be in court at all to the sufficiency of the averments of the bill for the relief asked, they cannot be heard to question the very basis upon which alone the court can act. If it is true that the defendant in the bill is not an entity at all, but only an empty name and nullity, the bill must fail for want of a defendant, and with it must fall all the petitions herein. * * * It hardly seems necessary to point out that a defense urged by one creditor against the claim of another, which must defeat, not only that at which it is aimed, but also that of the complainant and all other claims, and which denies the existence of the defendant against whom the action was brought, cannot be permitted to an intervener."

These remarks are peculiarly applicable to the case at bar, where the appellant occupies the anomalous attitude of denying the capacity of the defendant corporation to issue its own bonds to secure its own indebtedness, and to enable it to carry on its own business, while claiming that it had power to guaranty the bonds of another railroad company. Such a contention cannot be allowed. There is a motion in the case to dismiss the appeal, which need not be considered.

The decree of the circuit court is affirmed.

FOX SOLID PRESSED STEEL CO. v. SCHOEN MFG. CO. et al.

(Circuit Court of Appeals, Third Circuit. January 24, 1898.)

No. 31.

INTERPRETATION OF CONTRACTS—MANUFACTURE OF CAR TRUCKS.

Complainants and defendants were making center plates for car trucks under rival patents, and complainant, besides, was making a truck frame known as the pressed metal frame. They made a contract with the purpose, as expressed in its preamble, of adjusting their differences relating to pressed metal centers for truck frames. The contract, however, contained the clause forbidding defendants to make truck frames, "or any part of such frames, when made of pressed metal." At the time of the contract, defendants, with complainant's knowledge, were making pressed metal parts of diamond truck frames, and continued to do so for several years without objection. *Held*, that this clause, construed in the light of the circumstances, merely prohibited defendants from making the pressed metal truck frames or parts thereof which complainants were putting on the market, and did not prevent them from making pressed metal parts of other kinds of truck frames. 77 Fed. 29, affirmed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

This was a suit in equity by the Fox Solid Pressed Steel Company against the Schoen Manufacturing Company and others to restrain them from violating a contract. The circuit court dismissed the bill, with costs (77 Fed. 29), and the complainants have appealed.

Edwin H. Brown, for appellants.

John G. Johnson and Strawbridge & Taylor, for appellees.

Before DALLAS, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

KIRKPATRICK, District Judge. The appellants (complainants below) filed their bill in the circuit court for the Western district of Pennsylvania, to restrain the respondents from manufacturing truck frames for moving vehicles, or parts of truck frames, when made of pressed metal, in violation of an agreement between the parties. The clause of the contract upon which the complainants rely is in these words, viz.:

"It is further agreed that the parties of this second part will not engage during the life of the agreement in the manufacture of truck frames for moving vehicles, or any part of such frames, when made of pressed metal."

The complainants' contention is that, by this clause of the agreement, the defendants were prohibited from manufacturing parts of truck frames when such parts were made of pressed metal. The specific offense complained of is that the defendants have manufactured pressed metal truck bolsters to be used as a part of the ordinary diamond truck. The defendants, by their answer, admit that they have placed on the market pressed metal steel bolsters to be used in connection with Diamond truck frames, but insist that they are not prohibited from so doing by the terms of the agreement, which, properly construed, applies only to the parts of truck frames which were composed of pressed metal. It will be perceived that the clause of the contract in question, standing alone, is susceptible of either construction which has been put upon it by the parties. In

order that it may be properly interpreted, it will be necessary to examine the entire instrument, consider its subject-matter, the motives that led to it, the circumstances surrounding its execution, and the object intended to be effected. *Davis v. Barney*, 2 Gill & J. 382.

It appears from the record that both the complainants and defendants, prior to and at the time of the execution of the agreement, were the owners of certain patents relating to the manufacture of center plates for car trucks, concerning the validity of which suits were pending between them. The complainants were also engaged in the manufacture of pressed metal truck frames, with which business the defendants in no way interfered. A large part of defendants' business, outside of making center plates for all kinds of car trucks, was the manufacture of pressed metal parts of truck frames which were known as "Diamond truck frames," and which were constructed partly of wood and partly of iron or steel. The only business for which the parties competed was that of furnishing metal center plates, which were used in common by both styles of truck frames, as well as those specially manufactured by the complainants, and known as "pressed metal truck frames," as those in more general use, and known as "Diamond truck frames." The object of the agreement, as set out in its preamble, was to adjust the differences between the parties so far as they related to pressed metal centers for truck frames. Except in the clause in controversy, no other subject is mentioned in the agreement. It seems to have been injected as an afterthought, to accomplish some object outside of the subject-matter of the agreement. That it was not for the purpose of compelling the defendants to abandon any part of the then existing business is apparent from the testimony. It is the evidence on the part of the defendants, and not denied by the complainants, that, at the time the contract was entered into, the defendants were, with the knowledge of the complainants, manufacturing, and offering to the trade, parts of Diamond truck frames which were made of pressed metal, and that they continued to do so after the making of this agreement. The character of the business was not changed, and no objection was made to it until about the time of the filing of this bill, a period of over three years. It was not only acquiesced in by the complainants, but their bill avers that up to about February 1, 1895, the defendants had complied with the terms of the contract.

Reading the controverted clause in the light of its context, with due consideration of the motives leading to and the object to be accomplished by the agreement (*Chicago, R. I. & P. Ry. Co. v. Denver & R. G. R. Co.*, 143 U. S. 596, 12 Sup. Ct. 479), and giving to it that practical construction which both parties have put upon it (*District of Columbia v. Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585), we cannot construe it as prohibiting the defendants from manufacturing pressed metal parts for any other truck frames than the pressed metal truck frames which the complainants are engaged in putting on the market. Entertaining this view, it is unnecessary for us to determine the other questions presented in the argument. The judgment of the circuit court will be affirmed.

KING v. STUART et al.

(Circuit Court, W. D. Virginia. October 7, 1897.)

1. INJUNCTION AGAINST TRESPASS.

Injunction will lie against trespass whenever the injury threatened would be irreparable, or when the trespass is a continuing one, so that a single action for damages would not be an adequate remedy.

2. SAME—CUTTING TIMBER.

Injunction against cutting trees is not limited to shade and ornamental trees, but extends to the cutting and carrying away of trees from forest lands, when the trespass is a continuing one, which would result in denuding the land of valuable timber.

This was a suit in equity by Henry C. King against H. C. Stuart and others to enjoin defendants from cutting timber from certain lands claimed by the complainant.

Maynard F. Stiles and Daniel Trigg, for complainant.
Burns & Ayres, for defendants.

PAUL, District Judge. This is a suit brought by the plaintiff, Henry C. King, to restrain the defendants from cutting and carrying away the timber of the plaintiff on certain lands claimed by him, lying in Buchanan county, Va., the same being part of a tract of 500,000 acres lying in the states of Virginia, West Virginia, and Kentucky. The plaintiff traces his title from a grant by the commonwealth of Virginia to Robert Morris, dated June 23, 1795, and, through successive conveyances to himself. The bill, after setting out the plaintiff's title, alleges:

"That the title of your orator, as above set forth, has been sustained and held to be valid by repeated adjudications of this court, as well as of the circuit court of the United States for the district of West Virginia, in which court said land was for many years held and managed as a trust estate. That said tract of land is wild and mountainous, and heavily timbered with valuable growth of poplar, oak, walnut, and other valuable trees, which constitute the principal and almost sole value of said land, the same being practically worthless for agricultural, grazing, and other like purposes, and wholly worthless for such purposes to your orator, and unsalable therefor; and the portion of said land which is situated in said district was purchased by your orator solely on account of the timber aforesaid, and for the purpose of cutting, manufacturing, and marketing the same, and employing your orator's capital therein, and securing the profits therefrom. That that portion of said tract of land which lies in the state of Virginia is bounded on the western side by the state of Kentucky, and on the northern and eastern sides by the state of West Virginia, towards which states all the creeks and streams flow, which form the natural and only roadways to and from said lands, and the timber upon said lands can only be practicably removed therefrom to the markets therefor by hauling or floating the same out of the said state and into the state of Kentucky or West Virginia; and the said creeks, especially Knox creek and its tributaries, and a wagon road leading therefrom down Bull creek, in West Virginia, to the Norfolk & Western Railroad, furnish ready means and facilities for the removal of timber from said land. That defendant Pleasants, under a pretended purchase from defendant Stuart, has wrongfully and unlawfully, and without the consent of, and against the warning and protest of, your orator, entered upon your orator's said land in said district, and has cut down, and is preparing and threatening to remove, a large quantity of valuable walnut and other timber, and to cut and remove other timber, and your orator believes and avers that, unless restrained by order of this court, said Pleas-

ants and his agents, and those claiming under him, will speedily remove the said timber out of said state of Virginia, to be removed and shipped away upon the cars of the Norfolk & Western Railroad. That prior to the cutting of said timber by said defendant the said Pleasants inquired of your orator's counsel the situation and location of his said land, with the proposed purpose of avoiding any act of trespass thereon, and was advised by your orator's counsel that said tract of land embraced nearly all the country drained by Knox creek and its tributaries, and the neighborhood from which the said Pleasants has since cut said timber as aforesaid, and was shown a map representing and delineating the survey as made by the said W. D. Sell, C. E. That defendant Stuart, under whom said Pleasants professes to have cut said timber, claims, as your orator is informed, to be the owner of some tract of land adjoining or overlapping the land of your orator, but your orator declares that said Stuart is not, nor is any one claiming under him, nor was any one under whom Stuart claims, ever in possession of said land, or any part thereof, and the same is entirely in possession of your orator, and, if said Stuart claims under any writing or paper title, the nature and character thereof is unknown to your orator, but your orator declares the same to be wholly null and void; and, if such paper title shall be disclosed, then your orator will, by proper amendment or proceedings, declare and pray for the same to be adjudged and decreed to be null and void, and that the same be canceled and set aside. That said Stuart is also, as your orator is informed, participating in, and is interested in, the cutting and removal of said timber. That the cutting and removal of said timber is a practical destruction of your orator's land, and of the principal, and almost sole, value thereof to him, and is a permanent and irreparable injury and damage to the said land and to your orator, for which he has no plain, speedy, and adequate remedy at law, and wherefore your orator comes into this, your honor's court of chancery, and prays: That this his bill of complaint be received and filed in the said court, and that your orator have process of subpoena thereon against the said D. S. Pleasants and H. C. Stuart, requiring them, and each of them, to appear, and answer the allegations of said bill. That the said Pleasants and Stuart, and each of them, their servants, agents, and all persons acting or claiming under them, or either of them, be enjoined and restrained from entering upon or cutting or removing timber upon that portion of your orator's land situate in said state of Virginia, and from buying, selling, or trafficking in timber cut or to be cut thereon. That a receiver be appointed to take charge of the timber already cut by said defendants, and dispose of the same under the direction of the court."

The defendant H. C. Stuart demurs to the bill, and assigns as grounds of demurrer:

"First. That the said plaintiff has a full, complete, and adequate remedy at law, and is not, therefore, entitled to relief in equity for the matters complained of in said bill. Second. The said bill is in other respects uncertain, informal, and insufficient, and for other reasons to be assigned at bar."

The first ground of demurrer, viz. "that the plaintiff has a full, complete, and adequate remedy at law, and is, therefore, not entitled to relief in equity for the matters complained of in said bill," presents a clearly defined and important question for decision. A demurrer to a bill in equity admits the truth of the allegations of fact in the bill so far as the same are well pleaded. 1 Fost. Fed. Prac. § 108. The defendants in this cause, by their demurrer, admit that the complainant has title to the land mentioned in the bill lying within this district, and that he is in possession of the same. They likewise admit that the defendants have no title to said land; that they are not in possession thereof. They admit that the land is wild and uncultivated; that it is heavily timbered with a valuable growth of poplar, oak, walnut, and other valuable trees, and is practically worthless for agricultural purposes; that it was purchased

by the complainant solely on account of the timber; that they have, against the protest of the plaintiff, entered upon said land, and have cut down, and are preparing and threatening to remove, a large quantity of valuable walnut and other timber; that they enjoy ready facilities for removing the same out of the state of Virginia into the states of Kentucky and West Virginia. They further admit the facts upon which it is alleged that these trespasses, if permitted to continue, will result in permanent and irreparable injury and damage to the land and to the plaintiff. Admitting these facts, the defendants insist that a court of equity cannot, by injunction, prevent an actual or threatened trespass going to the destruction of the growing timber, and thereby causing irreparable damage to the plaintiff. It has frequently been held by this court, and by the circuit court of appeals for this circuit, that, pending an action at law to try the title to land, an injunction will lie to prevent the cutting and removal of timber until the question of the title has been determined at law; that the interests of the parties should remain in statu quo pending the litigation of the title. The defendants in this cause insist that, as there is no action pending at law involving the title to the land, an injunction will not lie to prevent the destruction of timber, which the plaintiff alleges will result in irreparable injury to him. The contention of the defendants is that the plaintiff has a full, adequate, and complete remedy at law for any damage he may suffer by reason of the trespasses of which he complains; that this remedy is an action at law for damages, to be measured by the value of the timber removed. That this was the doctrine at common law is admitted, but that its strictness has been greatly modified by the decisions of courts of equity in England and in this country is too well established to admit of discussion. A leading case in this country on this subject is that of *Jerome v. Ross*, 7 Johns. Ch. 315. In this case Chancellor Kent, while closely adhering to the common-law doctrine, said:

"In ordinary cases, this latter remedy [an action at law] has been found amply sufficient for the protection of property; and I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass which go to the destruction of the inheritance, or where the mischief is remediless."

He further says:

"I do not know a case in which an injunction has been granted to restrain a trespasser merely because he was a trespasser, without showing that the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass."

As cautiously and carefully as Chancellor Kent states the law, it seems that his view of the doctrine would cover the case at bar, and entitle the plaintiff to an injunction. But the law of injunction against trespass has, since the decision in *Jerome v. Ross*, been relaxed and expanded until now it is held that an injunction will lie to restrain trespass whenever the injury done or threatened would result in irreparable injury, or the defendant is insolvent. It will also be granted where the entire wrong cannot be redressed by one action at law for damages; this on the principle that equity

will interpose by injunction to prevent a multiplicity of suits. The result of the recent English and American decisions is very clearly stated in *Pom. Eq. Jur.* § 1357, as follows:

"If a trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere. The principle determining the jurisdiction embraces two classes of cases, and may be correctly formulated as follows: (1) If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable,—that is, if the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced by means of compensation in money,—then the wrong will be prevented or stopped by injunction. (2) If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions. In both cases the ultimate criterion is the inadequacy of the legal remedy."

A note to this section says:

"The legal remedy is not adequate simply because a recovery of pecuniary damages is possible. It is only adequate when the injured party can, by one action at law, recover damages which constitute a complete and certain relief for the whole wrong,—a remedy virtually as efficient as that given by a court of equity. This conclusion is sustained by the consensus of modern decisions of the highest authority, although it cannot be claimed that the cases are unanimous in its acceptance."

In *Spell. Extr. Relief*, § 14, it is said that:

"Injunction will lie to prevent threatened trespass, though the damages be susceptible of compensation, or otherwise there is a probability of the wrong being often repeated, and plaintiff thereby involved in a multiplicity of suits."

In *Id.* § 346, it is said:

"Especially will relief be granted where trespass of cutting timber amounts to the destruction of the essential value of the estate in the character in which it has been enjoyed."

Beach, Mod. Eq. Jur. § 22:

"While, ordinarily, courts of equity will not interfere merely to redress a trespass, they will do so where the trespass is a continuing one, and a multiplicity of suits is involved in the legal remedy."

Id. § 721:

"Where trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy at law for damages is adequate, equity will not interfere; but, if repeated acts of trespass are done or threatened, although each of these acts, taken by itself, may not be destructive, or involve irreparable injury, and the legal remedy may, therefore, be adequate for each single act if it stood alone, the entire wrong may be prevented or stopped by injunction. * * * Equity will also interfere where the trespass is a continuous one, and the legal remedy would involve a multiplicity of suits."

The contention of counsel for the defendants that an injunction to prevent the destruction of trees is confined to trespasses which destroy groves kept for beautifying the owner's home or lands, or to shade and ornamental trees, cannot be sustained. The modern decisions apply the relief by way of injunction to coal, iron, and other mines, and to growing timber in a forest.

Applying the doctrine laid down in the authorities above quoted, I find no difficulty in deciding that the temporary injunction in this

cause was properly awarded, and should be perpetuated. The trespass committed is not a single act, temporary in its nature, and such as might be compensated for by a single action for damages, but is continuous from day to day, and, if permitted to continue, will ultimately result in the entire destruction of the valuable timber admitted to belong to the plaintiff. The damage done the plaintiff to-day by cutting his timber is the foundation for an action of damages. The measure of recovery, on the damages laid in the writ in an action brought for this trespass will be the injury suffered by the plaintiff to the time of bringing his suit. To-morrow the defendant commits further injury by cutting other timber, thus giving the plaintiff another cause of action, and requiring him to bring another suit, if he is to be remitted to his remedy at law; for it is not to be presumed that the plaintiff will stand idly by until the destruction of his property is complete, and, by his acquiescence, perhaps endanger his right of recovery of damages for the injury done him. This statement shows the multiplicity of suits to which the plaintiff would have to resort for redress, and at the same time it shows the futility of the plaintiff's remedy at law,—a remedy which must be full, complete, and adequate. The remedy by an action at law for damages against a trespasser may have been an efficient remedy at common law. But at this day, when property of all kinds readily and easily changes hands; when a man who is solvent to-day may be insolvent to-morrow; when the ready means of transportation quickly conveys personal property from one section of the country to another, perhaps out of the jurisdiction of the courts which have been established for the protection of property rights; and when we consider the long delays that often precede a trial, a judgment, and execution,—we see how entirely inadequate is the remedy at law to secure compensation to a person whose property is destroyed by a trespasser. So far from his remedy at law being full, complete, and adequate, he may find himself, at the end of his litigation, with a naked execution in his hands, with no means for its satisfaction. In the meantime his most valuable property interests have been destroyed.

The only remaining question for discussion is: Is the damage that will result to the plaintiff if the defendants are permitted to cut and carry away his valuable timber irreparable? It must be conceded that every man has a right to enjoy his own property in his own way; that he has a right to say how long he will keep it, and when and how he will dispose of it. In the case of a heavily-timbered tract of land, like that of the plaintiff, it is his right to say what part of it, if any, or what particular trees or kinds of trees, he will cut, and what he will leave standing. It is difficult to find any kind of property that will suffer more by unrestrained trespasses, or that is more difficult to be compensated for in damages after its destruction than a forest of growing timber such as the plaintiff's. The trees are increasing in size and value from year to year; the younger trees are constantly reaching nearer the size at which they can be profitably utilized, and are constantly rendering the estate more valuable. Coal and ore, if taken from mines, may

be measured as to quantity and value. They have no increasing value by reason of growth, but are of fixed quantity. Yet the removal of coal and ore from mines is held to work irreparable damage to the property of the owner of the mine. The court knows of no measure of damages that could be adopted by a jury that would properly estimate what would be the value of a body of timber five years hence that is destroyed by a trespasser to-day. The court has no hesitancy in holding that the destruction of the plaintiff's timber by the defendants, as they threaten to do, and were doing when restrained, would result in irreparable damage to the property of the plaintiff, and that the plaintiff is entitled to the protection of a court of equity.

The bill is not uncertain, informal, and insufficient, as alleged in the second ground of demurrer, and this ground of demurrer requires no discussion. The demurrer will be overruled. The temporary injunction heretofore awarded was properly awarded, and will be continued in force.

MORGAN v. NUNN.

(Circuit Court, M. D. Tennessee. January 24, 1898.)

No. 3,152.

1. CIVIL SERVICE LAW—POWER OF REMOVAL.

With the exception of section 13 of the act of January 16, 1883, which prohibits promotion, degradation, removal, or discharge of any officer or employé for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose, no legislative declaration expressly bearing upon removals from office is made.

2. SAME—EXECUTIVE RULES.

Civil service rules promulgated by the executive, so far as they deal with the executive right of removal, are but expressions of the will of the president, and are regulations imposed by him upon his own action, or that of heads of departments appointed by him. They do not give the employés within the classified civil service any such tenure of office as to confer upon them a property right in the office or place.

3. SAME—INJUNCTION.

A court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointment of another. *Priddie v. Thompson*, 82 Fed. 186, disapproved.

Frank P. Bond, for plaintiff.

S. Brown, U. S. Atty., and Chas. C. Burch, Asst. U. S. Atty., for defendant.

LURTON, Circuit Judge. The complainant, William C. Morgan, is a general clerk in the office of the collector of internal revenue for the Fifth district of Tennessee. He was first appointed and qualified during the incumbency of Frank P. Bond as collector; and while serving under that appointment the position was placed within the classified service by the executive order of November 2, 1896, promulgating amended civil service rules, and extending the executive civil service so as to include places of the character held by complainant. Upon

the expiration of the term of office of said Bond, the defendant, David A. Nunn, was appointed and qualified as collector, and said Nunn thereupon reappointed Morgan to the place of general clerk, and took from him a new bond and oath of office. The bill avers that said Nunn, in violation of the civil service law, is now seeking to degrade or remove complainant, and appoint another in his place, wholly upon the ground that complainant is a Democrat; the defendant being a Republican. To accomplish this purpose, the bill charges, said Nunn, well knowing that no charges had been or could be successfully preferred against complainant, and well knowing that complainant had faithfully and diligently discharged all the duties incumbent upon him as a general clerk, and well knowing that complainant had not applied for, and would not accept, the place of storekeeper and gauger, had nevertheless recommended him for such an appointment to the commissioner of internal revenue, and that the latter had made the appointment as requested, and forwarded to complainant a bond to be executed for the discharge of the duties of storekeeper and gauger. This bond complainant returned without having executed same, and notified both the commissioner and collector that he had never applied for such a place, and would accept no such appointment. The bill then charges that the collector has announced his purpose to remove complainant, and to appoint another in his room and stead, and that he will do so unless restrained, to the irreparable damage and injury of complainant. The place of storekeeper and gauger is a place much less desirable, in point of character and salary, than that held by complainant. A restraining order was granted to preserve the statu quo until formal application could be made for a temporary injunction. By direction of the attorney general, the district attorney for this judicial district has appeared for the defendant, and has filed a demurrer, questioning the jurisdiction of the circuit court to grant the relief sought.

The act of January 16, 1883, commonly called the "Civil Service Act," deals in no direct way with the tenure of office of those persons then, or who might thereafter be, included within the classified service. Nor does it make any declaration expressly bearing upon the subject of removals from office, except in the single provision found in the thirteenth section, which prohibits any promotion, degradation, removal, or discharge of any officer or employé for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose. It is now well settled that, in the absence of constitutional or statutory regulation, the power of appointment carries with it, as an incident, the power to remove. This was first authoritatively determined in respect to appointments vested by the constitution, or by act of congress, in the president, judges of United States courts, and heads of departments, in the case reported as *In re Hennen*, 13 Pet. 230; the question there being as to the power of a district judge to remove a district court clerk. The doctrine of that case was followed, in an elaborate opinion, in *Parsons v. U. S.*, 167 U. S. 324, 17 Sup. Ct. 880. The civil service act prescribes no tenure of office, and does not deny the power of removal, except in the particular mentioned. The executive rules in force prior to November 2, 1896, in no way undertook to regulate removals; and it is a part of the

history of the country that removals were constantly made, at the will of the appointing power, down to the promulgation of the amended rules of November 2, 1896, and those of July 27, 1897. By paragraph 3 of rule 2 of the civil service rules promulgated by President Cleveland November 2, 1896, it was provided that:

"No person in the executive civil service shall dismiss, or cause to be dismissed, or make any attempt to procure the dismissal of, or in any manner change the official rank or compensation of, any other person therein, because of his political or religious opinions or affiliations."

This rule was amended July 27, 1897, by President McKinley, who added a new paragraph, as paragraph 8, in these words:

"No removal shall be made from any position subject to competitive examination, except for just cause, and upon written charges filed with the head of the department, or other appointing officer, and of which the accused shall have full notice, and an opportunity to make defense."

That these authoritative orders of the chief executive have been, or are about to be, most flagrantly violated by the defendant, who is a subordinate executive officer, cannot be, and has not been, denied. But the question contested is the power of a court of equity to prevent such violation by the writ of injunction. This authority is questioned upon two grounds:

1. It is said that the civil service rules, so far as they deny the unrestrained power of removal, are not the law of the land, but are mere executive orders, dependent for their force upon the vigilance and earnestness of the chief executive in compelling his appointees to regard and obey regulations voluntarily imposed by him as a regulation by the appointing power of its otherwise unrestrained liberty of removal. To this contention I am constrained to yield my assent. These rules regulating the power of removal were made by the president, and may be repealed, altered, or amended at his pleasure. Prior to November 2, 1896, no such restraints existed; and, if after that date they came into force, it was alone by virtue of an executive order. Law is not thus enacted, altered, or amended. Law must be an expression of a rule of action by the legislative authority. These civil service rules, so far as they deal with the executive right of removal,—a right which is but an incident of the power of appointment,—are but expressions of the will of the president, and are regulations imposed by him upon his own action, or that of heads of departments appointed by him. He can enforce them by requiring obedience to them on penalty of removal. But they do not give to the employés within the classified civil service any such tenure of office as to confer upon them a property right in the office or place.

2. Another and equally serious objection to the power of this court to grant relief is found in the fact that a court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointment of another. This is a general limitation upon the power of courts of equity, regardless of whether the removal is from a federal, state, or municipal office. In *Re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, the jurisdiction of a United States court of equity to restrain by injunction the removal of a public officer was involved, and also its juris-

diction to enjoin a criminal proceeding. As to the power to enjoin a threatened removal, Justice Gray, for the court, said:

"It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error, or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure established by the common law or by statute."

In support of this conclusion the learned justice cited many cases, —among them: *Attorney General v. Clarendon*, 17 Ves. 491-498; *Tappan v. Gray*, 9 Paige, 507-512; *Hagner v. Heyberger*, 7 Watts & S. 104; *Updegraff v. Crans*, 47 Pa. St. 103; *Cochran v. McCleary*, 22 Iowa, 75; *Delahanty v. Warner*, 75 Ill. 185; *Sheridan v. Colvin*, 78 Ill. 237; *Beebe v. Robinson*, 52 Ala. 66; *Moulton v. Reid*, 54 Ala. 320. To these authorities I may add the following: *Muhler v. Hedekin*, 119 Ind. 481, 20 N. E. 700; *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683; and *People v. Canal Board of New York*, 55 N. Y. 393.

"The office and jurisdiction of a court of equity, unless enlarged by statute, are limited to the protection of rights of property." In *re Sawyer*, 124 U. S. 210, 8 Sup. Ct. 487; *World's Columbian Exposition v. U. S.*, 18 U. S. App. 159, 6 C. C. A. 58, and 56 Fed. 654. The distinction between the jurisdiction of courts of law and courts of equity is most rigidly observed in the circuit courts of the United States, and the powers of a circuit court as a court of equity will not be exercised unless a case is made coming under some acknowledged head of equity jurisdiction. In respect to the exercise of equitable jurisdiction over public officers, the court of appeals of New York well expressed the rule in *People v. Canal Board of New York*, 55 N. Y. 393, when it said:

"A court of equity exercises its peculiar jurisdiction over public officers, to control their action, only to prevent a breach of trust affecting public franchises, or some illegal act, under color or claim of right, affecting injuriously the property rights of individuals. A court of equity has, as such, no supervisory power of jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made, coming within one of the acknowledged heads of equity jurisdiction."

The question of the power of a court of equity to restrain removals contrary to the provisions of the executive rules for carrying into effect the civil service act has of late been frequently before the courts. In the case of *Wood v. Gary*, a case in the superior court of the District of Columbia, not yet reported, where the opinion was by Justice Cox, and in *Dudley v. James*, 83 Fed. 345, where the opinion was by Judge Barr, and an unreported case, before Judge Rodgers, decided in the circuit court for the district of Western Arkansas, conclusions were reached identical with those I have indicated upon both points of the defense. The same questions arose before Judge Jenkins in *Carr v. Gordon*, 82 Fed. 373, and in *Taylor v. Kercheval* (before Judge Baker) 82 Fed. 497, and was by each of those learned judges elaborately considered; and both came to the conclusion that the rules regulating removals in the classified service were mere executive orders, not having the force or effect of law, and that, aside from this, a court of equity will not, by

injunction, prevent a removal from office, or restrain an appointment. A contrary view was taken by Judge Jackson, of the district of West Virginia, in *Priddie v. Thompson*, 82 Fed. 186, but I find myself unable to concur with the reasoning of that learned judge.

In High, *Inj.* § 1315, it is said:

"While courts of equity refuse to interfere by the exercise of their preventive jurisdiction to determine questions relating to title to office, they frequently recognize and protect the position of officers de facto by protecting such positions against the interference of adverse claimants."

There are possibly exceptional cases where one, having a vested right to an office, and who is in actual possession, is about to be dispossessed, by force and unlawfully, where equity may, without trying the title to the office, restrain such unlawful interference by a claimant to the office, and compel the latter to resort to legal remedies, and establish in a court of law his title. Certainly this is not such a case, but one clearly falling within the general doctrine announced authoritatively in *Re Sawyer*, heretofore cited. For the reasons indicated an injunction must be refused. The demurrer will be sustained, and the bill dismissed, with costs.

FLETCHER et al. v. HARNEY PEAK TIN-MIN. CO.

(Circuit Court, S. D. New York. December 27, 1897.)

1. RECEIVER—COURTS OF PRIMARY AND LOCAL JURISDICTION.

In the settlement of the accounts of a receiver of a corporation, in the federal court of primary jurisdiction, the directions previously given by that court will control in matters of general administration; and the directions of the federal court of another circuit, by which he was also appointed receiver, will control in matters of local administration in the latter circuit, and the question as to what shall be done with personal property within the jurisdiction of the local court, and incumbered with a local lien, is pre-eminently a matter of local administration.

2. TAX—LIEN ON ASSETS—LOCAL LAW.

The question of whether local taxes upon the property of a corporation, in the hands of a receiver appointed by the federal court of the circuit where the property is, are regular, and constitute a lien on the property, is a question of the local law, and is to be determined by that court, and its determination thereof is to be followed by the court of primary jurisdiction in another circuit.

3. SAME.

In such a case, however, the court of primary jurisdiction, when enlightened by the argument of all parties to the litigation, including some not represented in the local court, may appropriately indicate its views as to the course best calculated to save the property from sacrifice, and at the same time preserve the rights and secure payment to the local creditor: but an order embodying such directions is subject to the approval of the local court.

David C. Willcox and Hugh L. Cole, for the motion.
Louis Marshall, opposed.

LACOMBE, Circuit Judge. It appears that an order has been made in the district where the property is situated directing the receiver to sell the personal property there, and pay the overdue state taxes on or before January 3, 1898. Although this court first ap-

pointed a receiver, and may be considered the court of primary jurisdiction, it is thought that the local court is, under the ruling of the four circuit justices in the Case of the Northern Pacific Railroad, the tribunal which may more properly care for the rights of local creditors. Whatever order may be made here, therefore, would be in no way controlling of the circuit court in South Dakota. It would, however, be an expeditious and convenient way in which to indicate the views of the court of primary jurisdiction, enlightened by the argument of all parties to the litigation (including some not represented in South Dakota), as to what course would be best calculated to save the property from sacrifice, and at the same time preserve the rights and secure payment to the local creditor. The point urged by the defendants, that the taxes are irregular and not a lien, is not open here. It involves a question of the local law, which has been decided by the federal court there, and that decision this court will follow. The taxes are to be treated here as a debt, secured by lien on the property, which must be first paid out of the proceeds of such property. This property is of different kinds. A part, no doubt, is susceptible of ready transmission to some trade center, where it can probably be disposed of as favorably at one time as another. Other valuable machinery is not salable on the spot, and presumably cannot be disposed of on any reasonable terms during the winter season. It is thought, however, from what is shown in the papers and report of the receiver, that if the time for sale can be extended, and opportunity given to discover possible purchasers, and to make terms with them, enough can be realized, not only to pay the taxes with accumulated interest, but also to leave a considerable balance available for the costs and expenses of the receivership and other claims against the property. The tax collector, however, should not be asked to wait till all the property is sold, but should be paid on account, if he will accept on account, the proceeds of any sales that may be effected, as soon as they are made. An order may therefore be entered authorizing and directing the receiver to sell forthwith all the personal property of the receivership in South Dakota, at public or private sale, and in such separate lots as he may deem most advantageous; all such sales, however, to be completed before the 1st of June, 1898. All such property, however, as may be presently salable, is to be disposed of as quickly as it can be conveniently got to a proper market; and, as soon and as often as \$500 or over is realized from any sale or sales, the money thus realized shall be tendered to the proper officers as payment on account of the overdue taxes.

It will probably happen that, when this expression of opinion reaches the circuit court in South Dakota, that court may modify its former order, either to conform to this one, or in such other way as may commend itself to the discretion of that tribunal. The receiver will, of course, obey the order of that court touching the disposition of all property there, since in the settlement of his accounts it will be held here that, in case of any conflict, the directions of the primary court will control in matters of general administration, and the directions of the local court will control in matters of local administration, and the question as to what shall be done with personal property

within the jurisdiction of the local court, and incumbered with a local lien, is pre-eminently a matter of local administration. It seems unwise to require the master to report back to this court the terms of any proposed sale before closing the contract. He might thus, in many instances, lose the sole chance of a favorable market. For any abuse of his discretion himself and his bondsmen would respond, and his own judgment may safely be relied on, since he is no mere lay receiver, but a mining expert of large experience, who possesses the confidence of all parties. When it is considered that the alternative is the sale of all this property at public auction in the depth of winter, at a point possibly inaccessible on the day of sale through climatic conditions, the propriety of leaving it to him to sell, even on private terms, is surely manifest.

Motion having been made at the same time to pass the receiver's accounts, the same are ordered on file, and an order in the usual form, referring them to Arthur H. Masten, Esq., one of the masters of this court, for examination and report, may be made.

SMITH v. LEE et al. (DILLON, Intervener).

(Circuit Court, N. D. Iowa, E. D. January 13, 1898.)

1. PLEDGE—SALE BY PLEDGEE.

The owner of stock, who has pledged the same under an agreement giving pledgees the right to sell at public or private sale, without advertisement or notice, at their discretion, cannot compel an accounting by the pledgees and purchasers of a portion of the stock, or the establishment of a trust with respect to the same, because such stock was sold for less than its value, when, a month prior to the sale complained of, other shares of the pledged stock were sold at the same price, with the consent of the owner, and at the time of the latter sale neither the pledgees nor the purchaser had knowledge of a transaction calculated to enhance its value, and the sale was conducted by the pledgees in good faith, and with regard to the interests of the owner.

2. SAME—FRAUD.

A pledgor of stock, who specially consented to a sale of a portion of the same to a particular person at a price proposed by him, will not be allowed in equity to assert that his consent extended only to sales made to that person, with whom he claims to have been an interested party, and with whom he shared the profits at the expense of his creditors.

3. PLEDGE—SUBSTITUTION OF COLLATERAL.

A person who substituted stock owned by him for that pledged by another cannot claim that he did not know that, under the terms of the pledge as originally made, the stock was subject to public or private sale, without advertisement or notice, when the substitution was under such circumstances as to lead the pledgee to believe that there had been an exchange between the parties, and the substituted shares were the property of the pledgor, to be dealt with as those originally pledged.

Wm. Graham, for complainant.

Alphonse Matthews, for intervener.

Henderson, Hurd, Lenehan & Kiesel and Longueville & McCarthy, for defendants.

SHIRAS, District Judge. From the evidence in this case it appears that prior to July 1, 1891, there was organized a corporation at

Dubuque, Iowa, known as the Dubuque Specialty Machine Works, and that 350 shares of the capital stock therein was issued to A. Ferris Smith, the present complainant. This stock on July 20, 1891, was pledged by Smith to D. M. Hillis, of Chicago, to secure pre-existing debts for \$15,000, due to Hillis and other parties represented by him, and subsequently, with the consent of Smith, 100 shares of the stock was transferred through L. R. Giddings to the Dime Savings Bank of Chicago as collateral to a note for the sum of \$5,628.33, dated September 9, 1892, payable on demand to the order of L. R. Giddings, and executed by Smith. The remaining shares of stock were left in the hands of Hillis as security for a debt which was several times extended by new notes, the last ones being dated January 10, 1894, and payable 30 days after date. These notes to Hillis and Giddings contained a description of the shares of stock pledged as collateral with the statement, "which I hereby give the said legal holder of said note, his agent or assigns, authority to sell, or any part thereof, on the maturity of this note, or at any time thereafter or before, in the event of said securities depreciating in value in the opinion of said legal holder of said note, at public or private sale, at the discretion of said legal holder of said note, or his assignee, without advertising the same, or demanding payment, or giving me any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same." These notes were not paid by Smith, and, so far as the evidence discloses, remain yet unpaid, except by the crediting thereon of moneys received from sales of the collaterals deposited for the security thereof. At a date subsequent to the original pledging of the stock as collateral, Smith wished to raise money to aid him in his efforts to sell the patents and property of the Dubuque Specialty Machine Works, and to that end arranged with the intervener, Timothy Dillon, who was a large stockholder in the company, that 100 shares of the stock owned by Dillon should be substituted for a like number of Smith's shares pledged to Hillis, and the latter should be used in raising money needed by Smith. This exchange was made with Hillis, the reason assigned for the exchange being that it was proposed to raise the money by a sale of the 100 shares of stock to parties living in Dubuque, who would not be likely to buy the same if it appeared that the stock offered for sale belonged to Dillon, who was a heavy shareholder, and at the time the managing director, of the company. By December, 1892, the conclusion was reached that the Dubuque Company could not carry on the manufacture and sale of the mortising machines to good advantage, these machines being made under certain patents owned by the complainant and the company, and a written agreement was entered into between the complainant and the company under date of December 29, 1892, whereby the company agreed to sell to complainant, or to any one to whom he might direct, the letters patent owned by the company, and all machinery, tools, drawings, and patterns belonging to the company, for the sum of \$200,000, the sale to be completed within six months. It is shown by the evidence that this contract was not deemed to be a sale on part of the company to complainant, but it was executed as evidence that complainant had

the right to make sale of the property of the company named in the agreement upon the terms therein stated. Armed with this authority, Smith went to New York and Connecticut, and endeavored to make a sale of the property to third parties, and continued these efforts without success up to the spring of 1895. During this period it seems that disagreements respecting the company affairs had arisen between the directors, and it seemed important to the disagreeing parties to obtain control of a majority of the capital stock of the company with a view to the annual election of directors, which would take place in June, 1895. In April of that year the intervener, Dillon, went to Chicago, and entered into negotiations with Hillis for the purchase of the stock, or a part of it, held by Hillis as collateral to Smith's note. His final offer was to pay \$25 per share, or 25 cents on the dollar. Thereupon Hillis telegraphed to Smith, in New York City, as follows: "Dillon here. Offers twenty-five dollars per share for stock. Shall I sell? Answer,"—and received a reply in the following terms: "Proposition from Dillon satisfactory to me." Hillis thereupon sold to Dillon 110 shares of the stock for \$25 per share, and credited the proceeds on Smith's indebtedness, and he also informed Dillon that he could sell him the balance of the pledged stock at the same figures, and Dillon agreed to let him know whether he would take it immediately after his return to Dubuque. On April 23d Dillon wrote to Hillis that the company might have to look up new quarters for their business, which would entail an assessment on the stock; that the company were in receipt of a letter from Smith, requesting an extension of his contract authorizing him to sell the patents and other property until July 1st, and that for the present he would drop the negotiations for a purchase of the stock held by Hillis. Under date of May 2, 1895, Dillon again wrote to Hillis, stating:

"With the stock now in my possession, I have been able to form a combination that gives us full control, and will protect us from further assessments, except where absolutely necessary to run the business, and leaves us in position to close out should we find it for the best interests of the stockholders to do so. I believe I could sell your stock, but it would have to be at a less price than we talked of. If you want to sell, and make the price right, I think I could dispose of it for you. I will do nothing in the matter until I hear from you, and know that I can deliver the stock, should I be able to make the sale."

On or about May 20, 1895, the defendant Lee went to Chicago for the purpose of buying the stock pledged by Smith. He testifies that he had learned that Dillon was endeavoring to obtain control of sufficient of the stock to bring about a change in the directory of the company, and, after a discussion of the situation with Dr. Staples, the then president of the company, he went to Chicago for the purpose named. He called upon Hillis and W. R. Plumb, an attorney, who represented and acted for the Dime Savings Bank, and, after some discussion, agreements were entered into on the 21st of May, 1895, whereby the parties named agreed to sell the pledged stock to Lee for \$25 per share, and to deliver the same upon the payment within 10 days by Lee of the price agreed upon. Thereupon Lee returned to Dubuque, and within the 10 days succeeded in making

sales of the same to Dr. Staples and the other named defendants, retaining 50 shares for himself; and, the purchase price having been remitted, the 250 shares of stock were transferred to him, and subsequently new certificates were issued and delivered to the several parties who had become interested in the purchase. It also appears that during the month of May, 1895, negotiations were pending between the complainant, Smith, and F. G. Platt with regard to a purchase of the patents and property of the Dubuque Specialty Machine Works, which resulted in the making of a written agreement, dated May 15, 1895, in which it was recited that:

"Whereas, it is proposed to organize and establish in New Britain, Conn., a corporation to be known as the New Britain Machine Co., with a capital stock of \$300,000, for the purpose of purchasing the patents, machinery, stock, fixtures, etc., of the J. P. Case Engine Co. and the Dubuque Specialty Machine Co., and to manufacture the Case engine, and the chain mortising machine: Now, therefore, it is agreed by A. Ferris Smith, of Chicago, that he will deliver and assign to said Co., to be organized, all of the patents now granted or pending in the U. S. and Canada referring to chain mortising machines and which are now owned by the Dubuque Specialty Machine Co., upon receipt of \$100,000 of the paid-up stock at par of the New Britain Machine Co., to be organized, and \$125,000 in cash. * * * Said payment of stock and cash to be made at as early a date as possible, but not later than June 15th, 1895."

From the evidence it appears that the final completion of this proposed arrangement was dependent upon the success of Platt in securing sufficient subscribers to the capital stock of the proposed company at New Britain, and upon the further question whether, upon examination of the property and patents of the Dubuque Company, they were found to be as represented. It appears that after some days' delay Platt obtained sufficient stock subscriptions to organize the New Britain Company, and a committee was appointed to visit Dubuque, to examine the patents and property of the Dubuque Company. Upon visiting Dubuque, and examining the property, the committee, under date of June 22d, made a written proposition, addressed to Smith, to purchase the property and patents of the Dubuque Company for \$100,000, to be paid in cash, and \$75,000 in stock of the New Britain Company, to be organized with a capital stock of \$250,000. This proposition was accepted, and was finally completed by a transfer of the property and patents of the Dubuque Company to the New Britain Company, and the payment of the \$100,000 cash to the Dubuque Company, the stock received thereon going to the complainant, Smith. After the receipt of the cash paid on this purchase, dividends on the capital stock of the Dubuque Company were paid, amounting in the aggregate to the sum of \$51.50 on each share, which practically closed up the business of the company. When in Dubuque, in June, with the committee representing the New Britain parties, the complainant notified the defendants that he claimed that the sale of the stock by Hillis and the Dime Savings Bank to them was without authority, and, failing to get a settlement, on September 12, 1896, he brought this suit for an accounting, basing his right thereon on two general grounds: First, that Hillis and the Dime Savings Bank had no legal right to sell the stock pledged to them in the

manner in which the sales were made; and, second, that in making the purchase Lee acted for the other defendants, who had all combined to buy the stock at much less than its real value, knowing that Smith had made a contract with F. G. Platt, trustee, for the sale of the property of the Dubuque Company, which, if consummated, would give a large value to the stock, and that Lee concealed or misrepresented the facts to Hillis and Plumb, acting for the Dime Savings Bank, and was thereby enabled to secure a transfer of the stock for \$25 per share, when it was in fact worth over \$50 per share; and therefore, in equity, the defendants can be decreed to hold the stock in trust for complainant.

As already stated, the complainant, Smith, in the notes evidencing the debts for which the stock was pledged as security, had agreed that the holders of the notes might sell the stock at public or private sale, without advertising the same, or without demanding payment, or giving notice to Smith; and the validity of such contracts is recognized in Illinois, in which state these contracts were made, and were to be performed. *Cushman v. Hayes*, 46 Ill. 145; *Trust Co. v. Rigdon*, 93 Ill. 458; *Zimpleman v. Veeder*, 98 Ill. 613. These cases, however, also recognize the rule that, where a party undertakes to exercise a right to sell property pledged under contracts of the character of those contained in the notes executed by the complainant, he must have due regard to the rights and interests of the pledgor, and must not knowingly or carelessly make a sale which will result in injury to the interests of the pledgor; and the question is whether the facts show, as is the contention of the complainant, that in making the sales of the stock due regard was not paid to the interests of the pledgor in such sense that a court of equity would be justified in holding that the sales must be set aside, because in making them Hillis and Plumb failed to exercise due care, and thereby sacrificed the stock to the injury of complainant. The evidence shows that the debts secured by the stock were long past due. The holders of the securities had been lenient towards Smith, and had given him full opportunity to secure an advantageous disposition of the stock. When Dillon visited Chicago, in April, for the purpose of buying the stock, Hillis telegraphed to Smith in New York, stating that Dillon offered \$25 per share for the stock, and Smith replied that Dillon's offer was satisfactory. If Hillis had then sold the entire amount of the stock at those figures, no complaint could have been made on part of Smith. Dillon actually bought 110 shares, but left the trade open for the balance, but finally wrote Hillis that he personally did not want the remainder of the stock, but that he might sell it for him at a reduced figure. In the following month the sales were made to Lee at the same figures which Smith had said were satisfactory when offered by Dillon, and there is nothing in the evidence which shows that Hillis or Plumb had learned any facts showing a change in the value of the stock or in the situation which should have deterred them from accepting the offer of \$25 per share. Smith knew that Hillis was endeavoring to sell the stock, and he knew that he himself had said, in response to the telegram from Hillis, that Dillon's offer of \$25 per share was satisfactory; and it would seem, if there was negligence to be charged

to any one in this particular, it lies upon Smith, for, if his present theory be correct, he knew in the early days of May that there was a strong possibility of making a sale of the property of the Dubuque Company at a figure which would increase the value of the stock, and yet he did not write Hillis on the subject, but allowed him to remain under the belief that a sale at \$25 per share would be satisfactory to him. It is sought to explain this by the claim that Smith's answer to Hillis' telegram meant that a sale at \$25 per share to Dillon would be satisfactory, not because that was a fair value of the stock, but because Dillon and he were operating together, and that a sale to Dillon would be, in effect, a sale for his (Smith's) benefit, because he and Dillon would share in the benefit of the purchase. In other words, the theory seems to be that Hillis and the savings bank could lawfully make a sale of the stock to Dillon at \$25 per share, but could not lawfully make a sale to Lee at the same figures, because, in case of the sale to Dillon, Smith was interested, and would share in the profits to be realized on the purchase, which fact, however, was not made known to Hillis and the savings bank. The fact that Smith was willing to combine with Dillon in making the purchase from Hillis and the bank so that he might profit at the expense of his creditors, is certainly no good reason why a court of equity should interpose for his further benefit to set aside sales made of the stock at the figures which he had said were satisfactory to him.

It must therefore be held that the evidence fails to show any sufficient reason for holding the sales of stock to Lee to be invalid by reason of the want of proper care on part of Hillis and the Dime Savings Bank in protecting the interests of Smith as pledgor, and the next question is whether such sales can be invalidated on account of the action of Lee in making the purchase. In substance, the bill charges that the defendants, having knowledge that Smith had closed a contract for the sale of the property of the Dubuque Company, which, when carried out, would greatly increase the value of the stock, combined together to purchase complainant's stock at a low figure, so as to deprive him of the increased value, and secure the benefit for themselves; and to that end Lee went to Chicago, and induced Hillis to sell the stock at \$25 per share, by representing that the stock was of little value, was liable to an assessment which Smith would be unable to pay, and that the defendants were looking after the interests of Smith, and would protect him in case the stock was sold. In the evidence the only point relied upon to impugn the good faith of defendants in making the purchase is the alleged fact that when Lee went to Chicago he had knowledge of the contract of sale between Platt and Smith, because Smith had written a letter setting forth the matter to the company or its secretary, which was received in Dubuque, and its contents made known just before Lee went to Chicago; and the contention of complainant is that Lee and his associates learned through this letter that terms of sale had been reached which would greatly enhance the value of the stock, and that, for the purpose of reaping the benefit thereof, Lee went to Chicago, and, concealing the facts, succeeded in buying the pledged stock at far less than its real value. To sustain the contention of complainant, the burden is on him of proving that

the letter was written and sent to Dubuque, that its contents were such to show an agreement for a sale that would enhance the value of the stock, and that Lee knew the facts thus stated before he made the purchase of the stock. The letter is not produced in evidence. Smith kept no copy of it, and does not attempt to give its contents with any accuracy. Two or three of the witnesses for complainant at Dubuque testify with more or less directness to their recollections that such a letter was received, but none can give the date, nor do they agree as to its contents. In view of the fact that many letters had been received from Smith during the two years and a half in which he had been attempting to sell the property, and several had been received during April and May, 1895, it is entirely possible that all these witnesses have in mind the contents of letters written by Smith, but are confused as to the exact time they were written. Smith's testimony is that about the 7th day of May he and Platt had gotten practically to an agreement, which was, in substance, put in writing in the agreement dated May 15, 1895; that on the evening of the day, when Platt made the proposition, which he (Smith) said he wished to sleep over, he wrote to the Dubuque Company, stating that an arrangement had been reached for a sale of the property, and the contention of complainant is that the knowledge derived from the contents of this letter is what renders the purchase of the stock by Lee a fraud upon the rights of Smith. As already stated, neither the letter nor a copy thereof are produced, and no witness claims to be able to give its contents with any accuracy. Lee testifies that he never saw or heard of any such letter, and that when he went to Chicago, and purchased the stock in question, he had no knowledge of any contract of sale on part of Smith. Some light is thrown upon this point by the letter of May 16, 1895, written by Smith, at New Britain, Conn., to the Dubuque Company, which is as follows:

"Gentlemen: I have not been in New York for about a week, so have received no mail, if you have written. I rec'd the tools all O. K. De Witt forwarded them to me. I shall have something to say to you soon, but it is still uphill work to do much, and the load seems heavy to pull. I get everything to looking good, and then something turns up to upset the work of weeks. * * * I shall stick right to this now until settled one way or the other. Can't afford to give it any more time after the expiration of my present contract. I am writing a little blue, and yet I expect to make the deal, as I say I am bound to win if I don't get a dollar for myself out of it."

It seems hardly possible that, if Smith had written a letter about a week or so before the date of this one, in which he had stated that he had a sale practically completed, as is now claimed, he should have written one of the tenor of that just quoted, and not have made any reference to his former letter, or given any explanation why the former contract had not been completed.

Taking the entire evidence into account, it must be held that complainant has failed to prove that when Lee purchased the stock in Chicago he knew that a sale of the property of the Dubuque Company had so far progressed that he would be chargeable with fraud in making the purchase for the price offered by him, and it follows, therefore, that the complainant cannot rightfully call the defendants

to account for the stock which was thus bought from parties having the right to sell it under the authority given them by the complainant. The utmost claim that could be made on behalf of the complainant is that the equities and rights of the parties should be considered on the assumption that Hillis, the Savings Bank, and Lee, acting for the other defendants, knew the real facts of the situation when the stock was sold on the 21st of May, 1895. Experience had then shown that the company could not earn a profit by carrying on the business at Dubuque, and the hope of realizing anything of moment for the stockholders was dependent on selling out the patents and property to other parties. Smith had been engaged in the effort to make a sale for over two years, without success. He had held out promises of success, but had been so far disappointed in being able to accomplish anything, and he had obtained about all the money that the Dubuque friends of the enterprise were able or willing to advance him. In May, 1895, he was endeavoring to bring about a deal with F. G. Platt, but with regard to which he felt no more confidence than that shown in the letter of May 16th, already quoted from. He had succeeded in getting a preliminary agreement with Platt, but whether it would be carried out depended on many contingencies, the first one being whether Platt would succeed in getting stock enough subscribed to proceed with the organization of the company, and then whether, upon examination of the patents and other property of the Dubuque Company, the other parties would conclude to make the purchase. This was the situation when Hillis and Plumb sold the stock to Lee in Chicago. The utmost that can be said is that there were chances that the sale might go through, but fully as many that it would not. If it did, the stock would be worth 50 cents on the dollar; if it did not, the stock would be practically worthless. It could not be expected of Hillis and the bank that they would run so many chances of loss for the possible gain. They were justified for their own protection in taking advantage of the offers made them. If they had refused the price offered by Lee, and the deal with Platt had not been completed, they would not only have lost the sums realized, but they would have been liable to be called to account by Smith for their failure to make the sale. His claim would have been that they knew that there was no hope of realizing from the stock except by sale of it, and that its value was mainly speculative; that, in response to inquiry, he had said that a sale at \$25 per share was satisfactory to him; that they had the opportunity to sell at that figure, and that they could not refuse that sum, holding for an increased value, and compel him to run the risk of a speculative advance in price or a total loss in value. Certainly, under all these circumstances, it must be said that Hillis and Plumb, acting for the savings bank, acted prudently in making the sale at \$25 per share, in view of all the uncertainties and contingencies that then inhered in the situation; and if, with knowledge of the actual situation, it was prudent for them to sell, having regard for their own interests as well as those of the pledgor, it cannot be held that it was a fraud on part of the defendants to make the purchase, they having the same knowledge possessed by Hillis and Plumb, but no more. It must therefore be held that the complainant

has failed to make out a case against the defendants upon any of the grounds charged in the bill.

The intervener bases his right to a decree upon the theory that the 100 shares of stock which were substituted for an equal number owned by Smith, and originally pledged to Hillis, are still his property, and that he did not know the terms of the pledge, and never consented that the stock should be sold at private sale without notice. The evidence shows that the arrangement for the exchange of stock was made between Smith and Dillon, and under such circumstances that Hillis had the right to assume that the exchanged stock would become and remain the property of Smith, to be dealt with by Hillis the same as the shares originally pledged. The facts do not make it a case wherein Dillon pledged his property to secure a debt of Smith to Hillis, but simply a case wherein Smith's stock passed to Dillon and Dillon's to Smith, each becoming the owner of the stock exchanged; and therefore Dillon is in no position to claim an accounting from Hillis or from the defendants for the sale of the stock in question.

The bill of complainant will therefore be dismissed, at his costs, and that of the intervener at his costs.

HORST et al. v. ROEHM.

(Circuit Court, E. D. Pennsylvania. January 27, 1893.)

No. 42.

1. CONTRACT WITH PARTNERSHIP—EFFECT OF DISSOLUTION.

Upon the dissolution of a partnership, an assignment by one member to the others of his interest in a partnership contract does not release the other party to the contract from the performance thereof.

2. CONTRACTS—WHEN RIGHTS ARISING OUT OF CONTRACTS ARE ASSIGNABLE.

While rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided, it must appear, in order to preclude the transfer of rights arising out of a contract, that the relation of personal confidence is involved in the nature of the rights themselves.

3. CONTRACTS—RENUNCIATION OF—ACTION.

Where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other party may accept this as an anticipatory breach, and sue for damages before the time for performance arrives.

4. SAME—DAMAGES.

In such action, the measure of damages is the difference between the price named in the contract and the price at which it is shown plaintiffs could have made subcontracts for the delivery of the goods, according to their agreement with the defendant.

In pursuance of stipulation filed under section 649 of the Revised Statutes, this case was tried by the court without the intervention of a jury.

Finding of Facts.

On August 25, 1893, the firm of Horst Bros., composed of Paul R. G. Horst, E. Clemens Horst, and Louis A. Horst, the legal plaintiffs, entered into four

written contracts with John Roehm, the defendant, of which the following are copies:

"Hop Contract.

"Memorandum of agreement made and entered into by and between Horst Bros., doing business in the city of New York, parties of the first part, and John Roehm, party of the second part, witnesseth that the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for, and receive from the parties of the first part, one hundred (100) bales, prime Pacific coast hops, of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store, New York City, and to be paid for in net cash, ten days from date of arrival, at the rate of twenty-two (22) cents per pound. Time of shipment: 20 bales each month, March, April, May, June, and July, except as hereafter provided. If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and, in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and, in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery, to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive same. In witness whereof the said parties have hereunto set their hands, Phila., this 25th day of August, 1893.

"Horst Bros.

"John Roehm."

"Hop Contract.

"Memorandum of agreement made and entered into by and between Horst Bros., doing business in the city of New York, parties of the first part, and John Roehm, parties of the second part, witnesses that the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for, and receive from the party of the first part, one hundred (100) bales, prime Pacific coast hops, of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store, New York City, and to be paid for in net cash, ten days from date of arrival, at the rate of twenty-two (22) cents per pound. Time of shipment: 20 bales each month, October, November, December, January, and February, except as hereafter provided. If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and, in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of a majority of the three shall be final; and, in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery, to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive the same. In witness whereof the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

Horst Bros.

"John Roehm."

"Hop Contract.

"Memorandum of agreement made and entered into by and between Horst Bros., doing business in the city of New York, parties of the first part, and John Roehm, parties of the second part, witnesses that the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for, and receive from the party of the first part, one hundred (100) bales of prime Pacific coast hops, of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store, New York City, and to be paid for in net cash ten days from date of arrival, at the rate of twenty-two

(22) cents per pound. Time of shipment: 20 bales each month, March, April, May, June, and July, except as hereafter provided. If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and, in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of a majority of the three shall be final; and, in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery, to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive same. In witness whereof the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

Horst Bros.
"John Roehm."

"Hop Contract.

"Memorandum of agreement made and entered into by and between Horst Bros., doing business in the city of New York, parties of the first part, and John Roehm, parties of the second part, witnesses that the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for, and receive from the party of the first part, one hundred (100) bales, prime Pacific coast hops, of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store, New York City, and to be paid for in net cash, ten days from date of arrival, at the rate of twenty-two (22) cents per pound. Time of shipment: 20 bales each month, October, November, December, January, and February, except as hereafter provided. If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and, in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of a majority of the three shall be final; and, in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery, to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive same. In witness whereof the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

Horst Bros.
"John Roehm."

The months named in each of these contracts, respectively, as "time of shipment," must, under the custom of the trade, be understood as meaning the months so named which would follow next after the summer months of the year of the crop referred to in the particular contract. On June 23, 1896, the firm of Horst Bros. was dissolved, and Paul R. G. Horst assigned to his co-partners, E. Clemens Horst and Louis A. Horst, the use plaintiffs, all the interest of him, the said Paul R. G. Horst, in the said contracts. Upon June 23, 1896, a notice, of which the following is a copy, was addressed to and received by the defendant:

"June 23, 1896.

"Dear Sir: We beg to inform you that the partnership of Horst Brothers has been this day dissolved.

"Respectfully yours,

Horst Brothers."

To this, under date of June 27, 1896, the defendant replied, saying: " * * * I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm, * * * which, of course, you cannot fulfill. I therefore consider the contracts annulled, and will make other arrangements for the purchase of the hops I may need, and you may consider this as release from liability on your part to comply with the contracts." In answer to this, Horst Bros., in liquidation, addressed a letter to the defendant, which he duly received, in which it was said that he had misconstrued

the notice of dissolution sent out to the trade; that its meaning was that no new contracts would be made and no new business undertaken by the firm of Horst Bros.; and in which it was further stated that, "so far as the firm or business is concerned, the firm will discharge its obligations, and will try to collect its claims. It does not ask for any release or discharge, and will punctually live up to all the contracts which it has made with you." This communication was not replied to. In October, 1896, the first shipment of 20 bales of hops under the contracts was made, and the invoice and bill of lading covering that shipment were sent to the defendant, who on October 24, 1896, by telegram and letter, acknowledged receipt of the bill of lading and bill of particulars, but, upon the ground set up in his letter of June 27, 1896, declined to receive the hops. At the time of the defendant's refusal to receive the shipment above mentioned the plaintiffs could have made subcontracts for forward delivery, according to the contracts in suit, at the price of nine cents per pound for "prime Pacific coast hops, of the crop of 1896," and of eleven cents per pound for like hops, of the crop of 1897; and the differences between the prices fixed by the contracts sued on and those above stated, together with interest on the sum of such differences, from October 24, 1896, to this date, are as follows:

Difference between contract price, 22 cents per pound, and 9 cents per pound, on 200 bales, 39,200 pounds. @ 13 cents per pound	\$ 5,096 00
Difference between contract price, 22 cents per pound, and 11 cents per pound, on 200 bales, 39,200 pounds, @ 11 cents per pound	4,312 00
	<hr/>
	\$ 9,408 00
Interest from October 24, 1896, to January 27, 1895.....	710 30
	<hr/>
	\$10,118 30

Frank P. Prichard and John A. Garver, for plaintiffs.
Samuel Dickson and R. O. Moon, for defendant.

DALLAS, Circuit Judge. 1. The position taken by the defendant in his letter of June 27, 1896, and again upon the trial, is untenable. His contracts with Horst Bros. were not annulled by the dissolution of that firm, nor by the assignment of one partner's interest therein to his co-partners. To hold otherwise, it would be necessary to maintain that any dissolution of a commercial partnership, accompanied by a division of its executory contracts, would work their extinguishment, and the statement of such a proposition is, I think, its sufficient refutation. Of course, the other contracting party may, notwithstanding dissolution and regardless of the terms thereof, hold all the partners upon a partnership contract; and, on the other hand, the contractual rights of the latter continue to be enforceable, though only by action (as in this instance), in the name of all, to the use of such of them as, by agreement among themselves, may be entitled to the proceeds of recovery. The judgment in *Bank v. Hall*, 101 U. S. 43, is not opposed to this view of the law. The conclusion there reached was based, primarily and mainly, upon the actual non-existence of an asserted contract, and what, at the close of the opinion, was said respecting "the change of the firm," who, "if, in fact, there were * * * a contract," had been one of the parties to it, was unnecessary to the decision. But, aside from this, the facts of that case distinguish it from the present one, and the later decisions of the same court, hereafter cited, require that it shall be distin-

guished. Without pausing to point out the details of their dissimilarity, it will suffice to observe that, in the case referred to, the substance of the ruling was that a new party could not be imported into the contract there asserted, whereas, in the case now under consideration, as already said, the parties are still, both as to liability and right, precisely the same as those by whom the contract was originally made. "Rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." This statement of the law was adopted by the supreme court in *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 8 Sup. Ct. 1308. No statement more favorable to the defendant could be made, but the rule it embodies cannot avail him. The liability of all the members of the plaintiff firm continued after dissolution to be precisely what it had been before, and there is nothing whatever in the contracts to indicate that they "involve a relation of personal confidence" between the defendant and Paul R. G. Horst, the person who assigned to his co-partners. It was on the allegation that such confidence existed in fact that the defendant based his defense upon this point; and in support of this allegation the defendant testified, in general terms, to the effect that he had been influenced, or perhaps induced, to contract with the plaintiffs, by his reliance upon the judgment and fair dealing of Paul R. G. Horst, but the admission of this testimony was duly objected to by plaintiffs' counsel, and was received subject to that objection, and with reservation of judgment upon it. I have no doubt that it was irrelevant, and consequently I have excluded it from consideration, and have made no finding of fact with reference to it. As already indicated, I am of the opinion that "personal confidence," to preclude the transfer of rights arising out of contract, must be involved in the nature of the rights themselves, so that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided. If, from the nature of the subject, personal confidence be not implied, the fact, if conceded, that the personal participation of one of several contractors in carrying out the contract had been actually relied upon would be of no consequence whatever. *Delaware Co. Com'rs v. Diebold Safe & Lock Co.*, 133 U. S. 473-488, 10 Sup. Ct. 399.

2. This case is within the rule laid down in *Hochster v. De La Tour*, 2 El. & Bl. 678, and the other English cases cited in *Dingley v. Oler*, 117 U. S. 502, 6 Sup. Ct. 850. In the case last mentioned the supreme court, after remarking that the rule referred to had been followed by the courts of several of the states, but had been denied by the supreme judicial court of Massachusetts, declined to decide whether or not it should be maintained "as applicable to the class of cases" to which the one then before it belonged. The facts of that case were somewhat peculiar, and it is not quite clear that the court's declination to pass upon the applicability of the doctrine of *Hochster v. De La Tour* to it implied a doubt as to the propriety of its application in a case so plainly within that doctrine as is that now

presented. But, assuming the broad question to have been left open by the supreme court, I think that upon the preponderance of authority, as well as upon sound reasoning, it must be held that a right of action had accrued to the plaintiffs, with respect to all the contracts in question, at the time this suit was brought. There can be no doubt that this would be so under the law of England, and a diversity in the law, as administered on the two sides of the Atlantic, concerning the consequence to result from an absolute repudiation by one party of a commercial contract of this kind, is greatly to be deprecated. *Norrington v. Wright*, 115 U. S. 206, 6 Sup. Ct. 12. In my opinion, the argument of the court in *Daniels v. Newton*, 114 Mass. 530, was well and sufficiently answered by Judge Lowell in *Dingley v. Oler*, 11 Fed. 372. What is there said need not be repeated at length, but I may remark that I concur with that learned judge in thinking that the several state decisions cited by him (to which others might be added), as in conflict with *Daniels v. Newton*, are "founded in good sense, and rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic." Since the decision of *Dingley v. Oler*, the circuit court of appeals for the Sixth circuit has, in two cases (in both of which *Dingley v. Oler* was cited), stated the law to be that, "where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other party may accept this as an anticipatory breach of the contract, and sue for damages, without waiting until the time mentioned for the completion and fulfillment of the contract by its terms. * * *" *Brewing Co. v. Bullock*, 8 O. C. A. 14, 59 Fed. 87; *Lumber Co. v. Alley*, 43 U. S. App. 175, 19 O. C. A. 599, and 73 Fed. 603. In the absence of any controlling solution of the question by the supreme court, I do not hesitate to adopt this statement, supported, as it is, by the judgment of Judge Lowell, in *Dingley v. Oler*, as well as by the English authorities, and by the judgments of the courts of several of the states.

3. On behalf of the defendant it has been contended that "assuming that the action can be maintained, the measure of damages must be restricted to the loss, if any, upon the deliveries which should have been made prior to the bringing of the suit." I cannot yield assent to this proposition. It conflicts with the principle that the measure of damages in every case must be such as, when applied, will result in ascertainment of the sum necessary to make good the entire loss sustained by reason of the act or default which constitutes the cause of action. The plaintiffs were, by the act of the defendant, prevented from making the deliveries called for by the contracts. It is this anticipatory denial and obstruction of the right to deliver, not a tender and refusal, which is the ground of suit, and the measure which might otherwise have been applicable is therefore wholly inappropriate. The law of damages is not comprised in a set of arbitrary rules. Where a contract has been broken or a wrong has been committed, compensation must be made. This is the underlying principle, and any standard or measure which does not accord with it cannot be applied, but some other, which is fairly compensatory to the one party, and not unjust to the other, must be resorted

to. *Carroll-Porter Boiler & Tank Co. v. Columbus Mach. Co.*, 3 U. S. App. 633, 5 C. C. A. 190, and 55 Fed. 451. In this case the plaintiffs have shown that they could have made subcontracts for the delivery of the hops, according to their contracts with the defendant; and, whatever might be the rule in a case in which this could not be shown, I am of opinion that where, as in this instance, that fact appears, the difference between the price at which such subcontracts could have been obtained and the price named in the contracts between the parties is manifestly the amount of the loss actually suffered, and therefore must be the correct measure of the damages recoverable. *Hinckley v. Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875; *Mining Co. v. Humble*, 153 U. S. 549, 14 Sup. Ct. 876. There was some variance in the evidence respecting the price at which subcontracts could have been obtained. The evidence on behalf of the plaintiffs was that on October 24, 1896, the price for the crop of 1896 would have been $7\frac{1}{2}$ cents per pound, and for the crop of 1897 $9\frac{1}{2}$ cents per pound. But the evidence for the defendant tended to show, as to each crop, that the price would have been greater. In my findings of fact I have not accepted the extreme position of either side. I do not think I would have been justified in relying wholly upon any part of the evidence, and my conclusion was arrived at after carefully considering the whole of it, and giving to every portion of it the weight to which I believed it to be entitled. I have had in mind the right of the plaintiffs to compensation, but have also been especially solicitous to avoid doing injustice to the defendant. It is ordered that judgment be entered, as of this date, in favor of the plaintiffs, and against the defendant, in the sum of \$10,118.30.

HIBBERD v. SLACK.

(Circuit Court, S. D. California. December 6, 1897.)

No. 696.

1. PUBLIC LANDS—INDEMNITY SCHOOL LANDS—FOREST RESERVATIONS.

Rev. St. §§ 2275, 2276, as amended by Act Feb. 28, 1891, do not authorize a state to select indemnity lands in lieu of school lands which, after they have been surveyed and the title has thereby become vested in the state, are included within the exterior boundaries of a forest reservation.

2. SAME—SCHOOL LANDS WITHIN LIMITS OF RESERVATION.

School lands the title to which has vested in a state by their survey are not thereafter subject to the disposal of congress, and, although included within the limits of a forest reservation, they are not a part of such reservation.

3. SAME—CONSTRUCTION OF STATUTE.

Act Feb. 28, 1891, amending Rev. St. §§ 2275, 2276, does not contemplate an exchange of lands between a state and the United States, but only indemnity for loss to a state by reason of lands to which it is entitled being disposed of by the United States.

Action by I. Norris Hibberd against E. S. Slack.

Geo. E. Bates, for plaintiff.

Naphtaly, Freidenrich & Ackerman, for defendant.

WELLBORN, District Judge. This is an action of ejectment, for the recovery of the fractional S. W. $\frac{1}{4}$ of section 30, in township 6 N., of range 10 W., San Bernardino meridian, in Los Angeles county, Cal. The complaint alleges that on the 26th day of May, 1893, the surveyor general of California, acting as general agent of said state, and under authority of the act of congress of February 28, 1891, entitled "An act to amend sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes of the United States, providing for the selection of lands for educational purposes in lieu of those appropriated for other purposes" (26 Stat. 796; 1 Supp. Rev. St. [2d Ed.] p. 898), selected said fractional quarter section, in lieu of certain sixteenth and thirty-sixth sections of school lands, which had been included within the limits of forest reservations created by order of the president of the United States, under authority conferred upon him by the twenty-fourth section of the act of congress of March 3, 1891 (26 Stat. 1095); that this selection was accepted by the commissioner of the general land office, under his interpretation of the aforesaid act of congress of February 28, 1891; that on the 14th day of February, 1895, one Anders Paterson purchased said land from said state, and thereafter, for a valuable consideration, sold and assigned his certificate of purchase to plaintiff, who is now the owner thereof; that on April 17, 1896, defendant, without authority of plaintiff, and against his will, took, and continues to hold, possession of said land, and excluded, and now excludes, plaintiff therefrom. The answer does not controvert the foregoing facts, but denies that said facts make plaintiff the owner of the land, or entitle him to the possession of the same. In the answer, the further defense is set up that two of the school sections, which were the basis of the selections of the lands sued for, were surveyed by the United States, before they were included within the forest reservations, and that the title to said sections thereupon became, and still remain, vested in the state of California. Plaintiff demurs to the answer, on the ground that the same does not state facts sufficient to constitute a defense to the action. These pleadings raise the following question of law, to wit: Is the state of California entitled to select other lands, in lieu of the sixteenth and thirty-sixth sections of school lands, situated within the exterior boundaries of a public reservation, where said sections were surveyed, and became the property of the state, prior to the date when the reservation was created?

The aforesaid act of February 28, 1891, as indicated by its title, is simply amendatory of sections 2275 and 2276 of the Revised Statutes of the United States, which sections, thus amended, are as follows:

"Sec. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey in the field, which are found to have been made on sections sixteen and thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the state or territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said state or territory, in lieu of such as may be thus taken by pre-emption or homestead set-

blers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided, where any state is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof, by said state or territory, shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.' And it shall be the duty of the secretary of the interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the state or territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: Provided, however, that nothing herein contained shall prevent any state or territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands thereto embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

"Sec. 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the state or territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township, containing a greater quantity of land than one entire section, and not more than one-quarter of a township one-quarter section of land: Provided, that the states or territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.'"

1 Supp. Rev. St. (2d Ed.) p. 898.

Plaintiff contends that said act of February 28, 1891, so far as concerns the appropriation to and selection by a state of lands of equal acreage, in lieu of sections 16 and 36, included within a reservation, provides for two things: First, indemnity to said state for such of said sections as, before their surveys in the field, are included within a reservation, and thereby lost to the state; second, a plan by which the state may transfer or relinquish sections 16 and 36, after its ownership has become absolute by surveys in the field, to the United States, and obtain therefor other lands of equal acreage, where, subsequent to such surveys, a reservation has been created, whose exterior boundaries include said sections; this plan being, not a grant of lieu lands to compensate losses in school sections, but an exchange between the federal and state governments of lands which belong, respectively, to each. Defendant concedes the indemnity feature, as I have above distinguished it, of the act, but denies that said act gives to the state the right to select lands of equal acre-

age with the school sections, where the latter are included within the exterior boundaries of a reservation, subsequent to their survey in the field; that is, denies that the act provides for any exchange of lands between the federal and state governments. In a decision dated December 27, 1894, the then secretary of the interior, Hon. Hoke Smith, decided the precise question here involved adversely to plaintiff's contention. In re California, 19 Land Dec. Dep. Int. 585. Principles, however, contrary to those upon which that decision was based, have been subsequently applied, by the present secretary of the interior, in a decision bearing date January 8, 1897.

My opinion, after a careful consideration of the subject, is that plaintiff's construction of the act of February 28, 1891, so far as relates to an exchange of lands, cannot be maintained, although the reasons which have led me to this conclusion are different from those on which Secretary Smith rested his decision. In order to determine the question here involved, reference, of course, should be had first to the language of the act itself; and, if the intention of congress is clearly manifest therefrom, such intention will be enforced. Extrinsic aids to construction are decisive only where the language of a statute is obscure or ambiguous. To this effect, it has been well said:

"The cardinal rule of all statutory construction is that the meaning and intention of the legislature are to be sought for. This meaning and intention are to be sought, first of all, in the statute itself,—in the words which the legislature has chosen to express its purpose. If these words convey a definite, clear, and sensible meaning, that must be accepted as the meaning of the legislature; and it is not permissible to vary it, or depart from it, by reason of any considerations found outside the statute, or based on mere conjecture. In such case there is no room for construction. But if the words of the law are not intelligible, if there arises a substantial doubt as to their meaning or application, or if there is ambiguity on the face of the statute, then the endeavor must be made to ascertain the true meaning and intent of the legislature. And to this end, first of all, the intrinsic aids for the interpretation of the statute are to be resorted to. It should be read and construed as a whole. Its various parts should be compared. Each doubtful word or phrase is to be read in the light of the context. The interpretation clause, if there is any, should be examined to see if it defines or explains the ambiguous part; and light may be sought from the title of the act, the preamble, and even the headings of the chapters and sections. But if these intrinsic aids are exhausted without success, if there still remains a substantial doubt or ambiguity, then recourse may be had to extraneous facts, considerations, and means of explanation, always with the same object, to find out the real meaning of the legislature." Black, *Interp. Laws*, pp. 196, 197.

In construing the act of February 28, 1891, there are certain well-established principles of law, applicable to school sections, which should be constantly borne in mind, as follows: First. Title to a school section, if unincumbered at date of survey, then vests absolutely in the state. *Cooper v. Roberts*, 18 How. 173; *Heydenfeldt v. Mining Co.*, 93 U. S. 634. And this is the principle recognized and acted upon by the department of the interior. In re Colorado, 6 Land Dec. Dep. Int. 412; In re Virginia Lode, 7 Land Dec. Dep. Int. 459; In re Miner, 9 Land Dec. Dep. Int. 408; *Pereira v. Jacks*, 15 Land Dec. Dep. Int. 273. After title has thus vested, the section is not subject to any further legislation by congress. Therefore the

school sections which were the bases of the selections of the lands sued for in the case at bar, although situated within the limits of forest reservations, are not parts of such reservations. *Wilcox v. Jackson*, 13 Pet. 513; *Railroad Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112. Second. Until the surveys in the field of the school sections, to wit, 16 and 36, the United States has full power of disposition over them; and, by the exercise of this power, said sections may be lost to the state. Hence, and through various enactments of congress, has arisen the law of indemnity, whose cardinal doctrine is compensation for loss. Thus, it has been said, "the principle upon which indemnity is given to a state is for a loss. It is not given for that which the state has already received." *Poisal v. Fitzgerald*, 15 Land Dec. Dep. Int. 19.

Plaintiff concedes, in his brief, that up to the act of February 28, 1891, compensation for loss was the only theory on which a state could acquire other lands in lieu of school sections, but contends that said act introduced a new arrangement,—“a statutory expedient,”—for an exchange of properties between the United States and a state, whereby the former could reacquire sections 16 and 36 after they had vested in the state; such expedient being not only “novel,” but “contrary to the old maxim of indemnity law that indemnity is not allowed except for losses.” In order that plaintiff’s construction of said act may be clearly understood, I quote from his brief, as follows:

“The concluding sentence of the passage above quoted, from the decision of which review is asked, holds that the sections in question are not proper bases for indemnity, because they are not taken from the state; and in other passages it seems to be the understanding of the secretary that the state officers regard the inclusion of the sections within the reservation as an appropriation of them by the federal government, and ask for indemnity on the theory that the statutory exchange is forced upon the state. The real theory of those officers, on the contrary, is that the acceptance of indemnity for these sections is left entirely in the option of the state, and the exchange is not, and could not be, imposed upon them. And, so far as concerns the objection that the sections are not appropriated by the reservation, it is insisted on the part of the state that this is the essence of the new indemnity grant made by the act of 1891, and that the indemnity now claimed differs from all previous allowances of indemnity precisely in this fact: that it is not conditioned upon an antecedent loss or failure of the school grant, but is based upon a voluntary retrocession to the United States of lands to which the state has acquired title.

“It is claimed on behalf of the state that the school clause of the act of February 28, 1891, is intended to enable the United States to resume title to those surveyed school sections which are included within the forest reservations; and, to this end, indemnity is offered to the state, as an inducement to the surrender of her title in those sections, and the selection of indemnity is prescribed as a means and method of effecting such surrender. The motive which induced the United States to propose such an exchange of lands is sufficiently obvious. These forest reservations are established for the purpose of preserving the timber upon large areas of public land, and, to that end, it was, and is, pre-eminently desirable to eliminate from the reserved bodies the title of the state to the interspersed school sections. The expediency—one might say the necessity—of making the reservation a solid body of land, and the inconvenience—the actual peril—to the success of the forestry policy involved in allowing those sections to break the integrity of the reservation, have been urged in previous arguments. There is an injustice to the state in surrounding the sections with large tracts of land permanently and designed-

ly withdrawn from settlement, and the isolation of her lands must materially impair their value. * * *

"The irresistible conclusion is that the mineral lands and the sections in reservations, which are mentioned in the proviso, are in the same case; that both classes are lands included in the school grant, and vested in the state by survey; and that for such lands the United States proposes an exchange of title. That this is a novel provision, and perhaps an unexpected one, is readily conceded; and it is believed that the novelty of the statutory expedient makes the greatest difficulty in giving the proper construction to the act. We approach this enactment with strong preconceptions as to the nature of indemnity and the conditions of its allowance. The indemnity acts form a series beginning with the admission of Ohio, in 1802, and through many years the enactments of that character were substantially homogeneous in nature. The law of indemnity had in 1891 crystallized into a body of principles which were firmly established by long use, and had become almost venerable by their age. The more thoroughly one has studied this branch of the law, the more likely one is to be prepossessed against interpretations which involve contravention of such principles. The cardinal objection to the construction of the act of 1891 herein proposed is that it is contrary to the old maxim of indemnity law,—that indemnity is not allowed except for losses. Prior to that act no statute of general application had ever authorized a state to take indemnity in lieu of land which actually became vested in the state under the school grant. Lieu lands were given only for deficiencies in school sections, and no general provision existed for the exchange of such lands for public lands of the United States."

It may be well to state here that the preceding quotations, which I have referred to as parts of plaintiff's brief, are from an argument by C. A. Keigwin, Esq., of Washington, D. C., attorney for the state of California, on motion for a review of the decision of the secretary of the interior first above mentioned, and which argument plaintiff has appended to his brief, with the comment that it fully covers the points at issue herein. As a matter of convenience, such further references to that argument as may occur in this opinion will, like those above, be made to it as a part of plaintiff's brief.

Having thus stated plaintiff's contention, I will now assign the reasons why I am unable to concur therein.

1. The phraseology of the clause from which plaintiff derives the plan for an exchange of lands between the United States and the several states owning school sections cannot be fairly construed as making such an arrangement. This clause is as follows:

"And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory where sections sixteen and thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided, where any state is entitled to sections sixteen and thirty-six, or where said sections are reserved to any territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof, by said state or territory, shall be a waiver of its right to said sections."

The pivotal word of this clause is "included," and, to my mind, it refers, when read in the light of its immediate context, to those school sections which are constituent parts of a reservation, but not to those which, although shut in by its outer lines, are distinct from the reservation. This interpretation plaintiff combats, as follows:

"The word 'include' has two meanings. The first, which accords with its etymology, from 'claudere,' to shut, is 'to confine within; to shut up; to hold,—

as, the shell of a nut includes the kernel; a pearl is included in a shell.' Webster's Dictionary. The second, and derivative, meaning, is 'to comprehend; as, a genus the species, the whole a part.' In order to make this enactment applicable only to unsurveyed sections, we must interpret the word 'included' as meaning incorporated into the reservation, so as to form a constituent part of it. But this, as before remarked, is only a secondary and derivative meaning of the word. The primary sense implies a shutting in, the thing included being distinct from that which includes. The verb 'claudio' is habitually used in the classics in connection with the confinement of prisoners. 'Mare clausum' is a sea shut in by land, the sea being distinct from the including medium. And in this, its original sense, the word is presumably used, rather than in that secondary sense, which conveys the purely adventitious idea of incorporation and assimilation. These surveyed sections are certainly included in the reservation, hemmed in, embraced, surrounded, shut off, and segregated by the circumjacent reservation. It would be too much to say that such sections are not included, because they are not made part of the reservation. It is true that the word 'included' is broad enough to cover both classes of school lands,—the unsurveyed, which are included by being merged in the mass of unsurveyed lands; and the surveyed, which are included by being shut off and locked in by surrounding lands of different character. But the word can be applied to the former class only by an extension of its original meaning, while it must certainly apply to the latter class, because that class is within its primary, literal, and strictest sense."

The infirmity of this argument is its failure to consider that whether the word "include" is used in its primary or derivative sense depends largely, in many cases, as in the present, upon the immediate context; that is, the subject and object of the verb. This is illustrated with uncommon clearness by the very example which plaintiff quotes: "The shell of a nut includes the kernel." Webster defines a nut to be "the fruit of certain trees and shrubs, consisting of a hard shell inclosing a kernel." Thus, it appears that the word "shell," in the expression, "The shell of a nut includes the kernel," indicates with certainty that the verb "includes" has its primary meaning, namely, "to confine within, to shut up," etc. Suppose, however, that the expression were, "The nut includes the kernel." There, obviously, the verb "includes" would have its secondary signification, and imply that the kernel was a part of the nut.

Now, if the act of February 28, 1891, had provided that indemnity should be granted where the "exterior boundaries" of a reservation included sections 16 and 36, we might well conclude, unless there was something else in the statute to the contrary, that "included" was used in its primary sense; that is, "to confine within, to shut up, to hold." But the language of the act is that indemnity is granted where a "reservation" includes the school sections, or, rather, in the exact words of the statute, "where sections sixteen and thirty-six are * * * included within any * * * reservation." The word "reservation" shows that the word "included" is used in the secondary sense, as defined by Webster,—"to comprehend; as, a genus the species, the whole a part," etc.

Plaintiff, in his brief, seeks to fortify his position as to the meaning of the word "include," as follows:

"Taking up next the proviso which accompanies this grant of indemnity, there can be no possible doubt as to its meaning. The language is: 'Provided, where any state is entitled to said sections sixteen or thirty-six, or where said sections are reserved to any territory, notwithstanding the same may be min-

eral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof, by said state or territory, shall be a waiver of its right to said sections.' The first remark to be made upon this proviso is that the word 'embraced' is used in place of the word 'included,' and is manifestly intended as a synonym, and to designate the same lands, or a part of the same lands. Whatever ambiguity might be found in the word 'included,' the word 'embraced' can mean only lands within the reservation, and not forming part of it. Though like may include like, the thing embraced is necessarily something different and distinct from that which embraces. It may be granted that a reservation includes reserved lands, but it could scarcely be said that a reservation embraces its constituent parts. The dullest sense understands that lands embraced in a reservation are distinct from the reserved lands which embrace them. If lands included within a reservation may be unsurveyed school lands absorbed in the reservation, the lands embraced in a reservation must be school sections, which cannot be absorbed, but retain their identity, and remain distinct from the embracing body."

Plaintiff is manifestly right in assuming that the word "embraced" is a synonym of "included." I cannot agree with him, however, as to the meaning he attaches to the word "embraced." As defined by lexicographers, and as commonly used, it has, among others, the two meanings already ascribed to the word "include." Webster, for instance, defines the word "embrace" thus:

"(3) To encircle; to encompass; to surround or inclose. * * *

"(4) To include as parts of a whole, or as subordinate divisions of a part; to comprehend,—as, natural philosophy embraces many sciences."

As I have already said, with reference to the word "include," in order to determine in which one of its meanings the word "embrace" is used, an ordinarily safe criterion is the immediate context of the word. And here, as with the word "included," the statute speaks of the school sections "embraced" within a "reservation," not within the "exterior boundaries" of a reservation.

It is a somewhat striking coincidence that congress itself has used this word "embraced," and with reference to grants of school sections, in a sense directly opposite to that insisted upon by plaintiff, and conformable to the latter of the above definitions. The act of February 22, 1889, for the admission into the Union of the two Dakotas, Montana, and Washington, granted to those states, for school purposes, sections 16 and 36, with the following proviso, in section 10 of said act:

"Provided, that the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands restored to, and become a part of, the public domain." 25 Stat. 679.

It is obvious, that, in the proviso just quoted, the word "embraced" refers only to such lands as form constituent parts of the reservations.

Plaintiff takes no further notice of the words "otherwise disposed of," which occur in the granting clause now under consideration, than to say that they are immaterial to his argument. With this statement I am unable to agree. Said words refer to that part of the sentence which immediately precedes them, "or are included

within any Indian, military, or other reservation," and seem to imply that the inclusion within a reservation therein specified is such an inclusion as is a disposition of the land by the United States, which disposition, as conceded and before stated, could not be effected where the lands were surveyed before the reservation was created.

Plaintiff further insists that the word "entitled," as used in the proviso to the grant in question, means "having title," and that, as the state never acquired complete title until after survey, said proviso must refer to surveyed lands. This contention, I think, is not well taken. "Entitled" does not, ordinarily, have the meaning which plaintiff ascribes to it. When used to express the idea of ownership, it does not signify complete ownership, but merely a claim or right thereto. Thus, Webster defines the word:

"(2) To give a claim to; to qualify for, with a direct object of the person, and a remote object of the thing; to furnish with grounds for seeking,—as, an officer's talents entitle him to command. Burke."

"Entitled," therefore, refers to the inchoate claim before, rather than the absolute ownership after, survey. This interpretation is confirmed by the last clause of the sentence, "The selection of such lands in lieu thereof by said state or territory shall be a waiver of its right to said sections." This phraseology is not such as is commonly employed to designate the transfer or conveyance of a complete title to real estate. Indeed, it would be a striking anomaly to speak of a waiver of right to land, where it was intended to convey the idea of a transfer of absolute ownership. Moreover, the occasion of the proviso now under consideration, I think, is to be found in the next proviso to the act, which gives to or recognizes in any state or territory the right to await the extinguishment of the reservation, and to then take sections 16 and 36 in place; and this is the right which the state waives by selecting lieu lands.

2. Another unanswerable objection to plaintiff's construction of the act of February 28, 1891, is to be found in that part of said act which amends section 2276 of the Revised Statutes. It will be remembered that plaintiff, in his brief, concedes that the construction which he places upon the act of 1891 is "contrary to the old maxim of indemnity law,—that indemnity is not allowed except for losses." From this concession it follows, necessarily, that, if there is any clause in the act which shows clearly that it is not contrary to the "old maxim of indemnity law," then plaintiff's construction of the act is inadmissible. The act contains just such a clause, namely, the first clause of the first sentence of section 2276, as follows:

"That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the state or territory where such losses or deficiencies of school sections occur."

The clause just quoted is new matter, introduced into the section by the very act which plaintiff claims is contrary to the old maxim, "that indemnity is not allowed except for losses"; and yet this clause, by an implication as irresistible as if the fact had been expressly affirmed, declares that the grants and appropriations of lands made by the act are limited to cases where there are "losses or defi-

ciencies of school sections." These qualifying words, I repeat, are a part of the same act which makes the grants and appropriations of indemnity lands, and show unquestionably that the legislative intent was to limit said grants and appropriations to cases where the school sections were lost to the state, either in whole or in part.

The case of *Johnston v. Morris*, 19 C. C. A. 229, 72 Fed. 890, cited by plaintiff, so far from being favorable to, is strongly against, his contention, for Judge Morrow evidently had prominently in view, in connection with the act of February 28, 1891, the maxim above stated, "that indemnity is not allowed except for losses." At page 895 of 72 Fed., and page 234, 19 C. C. A., discussing the decision of the secretary of the interior, Judge Morrow says:

"The secretary held that California took her school grant under section 6 of the act of March 3, 1853, and section 6 of the act of July 27, 1866; and that the indemnity provision of section 2275 of the Revised Statutes, as amended, was not applicable to selections made by the state in lieu of the swamp land lost from the school land grant, on the ground that it would be giving to the state an indemnity for a class of lands already donated to the state; and that the principle upon which indemnity is given to the state is for a loss, and not for that which the state has already received. This is a clear and forcible statement of the reason why the state is not entitled to make her indemnity selections for school lands which it had already received as swamp lands, but this reason does not apply to losses from the school grant by reason of sections sixteen and thirty-six being mineral lands. Where such sections are found to be mineral lands, there is an absolute loss of such lands to the state, and, to that extent, a clear and unconditional diminution of the school land grant."

Judge Morrow also quotes with approval, as showing the purpose of said act, from a report of the committee on public lands of the house of representatives, as follows:

"In the administration of the law, it has been found by the land department that the statute does not meet a variety of conditions, whereby the states and territories suffer loss of these sections, without adequate provision for indemnity selection in lieu thereof. Special laws have been enacted in a few instances to cover, in part, these defects with respect to particular states or territories; but, as the school grant is intended to have equal operation and equal benefit in all the public land states and territories, it is obvious the general law should meet the situation, and partiality or favor be thereby excluded. * * * The bill now framed will cure all inequalities in legislation; place the states and territories in a position where the school grant can be applied to good lands, and largest measure of benefit to the school funds be thereby secured." 22 Cong. Rec. p. 3465.

While the language of the act of February 28, 1891, is not so obscure nor ambiguous as to require extrinsic aids in its interpretation, it can but be observed that the above quotation accords fully with the construction which I have placed upon the language of said act; indeed, is virtually a contemporaneous statement by congress, speaking through its appropriate committee, of an intention to provide, through said act, for all states and territories having grants of school sections a uniform and general system of indemnity, whereby losses of any such sections might be compensated.

The considerations of public policy which have been earnestly pressed by plaintiff, namely, that the growth and security of timber upon the large areas of public land included within forest reservations would be promoted by extinguishing state titles to interspersed school sections, thus making the reservations solid bodies of land,

and also that the states would be benefited by selections of other lands in lieu of their school sections surrounded by large tracts of land permanently withdrawn from settlement, would, it may be conceded, if the act of February 28, 1891, was itself ambiguous, point with some force to a legislative purpose in harmony with such considerations. Since the act, however, declares unmistakably, as above shown, a contrary intent, courts are not at liberty to disregard, because of any extraneous matters, the meaning thus declared. Besides, plaintiff himself, in a supplementary brief, filed October 18, 1897, and as confirmatory of his theory, has called attention to an act of congress, which act, to my mind, indicates that the United States has never entered upon any general policy for extinguishing state and private ownership of school sections situated within the limits of forest reservations. The act referred to is one approved June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," and the particular provision relied on by plaintiff is as follows:

"That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: Provided, further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims." 30 Stat. 36.

This provision unquestionably makes an arrangement for exchanges of lands between the United States and settlers thereon; and it is noticeable that the phraseology is well adapted to the end in view, and strikingly different from that used in the act of February 28, 1891. In the provision just quoted, the land upon which it operates is described, not as being included within a reservation, but within the limits of a reservation. Again, the effect of the exchange is referred to, not as a "waiver" of the settler's right to the land, which the United States reacquires, but the words are, "The settler or owner may, if he desires to do so, relinquish the tract to the government," etc. In the provision just quoted, the phraseology is precisely suited to the arrangement contemplated, namely, an exchange of lands; while the language of the act of February 28, 1891, is wholly inapt for such a purpose. Moreover, careful study of the provision last quoted, in connection with other parts of the same act, leads me to believe that said provision was designed, not in furtherance of any such general policy as that insisted upon by plaintiff, but chiefly for the benefit of settlers.

Said act declares the purposes for which the forest reservations may be established as follows:

"All public lands heretofore designated and reserved by the president of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said act, shall

be as far as practicable controlled and administered in accordance with the following provisions: No public forest reservation shall be established, except to improve and protect the forest within the reservation, or to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. * * * Upon the recommendation of the secretary of the interior, with the approval of the president, after sixty days' notice thereof, published in two papers of general circulation in the state or territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the secretary of the interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained." 30 Stat. 35, 36.

The act further provides as follows:

"The secretary of the interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the state or territory, respectively, where such reservations may be located. * * * The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservations, and for that purpose may occupy any part of the said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church." 30 Stat. 35, 36.

These quotations, so far from indicating a general policy on the part of congress to reacquire school sections situated within the limits of forest reservations, in order to make the reservations solid bodies of land, show clearly a purpose to except from the reservations even public lands so situated, where they are better adapted to mining or agricultural uses. However, as I have already stated, the language of the act of February 28, 1891, is so plain and unmistakable as not to require extrinsic aids in its interpretation. The demurrer to the answer will be overruled.

CASE et al. v. L'OEUBLE et al.

(Circuit Court, E. D. Pennsylvania. December 24, 1897.)

No. 54.

1. CONTRACT—BAILMENT—CONDITIONAL SALE.

Whether a contract for the construction and erection of fixed machinery, which, for its successful operation, must be attached to the freehold, is a bailment or a conditional sale, depends upon the intent of the contracting parties, as disclosed by the contract and the evidence.

2. SAME.

A contract provided for the erection, by the maker, of a refrigerating plant on the premises of the other party, and for the lease of the plant to the latter for a monthly rental; gave the maker the right to re-enter and remove the plant on nonpayment of rent; stipulated that on payment

of such a sum as, with the rentals theretofore paid, should amount to the value of the plant, the maker should give the owner of the premises a bill of sale for the same; and declared that "no title, either legal or equitable," in the plant, should vest in the owner of the premises, "except as lessee under this agreement," and that "all moneys paid or to be paid shall be paid as rent, only, until the privilege of purchasing herein mentioned has been accepted." *Held*, that the contract was a bailment, and not a conditional sale.

3. CONTRACT—BAILMENT—RIGHTS OF SUBSEQUENT MORTGAGEES.

Where, under a contract of bailment, merely, machinery is delivered, and subsequently the bailee places upon the premises a mortgage, which includes, in general terms, all machinery and appliances thereon, no property in the machinery so delivered passes to the mortgagee, nor to any one purchasing at sheriff's sale upon foreclosure of his mortgage. The fact that the mortgagee had no knowledge of the bailment until after the consideration for the mortgage had passed is immaterial.

This was an action of replevin to determine the title to a refrigerating plant. All the defendants pleaded the general issue, and one of them (Frederick Albert L'Oeble) pleaded, in addition, property in himself.

At the trial it appeared that Frank X. Rieger, the owner of a brewing plant, procured from the Case Refrigerating Machine Company, under an agreement dated 16th January, 1893, a refrigerating plant. The plant was attached to the freehold, to the extent necessary for its safe operation. Subsequently Rieger mortgaged the premises and the improvements thereon. No notice of the interest of the Case Refrigerating Machine Company in the refrigerating plant was given to the mortgagee until after the consideration of the mortgage had passed. Upon foreclosure of the mortgage, the property was bought in by F. A. L'Oeble, one of the defendants. Questions of fact, as to whether the contract was not a mere cover for a previous actual sale, and as to the value of the plant delivered, were decided by the jury adversely to the defendants. The court at the trial instructed the jury that the contract was one of bailment, and not of conditional sale. Upon argument of the motion for a new trial, the correctness of this construction was challenged. The material paragraphs in the contract were as follows:

"That the said party of the first part hereby agrees to construct and erect at the premises of the party of the second part, and to lease and hire unto him, a complete Case refrigerating plant, hereinafter described, of the value of thirty-eight hundred dollars, for the term of two years from this date, at the monthly rental of one hundred and fifty dollars, to be paid by the party of the second part to the party of the first part at the times and in the manner hereinafter provided. * * * The said party of the second part will pay unto the party of the first part, as consideration for the said plant, the sum of five hundred dollars during the first month while the machine is being erected, and the sum of one hundred and fifty dollars for every following month, in rental payments, until the expiration of this lease.

"The party of the second part further agrees that, if the payments as herein specified remain unpaid for the period of thirty days after such payment may become due, that then the party of the second part will, and hereby does, permit and authorize the party of the first part, or its agents, and such help as may be necessary, to enter into and upon any premises where the above-specified machine may be found, and, without let or hindrance, remove the same, and repossess itself thereof.

"The party of the first part agrees that if the party of the second part at any time during the term of this lease wishes to purchase the above-specified machine and appliances, and will pay or cause to be paid to the party of the first part such sum of money as, with the amount of moneys paid as rent or hire, will amount to the sum total of thirty-eight hundred dollars, lawful money of the United States, then the party of the first part, upon receipt of said payment, will make and deliver to party of the second part a complete bill of sale of said machine and appliances.

"But it is distinctly understood by both parties that no title, either legal or equitable, to or in the above-specified machine and appliances, shall vest in the party of the second part, except as lessee, under this agreement, and that all moneys paid or to be paid shall be paid as rent, only, until the privilege of purchasing herein mentioned has been accepted, and the terms as above specified are complied with."

R. M. Schick, for plaintiff.

William C. Hannis, for defendant.

DALLAS, Circuit Judge. Upon the trial of this case the presentation of evidence was not concluded until about the hour of adjournment on the last day of the week assigned for jury trials; and, as there was no other case for trial, counsel, to relieve the jury from returning on the following Monday, waived discussion; but at the same time they submitted points for charge, to the number of five on behalf of the plaintiff, and ten on behalf of the defendant, which, together, covered six typewritten pages of foolscap paper. It was, under the circumstances, of course, not possible to answer the points with particularity, but I said:

"I will ask the stenographer to note that certain points have been presented on either side, which it has been impracticable for the court to separately consider in the haste of trial, and which, except as affirmed or denied in the general charge, may be marked as declined."

To this action with respect to defendant's points, his counsel asked and was allowed an exception; but inasmuch as, in my opinion, the law upon every matter material to the issue was correctly stated in the general charge, the omission to answer defendant's points categorically cannot be said to have occasioned him any injury. In the brief now presented, his learned counsel states that the questions involved (apart from that relating to the damages) are:

"(1) Was the contract under which the plaintiff claimed a contract of bailment, or was it a sale of property, with a reservation of title as security for the purchase money? (2) Even though it were a bailment, and therefore valid as between the original parties, under the law of Pennsylvania is not the plaintiff estopped from asserting his title as against the mortgagee, or other purchaser for value without notice?"

The charge adequately, though hastily, dealt with the law applicable to both of these questions, and to the entire case. Therefore, I repeat, the declination of the court to answer the several points specifically was not error. *Improvement Co. v. Stead*, 95 U. S. 161; *Railroad Co. v. Friel*, 23 C. C. A. 679, 77 Fed. 1007. The contract in question I held to be one of bailment, and instructed the jury accordingly. There was no evidence whatever to warrant a doubt as to its having been so intended, and that such was the effect of its terms, under the law, I believed was established by the authorities. The charge to the jury, therefore, was absolute and binding, that, except by way of bailment, no title to the refrigerating apparatus, which was the subject of contract, passed by virtue of its provisions, and of the delivery made in pursuance thereof. There was some testimony which, it was claimed, tended to show that the machine had been actually sold and delivered prior to the making of this contract; and, with reference to that evidence, the jury were told, in sub-

stance, that if there had in fact been a previous absolute sale, and the written agreement was subsequently made for the purpose of giving a false color to the transaction, the writing would be fraudulent, and could not avail the plaintiff. The question of fact was distinctly left to the jury, though with the statement, emphatically made by the court, that in its opinion the evidence for plaintiff was entitled to the greater weight. I still think that this opinion was amply warranted, and have no doubt that it was rightfully and competently expressed. *Car Co. v. Harkins*, 17 U. S. App. 22, 5 C. C. A. 326, 55 Fed. 932.

That the intent of the parties to the agreement was that the refrigerating plant should not be or become a part of the realty, plainly appears upon the face of the instrument itself. There was no testimony to the contrary, and, indeed, this fact was, at least tacitly, conceded. But it was and is insisted that the machinery was so annexed to the freehold as to make it, regardless of intent, a part thereof. I cannot, however, assent to this proposition, either as one of fact or of law. As matter of fact, it was conclusively shown that the machinery was not permanently attached, but in such manner only as was necessary to retain it in place, and by such means as admitted of its removal without substantial injury either to it or to the building. As matter of law, I remain of the opinion which I expressed upon the trial, that upon this subject the controlling consideration in this case is the intent of the parties, and not the character of the annexation.

The defendant having moved for a new trial, that motion has been ably argued at bar, and there have been submitted very thorough briefs upon both sides. These, and the authorities to which they refer, have been carefully examined; but I am not convinced that the view I took of the case upon the trial was incorrect, or that it was insufficiently presented to the jury.

The damages assessed are somewhat larger in amount than the court, if that matter had been for its determination, would have awarded; but there was substantial evidence to support the assessment made, and I do not think I would be justified in holding it to be unreasonable, especially in view of the fact that I pointedly cautioned the jury against rendering an excessive verdict. It must be assumed that they regarded this caution, and rightly judged the evidence. It is proper to add, in this connection, that what was said in the charge as to the plaintiff being entitled to interest was said in pursuance of a suggestion of counsel for plaintiff which was acquiesced in by counsel for defendant, and not as accurately expressing the court's understanding of the law. It was not excepted to, and is not now complained of. The defendant's rule for a new trial is discharged.

KOWALSKI v. CHICAGO G. W. RY. CO.

(Circuit Court, N. D. Iowa, E. D. January 3, 1898.)

1. FEDERAL COURTS—RULE OF STATE DECISIONS

As to questions not involving the constitution or laws of the United States, or affecting the commercial intercourse or business of the country at large, but relating solely to a subject-matter within state control, the federal courts should follow the rules adopted by the state courts.

2. NEGLIGENCE OF PARENT—WHEN NOT IMPUTED TO CHILD.

The negligence of a father, as the driver of a wagon, in which his infant child was riding, in failing to keep a proper lookout for a train at a railroad crossing, which contributed to the occurrence of a collision in which the child was injured, is not imputable to the child so as to prevent its recovering for the injury from the railroad company, which was guilty of negligence in failing to properly guard the crossing.

3. RAILROADS—NEGLECT—GUARDS AT CROSSING.

The requirements of the statute law and of the ordinances of a city are not the sole standards for determining whether due care has been observed by a railroad company to guard against accidents at a crossing.

4. SAME—PROXIMATE CAUSE OF ACCIDENT.

A court cannot say, as matter of law, that because the driver of a wagon failed to hear or heed the signals given by a train on approaching a crossing, and was negligent in failing to keep a proper lookout, the absence of a flagman at the crossing did not proximately contribute to the collision.

Action by Frank Kowalski, by his next friend, against the Chicago Great Western Railway Company, submitted on motion for new trial after verdict by a jury in favor of plaintiff.

N. H. Utt and A. Matthews, for plaintiff.

D. E. Lyon and D. J. Lenehan, for defendant.

SHIRAS, District Judge. The first question presented by the motion for a new trial in this cause is whether, ordinarily, the negligence of a parent is to be imputed to his infant child, so as to defeat the right of recovery on behalf of the infant against one whose negligence has caused personal injury to the child. Briefly stated, the facts are as follows: In June, 1896, a collision occurred at a street crossing in the city of Dubuque between a freight train on the defendant's line of railway and a wagon driven by the father of the infant plaintiff, in which wagon were the parents of the plaintiff, then an infant about three months' old. The evidence tended to show that the railway company was guilty of negligence, in that it did not have a flagman at the crossing, and the jury, on this issue, found for the plaintiff. The evidence also tended to show that the father of the plaintiff, who was the driver of the team and wagon, was guilty of contributory negligence in not keeping a proper outlook when approaching the crossing.

The court instructed the jury that the negligence of the driver of the wagon, even though he was the father of the plaintiff, could not be imputed to the plaintiff, so as to defeat his right of recovery for the injuries to his person; and the question presented by the motion for a new trial is whether the court erred in thus instructing the jury.

In giving this instruction the court followed the ruling of the

supreme court of Iowa, which court, in the case of *Wymore v. Mahaska Co.*, 78 Iowa, 396, 43 N. W. 264, expressly held that the negligence of a parent could not be imputed to an infant child under circumstances substantially similar to the case now before the court. On behalf of the defendant company it is contended that this court is not bound to follow the ruling of the supreme court of the state, but that this court must exercise its independent judgment upon the question, even though it results in variant rules upon the one question between the state and federal courts in Iowa. The great desirability of securing uniformity in the rulings of courts acting within the same territorial limit is self-apparent, and therefore in matters which are purely domestic, and which are not affected by any provision of the constitution or laws of the United States, or which do not pertain to the general commercial law of the country or other matters within the legislative control of congress, the rule adopted by the supreme court of the state wherein the cause of action arises should be followed by the federal court, acting within the state.

In the case now under consideration it appears that the defendant company, through negligence on its part, injured the person of the plaintiff, and, in order to defeat the liability thus shown to exist against it, it is claimed that, under the law existing in Iowa, the negligence of a parent may be imputed to his infant child; that the parent in this case, by negligence on his part, when driving the wagon over the crossing, aided in causing the accident, and therefore recovery on part of the child is defeated. In dealing with the question of the duties and responsibilities pertaining to the relation of parent and child, the supreme court of Iowa holds that, in cases of this character, the negligence of the parent is not legally imputable to the child; and therefore it is clear that under the law of Iowa, as declared by the highest court of the state, the defendant company cannot escape liability, for injuries caused to the infant plaintiff by its negligence, by showing that the father of the infant was also guilty of negligence contributing to the accident wherein the plaintiff was injured. Admitting that this is the law upon the subject in the courts of Iowa, the defendant company contends that this court should refuse to follow the rule governing the question in the courts of the state, and should exercise an independent judgment upon the point; but, as already stated, it is not a question arising under the constitution or laws of the United States, or which affects the commercial intercourse and business of the country at large, but it pertains solely to a subject-matter wholly within state control, and touching which each state is at absolute liberty to adopt the rule deemed most suitable for its circumstances. Thus, in the case of *In re Burrus*, 136 U. S. 586, 10 Sup. Ct. 850, in which the United States district court in Nebraska had undertaken, upon a writ of habeas corpus, to determine the conflicting claims of a father and grandparent to the custody of an infant, the supreme court held that "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states; and not to the laws of the United States." This being true, and it being also true that the supreme court of the state holds that

the negligence of a father is not imputable to a child, so as to defeat a recovery for personal injuries to the child, caused by the negligence of a third party, upon what defensible theory should this court refuse to follow the rule of the state court, and assert the right to establish an antagonistic position upon the mutual duties and responsibilities growing out of the relation of parent and child? Even if it be held that the question is such that this court is not strictly bound to follow the ruling of the supreme court of the state, nevertheless it belongs to that class of questions with regard to which it is highly desirable that uniformity of ruling should be maintained between the several courts, exercising jurisdiction within the territorial limits of the same state; and for that reason I should deem it my duty to accept the decision of the supreme court of the state, as a proper guide to be followed, in determining the matter in dispute.

But, furthermore, if the question was open to consideration on principle, it would not change the result; for, in my judgment, the case is not one wherein the negligence of a parent ought to be availed of as a defense by one whose own negligence has caused injuries to the person of the infant plaintiff. The facts of the case are these: A collision occurred at a street crossing between a railway train operated by the defendant company and a wagon driven by one Albert Kowalski, in which wagon was the plaintiff, with other parties. The railway company and the driver of the wagon were each guilty of negligence causing the collision, and the plaintiff was injured. Under the view taken in *Thorogood v. Bryan*, 8 C. B. 115, and the cases in this country based thereon, the negligence of a driver was held imputable to the occupants of the vehicle, and, if that view was still in force, it would follow in this case that none of the occupants of the wagon could recover against the defendant company, no matter how gross its negligence might have been, because the contributory negligence of the driver of the wagon, being legally imputable to them, would defeat a recovery. The reasoning, however, upon which this view of the law was based, is no longer accepted by the great majority of the courts in this country; and since the ruling of the supreme court in *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, it is generally held that there is not a legal identity between the driver of a vehicle and those who occupy the vehicle as passengers or upon invitation of the driver. For illustration, suppose, in this case, Kowalski had had in his wagon two children beside his own, one of which he was bringing to the city of Dubuque as an accommodation to a friend, and the other he was bringing for a price paid him, and all three had been injured in the collision. The negligence of which the defendant company seeks to avail itself as a defense is the negligence of Kowalski as the driver in control of the wagon. Under the rule in *Little v. Hackett*, the negligence of the driver would not defeat a recovery on behalf of the two infants who were not the children of Kowalski, because the negligence of the driver, as such, is not imputable to the occupants of the vehicle. Why, then, would such negligence defeat a recovery in the third case? Kowalski, being in charge of the wagon, owed to all the children in the supposed case just the same degree of

care, and the defense is based upon the fact that, as the driver of the wagon, he failed to exercise proper care in approaching the crossing, and heedlessly drove upon the same, and thus aided in causing the accident. The negligence complained of is in fact that of Kowalski, as driver, which, under the authorities, is not imputable to the occupants of the wagon, and therefore the position is taken that Kowalski, in his relation of parent, was guilty of negligence, for which the child must be held responsible.

In fact, however, the accident had nothing to do with the family relation existing between the occupants of the wagon. The cause of action and the right of action on behalf of the plaintiff against the defendant company grow out of the negligence of the company in not having the proper safeguards at the crossing to give warning of the approach of the train, and the duty of the company in this respect, and its liability for accidents resulting from a failure to perform its duty, have no possible connection with or relation to the obligation and responsibilities growing out of the family relation. The later authorities declare the rule to be that, in cases wherein the parent sues for damages resulting to him from an accident wherein his child is hurt, as for the recovery of the expenses of taking care of the injured child, or for the deprivation of the services of the child, then the negligence of the father contributing to the accident may be availed of as a defense to his action; but where the child sues for the recovery of damages resulting from injuries to his own person, and caused by the negligence of a third party, the latter cannot escape responsibility for the consequences of his own negligence by averring that the parent of the plaintiff was also guilty of negligence.

The next ground relied on in support of the application for a new trial is that the court erred in submitting to the jury the question whether the railway company was chargeable with negligence in not having a flagman at the crossing. In the petition in the case the plaintiff charged negligence against the railway company on several other grounds, but the jury were instructed that the evidence failed to support the charges of negligence based on the action of the employes in charge of the train, and that there was only one ground for their consideration in connection with the question of the alleged negligence of the company, and that was whether the crossing, in view of its situation and surroundings and of the amount of travel over the same, was of such a nature that ordinary care on part of the railway company required the keeping of a flagman at the crossing, even though the statute of the state and the ordinance of the city did not so require. That the requirements of the statute law and of the general ordinance of the city are not always the sole standards for determining whether due care has been observed at railway crossings is settled by the rulings of the supreme court in *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, and of the court of appeals for this circuit in *Railway Co. v. Netolicky*, 14 C. C. A. 615, 67 Fed. 665. The evidence showed beyond question that the crossing was one whereat the view of parties coming along the public street was obstructed by buildings, trees, and the like, so that a train coming in the direction

that the one which struck the wagon was coming could not be readily seen until the persons on the street were within 20 or 30 feet of the rails forming the railway track, and the evidence was clearly such that it required the court to submit this charge of negligence to the jury, and in the judgment of the court the finding of the jury that the crossing was of such a nature that a flagman ought to have been stationed thereat finds ample support in the evidence. The contention of counsel for the railway company that, owing to the ruling of the court that the negligence of the driver of the wagon could not be imputed to the child, the jury might not have rightly apprehended the real issue submitted to them, and might have construed the charge to mean that the jury could not attribute the happening of the accident to the action of Kowalski, as driver of the wagon, and, so construing it, might have assumed that they were not at liberty to find that the accident was not due to negligence on part of the railway company, but was caused solely by the negligence of Kowalski, in driving heedlessly upon the track, has certainly much of plausibility to sustain it; yet it is certainly true that the court did not so instruct the jury, and it cannot be assumed that the jury failed to understand the charge that was in fact given. The jury was expressly instructed that the case against the railway company was based upon the charge of negligence; that merely proving that a collision occurred between the train and the wagon at the crossing would not make out the case against the defendant; that it must be shown that the railway company had been negligent, and that its negligence was the approximate cause of the accident; and then the attention of the jury was called to the particular charge of negligence which was submitted to them, to wit, the question whether the crossing was of such a nature that, in the exercise of ordinary care, the railway company ought to have kept a flagman thereat; and, further, that, even if they found that a flagman ought to have been kept at the crossing, they could not find against the company, unless they also found that the failure to have a flagman was a proximate cause of the accident, or, in other words, that the relation of cause and effect must exist between the negligence and the accident. If the finding of the jury on this question was clearly against the weight of the evidence, that fact might be relied on as evidence that the jury had in some way failed to properly construe and apply the instruction given them; but, as already said, the finding of the jury is in accord with the evidence, and is sustained thereby, and the court cannot assume that the jury misunderstood the charge of the court on this branch of the case.

The next contention is that, even if it be admitted that the crossing was of that character that it required the presence of a flagman thereon to give due warning to persons upon the highway of the approach of railway trains, nevertheless the facts show that the absence of a flagman had no connection with the accident; that the parties in the wagon took no notice of the other warnings that were given; and that the action of the driver of the wagon was such that it proves that he simply entered into a race with the approaching train in the effort to pass over the crossing before the train reached it; and that the pres-

ence or absence of a flagman could have no connection with the accident. The testimony of the persons in the wagon was to the effect that they did not see the train until the horses' heads were within a few feet of the railway track. The testimony of all the defendant's witnesses was to the effect that, when the horses were close to the track, the driver threw up the reins in the apparent effort to stop, and then dropped them, apparently for the purpose of urging the horses over the crossing. This evidence clearly tends to support the testimony of Kowalski and his wife that they did not see the train until they were nearly on the track. Mrs. Kowalski testified that the horses' heads were about six feet from the rails when she first saw the train, and other witnesses estimated the distances when the driver checked up the horses at from a few up to about 10 feet. The persons in the wagon must therefore have been fully 20 feet from the track, or at about the point where it first becomes possible to obtain a view for any considerable distance up the track, and therefore the evidence tends to show that they did see the train at about the place where a good view up the track could be had. The negligence chargeable against the adults in the wagon is that knowing the nature of the crossing, and the impossibility of seeing any distance up the track, until they had reached a point so close to the track that the horses' heads would be within from 6 to 10 feet of the rails, they drove down to the crossing at a smart pace, without halting or slowing up the speed of the horses in order that they might properly exercise their senses of sight and hearing, and the jury properly found that there was negligence on part of Mrs. Kowalski that would defeat any right of recovery on her part. The fact, however, that they failed to see or hear the coming train, or the signals given by gong or bell, does not prove that they would also have failed to see and hear the signals given by a flagman had one been stationed at the crossing. He would have been right on the crossing, in plain sight of the persons in the wagon, long before they reached a point of danger. His signals, if he properly performed his duty, would in all probability have been seen and understood by the occupants of the wagon, and thus they would have received a warning of danger in season to have avoided it without risk to themselves. By the finding of the jury in this case it is determined that, for the proper protection of persons lawfully using the highway crossing in question, the duty was imposed upon the railway company of having a flagman thereat to give warning of the approach of its trains. It is admitted that there was no flagman at the crossing at the time this accident happened, and thus it is shown that the plaintiff in this case was subjected, in using the crossing, to all the additional hazards and dangers resulting from the failure to keep a flagman thereat, and the evidence was such as to justify the finding that this failure, constituting negligence on part of the railway company, aided in causing the accident and the resulting injuries to the person of the plaintiff.

The last point presented by the motion for a new trial is that the amount of damages awarded, to wit, \$2,000, is excessive and not warranted by the evidence. The testimony on behalf of the plaintiff tended

to show that the child received a blow on the head; that there is a slight displacement of the parietal bone on one side of the head; that for some weeks after the accident the child's neck was twisted to one side; that, while the child can now readily turn his head in any direction, there still remains a slight atrophy of the muscles on one side of the neck, creating a tendency to carry the head slightly drooped; that since the accident the child has been subject to spasms, which did not exist before the accident; and that, if these result from the injury to the head, they may develop into a serious form. The testimony on behalf of the defendant tended to deny the existence of these injuries, and to minimize the effects thereof. This conflict in the evidence it was the province of the jury to consider, and to determine what the evidence established with regard to these particulars. If the evidence adduced by the plaintiff is accepted as a fair statement of the injuries actually caused the plaintiff, then it cannot be said that the verdict is so excessive in amount as to justify the court in interfering with the finding of the jury on this question, and it was clearly within the province of the jury to determine whether the evidence on behalf of the plaintiff on this question exceeded in weight that adduced by the defendant. The motion for new trial is therefore overruled, and judgment will be entered in favor of the plaintiff in accordance with the verdict of the jury.

COLUMB v. WEBSTER MFG. CO.

(Circuit Court of Appeals, First Circuit. January 3, 1898.

No. 200.

JUDGMENT—RES JUDICATA—IDENTITY OF CAUSE OF ACTION.

A judgment on the merits in a state court, in an action to recover for a personal injury on the ground of negligence, is a bar to a second action in a federal court by the same plaintiff against the same defendant to recover for the same injury, and grounded on defendant's negligence in respect to the same occurrence, though additional acts of negligence are charged.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was an action for personal injury, brought by Frank Columb against the Webster Manufacturing Company. The circuit court sustained a plea of former adjudication, and the plaintiff brings error.

John L. Hunt, for plaintiff in error.

Richard M. Saltonstall (H. Eugene Bolles, on the brief), for defendant in error.

Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

ALDRICH, District Judge. This is an action to recover for damages which the plaintiff claims he sustained by reason of the defendant's negligence in New Hampshire. The plaintiff brought a prior

suit in the New Hampshire state courts against this defendant, and for the same injury, where he had his trial upon the merits, and upon a cause of action involving the defendant's alleged negligence as a ground of recovery, and where there was a verdict of the jury and judgment for the defendant, and the defendant in the circuit court interposed such judgment as a bar to the further prosecution of the plaintiff's action therein.

We think the New Hampshire judgment is a bar to the plaintiff's second action, and it seems quite unnecessary to add anything to the reasoning of the court below. It may be observed, however, that the cause of action (that of the defendant's negligence in respect to the same affair) was identical in both proceedings, although the plaintiff, in this, his second proceeding, varies somewhat his description of the defendant's negligence. It remains, nevertheless, that this action was brought for the same injury, and that the action is grounded on the defendant's fault or negligence in respect to the same occurrence. In the New Hampshire case the plaintiff alleged the defendant's want of care in respect to its duty to furnish a suitable and safe place for the performance of the service which he was expected to render, and that, by reason of the careless and negligent construction of the bridge or trestle, and "by the sudden giving away of said trestle or railroad," he was "thrown into the river below," and injured; while in the proceeding here he alleges that "an unsupported section or part of said bridge, on which plaintiff was so assisting as aforesaid, fell, and, owing to the neglect of the defendant to provide safe and suitable safeguards, instrumentalities, and protection for and in the performance of said work, and owing to the neglect of defendant to provide safe, suitable, and competent servants and agents to assist the plaintiff in the performance of said work, the plaintiff was precipitated into the said river," and was injured. The cause of action in the two proceedings is obviously the same. In the proceeding here the plaintiff alleges other elements of negligence, which he in effect says co-operated with the elements of negligence alleged in the first proceeding to bring about the same result; in other words, he alleges here additional acts of negligence, operating upon the same occurrence, and tending to the same result.

It is not necessary to prolong the discussion of this question further than to say that the scope or extent of the estoppel, operating upon the second action, like that involved in *Roberts v. Railroad Co.*, 158 U. S. 1, 27-29, 15 Sup. Ct. 756, depends upon the question whether the demand or claim or cause of action is the same in the two proceedings. All authorities seem to agree that, if the cause of action is the same, a trial and judgment upon the merits operate as a bar to subsequent litigation between the same parties; while another line of authorities hold that, where the suit is between the same parties, and the claim or demand or cause of action is different (*Forsyth v. City of Hammond*, 166 U. S. 506, 518, 17 Sup. Ct. 665), the judgment in the former action operates as an estoppel only as to the particular points controverted, or to those matters which were strictly in issue. As to the first class of cases, as said by Mr. Justice Shiras in the

Northern Pacific Railroad Case just cited (page 28, 158 U. S., and page 765, 15 Sup. Ct.), in quoting approvingly from an earlier decision of the supreme court, "a judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented." Southern Pac. R. Co. v. U. S., 168 U. S. 1, 50, 18 Sup. Ct. 18.

The supreme court decisions are quite decisive, and controlling upon the question before us. In the case of *Beloit v. Morgan*, 7 Wall. 619, it is said, with reference to a former trial before a court having jurisdiction over the parties and the subject, that "under such circumstances a judgment is conclusive, not only as to the res of that case, but as to all further litigation between same parties touching the same subject-matter, though the res itself may be different."

Again, in referring to the point taken by counsel that the estoppel only operates upon the precise question in issue, it is said:

"But the principle reaches further. It extends, not only to the questions of fact and of law which were decided in a former suit, but also to the grounds of recovery or defense which might have been, but were not, presented."

Again, in the same case it is said:

"A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction."

This principle was reaffirmed, and the doctrine emphasized, by the supreme court in *Stark v. Starr*, 94 U. S. 477, 485, where it is said by Mr. Justice Field:

"It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand, and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible."

We have said, in this circuit, of supposed grounds of recovery not presented in the original cause, that, if we were to assume they were sufficient to put in issue the propositions argued, they would not be effectual to give the complainants the relief desired; and this was for the reason, as there observed, that in the principal cause the court had jurisdiction of the parties and the subject-matter of the controversy, and judgment therein must, therefore, be taken as conclusive. *Jones v. Bank*, 33 U. S. App. 703, 713, 22 C. C. A. 483, and 76 Fed. 683.

The additional allegations of negligent acts, in the case at bar, are (as said of the new evidence in *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 65, 18 Sup. Ct. 18) "simply cumulative," and they merely present elements of negligence which were, in contemplation of law, at least for the fair and reasonable purposes of the *res judicata* rule, involved in the affair originally complained of, and in the single and indivisible cause of action originally set out,—that of the negligence and fault of the defendant which occasioned the injury to the plaintiff. *Beauregard v. Construction Co.*, 160 Mass. 201, 203, 35 N. E. 555; *Patterson v. Wold*, 33 Fed. 791, 793. The reasons for the *res judicata* rule have been stated again and again, and they include, among other considerations, the idea that the interests of the public

and of litigants alike require that a legal controversy should end with one investigation before a tribunal with ample jurisdiction to do justice, and with ample opportunity for the parties to present their case with such measure of statement and proofs as they see fit. A rule which would allow the plaintiff to split his case, and measure out a part of his grievance and of his proofs, and, in the event of failure, to try again upon a greater measure, would necessarily allow the defendant to stand on a part rather than all of his defense to a given cause of action, and, if this should prove insufficient, a second trial upon a more full statement and a greater measure of proofs would be open to him. Under such a rule, litigation would at once become burdensome and oppressive, interminable and never-ceasing,—a condition which the modern law seeks to avoid, and a situation which the courts of the present age are not disposed to aid in creating.

Is there any safe or reasonable ground upon which a cause of action based upon the supposed negligence of an employer can be treated as divisible? Is there any reason for a rule which would permit a plaintiff, by varying his description of negligence, to have a second trial, if he fails to succeed upon his first description and proofs, but deny him a second trial if he does succeed? No reason has been urged in support of such a rule of law, and it is difficult to see that any could be suggested. Then let us look at the question with reversed light. Suppose the plaintiff had recovered in his New Hampshire case, upon such description of the negligence as he employed there; could he, by varying his description, and alleging additional negligence contributing to the same accident, have another recovery of damages for the same injury? If the affirmative is asserted, how are the damages to be divided? How much for the negligence as first described, and how much for the negligence set out in the second description? It is not believed that any one would seriously insist upon the right of a second recovery. If it is conceded, then, that under such circumstances a second recovery could not be had, for the reason that the full right of recovery was involved in the description of the defendant's negligence which the plaintiff employed, and in the trial, and therefore merged in the judgment favorable to the plaintiff, upon what logic can it be urged that the full right of recovery is not merged in a judgment unfavorable to the plaintiff, which is based upon the same allegations, the same trial, and the same proofs? A rule which would make the question whether a judgment is conclusive upon the plaintiff depend upon the question whether the judgment is for or against him, and make the result of the trial a conclusive estoppel upon both parties if favorable to the plaintiff, and otherwise not, would be a one-sided rule, discriminating in favor of the plaintiff, and a rule which would at once destroy the fundamental idea of estoppel by judgment.

It is true that the plaintiff, in his second attempt to describe the cause of action, states a stronger case than in his first, for the reason that he includes other elements of negligence; but this does not entitle him to a second trial. A person suffering from a supposed grievance of the character in question must not be permitted to re-

sort to several trials and to different courts, experimenting as to relief, first with a part of his cause of action, then with a little more, and then again with a still stronger description of the co-operating elements which are supposed to have caused the injury. If sound principles permit a second trial, because the second pleader presents a stronger description of the negligent acts contributing to the injury than the first, why not a third, and fourth, and so on without limit, as long as a pleader can be found with sufficient skill and ingenuity to draw a declaration broader than the one next preceding? It follows, from this reasoning, that, the plaintiff having elected the New Hampshire court as the tribunal to settle his rights, and his cause of action being grounded upon the supposed negligence of the defendant, he should have put in evidence all the supposed negligent acts which contributed to the injury, and if, upon the trial, it had turned out that the scope of the evidence was broader than that of the declaration, it is understood that the New Hampshire amendment practice would have permitted the declaration to be recast, to the end that the whole case might go to the jury. If he did not do this, it was his own fault or misfortune, but is not such a misfortune as entitles him to a second trial.

No question is made on argument that the plaintiff, Frank Columb, is not the same person as "Frank Colon," the plaintiff in the New Hampshire case, and it is conceded that the variance between the names is the result of clerical error. This being so, it abundantly appears from the record that the parties and the subject-matter of the cause of action here are the same as in the case presented in the New Hampshire state court, and upon which the plaintiff had a trial upon the merits. The plea in bar interposed in the circuit court, therefore, did not require the aid of matter dehors the record. The circuit court expressly excluded the aliunde evidence, and determined the question—and rightly, we think—upon the record itself. This being so, it is not necessary that we consider the other questions raised by the assignment of errors.

Judgment of the circuit court affirmed, with costs in this court to the defendant in error.

ADAMS v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fifth Circuit. January 3, 1898.)

No. 572.

1. RAILROADS—INJURY TO PERSONS ON TRACK—TRESPASSERS.

A declaration, in an action to recover for the death of children killed on defendant's railroad track by one of its cars, which alleges a custom by the public for 10 years to use the track at the place where the injury occurred as a footway, as was being done by the children, and that such custom was known to, and acquiesced in by, the officers of the defendant company, is sufficient to require the question as to whether the children were trespassers to be tried and determined as one of fact.

2. SAME—NEGLIGENCE—PROXIMATE CAUSE.

Where a car escapes from control through the negligence of the servants of a railroad company, and, after running three-fourths of a mile, injures

persons on the track, the company is not relieved from liability on the ground that the negligence was not the proximate cause of the injury.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

Action by Mahulda C. Adams against the Southern Railway Company. A demurrer to the declaration was sustained, and plaintiff brings error.

J. T. Pendleton, for plaintiff in error.

R. S. Dorsey and Sanders McDaniel, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

McCORMICK, Circuit Judge. The original declaration and its amendments show: That the plaintiff was the mother of two children,—one a son aged 11 years, and the other a daughter aged 7 years. They resided on Mangum street, in the city of Atlanta, where the plaintiff kept a boarding house, and was assisted by these children. The children were attending school on Marietta street, in the city of Atlanta. About noon on September 12, 1895, they were passing from the school to their home over and along a floored trestle of the defendant railroad company over Rhodes street, in the city of Atlanta; and while so passing over said trestle an oil-tank car in possession of, and being operated by, the defendant, ran over these children, and inflicted such personal injuries as caused the immediate death of the boy, and the death of the girl within a few hours. The floored trestle or bridge over Rhodes street is 30 feet wide, and is closely covered with heavy, two-inch plank, securely nailed, making a fine, level walkway. That the tracks of the railroad at the bridge, and for some distance from each end of same, run parallel with, and adjacent to, Elliott street. That, before the railroad was built, Mechanic street entered into Elliott street near one end of said trestle, but was cut off by the railroad embankment, and now stops at the railroad; and on the south side of the railroad, next to Elliott street, there is a deep descent into Elliott street, 50 feet down this embankment, down which people never go, but turn up said railroad, across the floored trestle or bridge, and go into Elliott street beyond the bridge, where the railroad and the street are on a grade. That, at 150 feet from each end of the bridge, Elliott street is on a grade with the railroad, but immediately at the bridge it is 60 feet below the grade of the railroad; and Mechanic street, coming right up to the railroad at the commencement of the trestle, was stopped there by the railroad and trestle, and the only connection between that street and West Hunter street, at the other end of said trestle, along which two streets (Mechanic and West Hunter) the children were going home, was over the trestle. That men, women, and children had for 10 years prior to that time (September 12, 1895), in great numbers, passed over that trestle daily, and that they were so passing over the same was known to the officers of the railroad company, and to the servants of the railroad company then managing and controlling said oil-tank car. That there is an ordinance of the city of Atlanta pro-

hibiting any railroad company from running any car within the corporate limits of the city at a greater speed than 6 miles an hour. That the trestle is within the corporate limits of the city of Atlanta, and that the car in question was permitted to run at the rate of 20 miles an hour. That the car had been left standing on the track of the railroad company, in its yards, near the junction of its track with Fair street, in said city, at a point three-fourths of a mile distant from said trestle, from which point the track is on a down grade to, and far beyond, the trestle; so that a car starting at Fair street will run, of its own motion, for several miles, and gradually increase its speed. That cars had frequently got loose in said yard, and rolled 8 or 10 miles on said grade, and defendant's superintendent had issued an order (known as "Bulletin Order") that no conductor or crew should switch or move any car with brakes so defective that they could not be used, which said order was posted on the bulletin board at the office of the train dispatcher in the yard of defendant company, in the southern part of the city of Atlanta, and had been so posted for more than 20 days before these children were killed, and was in force at the time, and was only taken down about 3 hours after the killing. That the oil-tank car in question was, on the day before the children were killed, marked by the car inspector: "B. O. Hold. Brake,"—which was known by the conductor and the crew to mean that the car was in bad order, and was held for work on the brakes. That the condition of the car was known to the conductor and the crew handling the same, or could have been known in the exercise of reasonable care in inspecting the same. That the crew was switching the car for the purpose of moving it, and struck it with other cars, which caused it to roll, because there were no brakes on it. That in order to get the engine on the side track, to get some cars thereon, the crew "kicked" two cars that were attached to the engine, which struck said oil-tank car, and started it rolling. That the eyebolt of the brake chain that fastened the chain through and to the brake rod was broken, so that the brake chain was not fastened to the brake rod, and made the brake wholly useless, so that the servant of defendant company, who got upon said car when it was moving very slowly, could not put on the brakes and stop said car. The pleadings are somewhat involved, but substantially embrace the averments as above summarized, together with proper averments as to damage, and other matters not contested. The defendant demurred to plaintiff's declaration, that it showed no cause of action, and moved its dismissal, on the hearing of which demurrer to the original declaration and the amendments filed, the circuit court sustained the same, and ordered that the cause be dismissed at plaintiff's cost; to review and reverse which action this writ of error is sued out.

The demurrer being general, and the judgment thereon general, the single error is assigned that the court erred in its judgment. There is nothing in the record to indicate on what particular ground or grounds the circuit court sustained the general demurrer. We gather from the briefs of counsel that the defendant railroad company contended in the circuit court, as it does in this court, that the children were trespassers upon the track of the defendant company's

road, and that it owed no duty to them; and contended further that the action of defendant's servants in connection with the oil-tank car, at a distance of three-fourths of a mile from the place of the injury, could not be relied on as negligence of the defendant, because too remote in time and place; and that, if both of these positions are held to be unsound, the declaration, on its face, shows such contributory negligence on the part of the children as would prevent recovery in this case. Against which contentions the plaintiff urges that the facts averred in the declaration show that the children injured were not trespassers upon the track at the time of receiving the injury, that the defendant and its servants were not authorized to assume that the track would be clear on the trestle or bridge in question, that the injury was the direct result of the negligence of the crew in handling the defective car, and that no act of the children tended to constitute contributory negligence on their part.

The question as to whether persons are or are not trespassers upon the track of a railroad company is generally one of fact, or of mixed law and fact. The evidence may be so undisputed and so clear in some cases as to authorize the court to declare that the parties are or are not trespassers, but such cases are now rare. In the beginning and early history of railroad operations, the number of such roads, and the number of their tracks and of the trains run thereon, were so limited, and all of the features so novel, that their actual presence at any point was a signal that arrested attention, and gave warning for the exercise of care by all who wished to pass across or along their tracks. The tracks and trains were run only where the pre-existing community felt the need for them, and gladly gave the companies the paramount right of way at public and licensed crossings, and exclusive right of way at all other points. The number of running trains was small, and the rate of speed moderate; and it was not then necessary, or deemed prudent, to run the roads into, and through the business centers of, such towns as Atlanta. Within comparatively a few years through passenger trains of Pullman sleepers from our national capital to our commercial capital were drawn through Baltimore by teams of horses. Now, the railroad companies, by contract, or by the exercise of the delegated power of eminent domain, push and concentrate their roads, and multiply their tracks, into the hearts of most of the capital towns of the country. When the question as to who were trespassers on railroad tracks, and what duty, if any, the companies owed to such persons, first demanded judicial decision, analogies were sought in reported cases arising out of other operations, and out of injuries received by strangers on the private premises of others. Guided by the analogies of such cases, which then appeared to be close and instructive, and which were more helpful then than now, it appears to have been held that all were trespassers on a railroad track who could not claim the right under some public regulation, some contract of the parties, the invitation of the corporation, or such notorious use continued for such time as would give a right by the longest period of prescription for acquiring an interest in land, and that the corporation owed no duty to those who were trespassers. It soon became manifest

that this doctrine was too harsh to apply to the operation of such agencies as are in use upon railroads, and that those agencies, and the modes of their use, are of such a nature as impose upon persons or parties using them a high degree of care, not only for the personal safety of passengers and employes, but of the general public. And a more humane rule was declared, that where the servants of the corporation in charge of the operation of trains have knowledge of the exposed condition of the party injured, or the circumstances are such that a reasonably prudent man in the position of those servants would take knowledge of it, the corporation cannot claim exemption from liability for the injury inflicted through negligence of its servants under such circumstances. And, further, in the matter of passing across a railroad, or along its track, at points where no public crossing had been established by law or contracted for by the parties, and where no express invitation had been extended to the public or to individuals for such use, that the notorious, frequent, and continued use thereof for such purpose by individuals or the general public, known to the officers and servants of the company, and acquiesced in by them without objection, would imply such a license as would relieve parties so using it from the charge of being trespassers, and would charge the corporation with the duty of expecting such persons to be on its track, and to use reasonable care to avoid inflicting an injury on them. Some unguarded expressions occur in a number of the more recently reported decisions, and a few cases in the courts of some of the states appear to support the contention of the defendant in this case, and to sustain the action of the circuit court in its ruling on the demurrer. Most of the cases which we have examined differed from this case, in that the whole case was before the appellate court, and the questions considered arose on the consideration of the whole proof in courts sitting as courts of appeal, and passing upon the evidence, or upon instructions given or refused, on states of fact fully shown by bills of exception. We are not called upon to say that the facts pleaded with reference to the use of the covered trestle or bridge over Rhodes street constituted an implied license to the public to use that bridge; nor are we called upon to say that the defendant, in the matter of handling the oil-tank car as charged in the pleadings, was or was not guilty of negligence; nor are we called upon to say that the children were or were not guilty of contributory negligence. All that we are called upon to decide, and all that we do pass on, is whether such a case is made by the pleadings of the plaintiff as required the defendant to answer, and the court to submit issues to the jury.

What we have already said clearly indicates that, in our view, the question of whether the use of the trestle had been such as to constitute an implied license to the public to pass over it, and relieve the children of the charge of being trespassers, should have been submitted to the jury. This view, we think, is supported by the great weight of recent decisions. The cases are so numerous that to review them would be tedious and unprofitable. We cite only a few, which, with those to which they refer, sufficiently show the present state of the authorities: *Bennett v. Railroad Co.*, 102 U. S. 577; *Fletcher v.*

Railroad Co. (Nov. 1, 1897; not yet officially reported) 18 Sup. Ct. 35; Cahill v. Railway Co., 46 U. S. App. 85, 20 C. C. A. 184, and 74 Fed. 285; Felton v. Aubrey, 43 U. S. App. 278, 20 C. C. A. 436, and 74 Fed. 350; Railway Co. v. Watkins, 88 Tex. 20, 29 S. W. 232; Railway Co. v. Crosnoe, 72 Tex. 79, 10 S. W. 342; Railway Co. v. Boozer, 70 Tex. 530, 8 S. W. 119; Railroad Co. v. Hewitt, 67 Tex. 473, 3 S. W. 705; Roth v. Depot Co. (Wash.) 43 Pac. 641; Barry v. Railroad Co., 92 N. Y. 289; Taylor v. Canal Co., 113 Pa. St. 162, 8 Atl. 43; Chenery v. Railroad Co., 160 Mass. 211, 35 N. E. 554.

The elementary principle, fundamental in all civilized life, to test that degree of care, the absence of the reasonable use of which constitutes culpable negligence, is that a party must so use his own, and so conduct himself, as he would have a right to expect that another, honest, reasonably prudent, and humane, would do under similar circumstances. Subject to certain well-settled limitations, the fit adjustment of this principle to the infinitely varying conditions of particular cases can best be made by the jury. It is clear to us that if the defendant was negligent in the handling of the oil-tank car in question, in its yards at the junction of Fair street, by which the car escaped from control, and rushed down the track at a great speed, and across the bridge on which the children were, and inflicted the injury of which they died, the cause was direct and proximate, and the defendant could not be relieved on the ground that the cause was remote, and the effect not to have been expected. There is in the declaration no suggestion of any act upon the part of the children that would constitute negligence, other than the mere fact of their being run down and killed by a blind car coming on them from the rear at a fearfully excessive rate of speed, without any signal or note of warning other than the noise that the movement of a single car would make, which, even to ears of adult experience, must have been inaudible at the given time and place. As already suggested, the test to be applied to a given state of facts, either by court or jury, to determine whether they constitute negligence, is our common knowledge of what would be the conduct of a reasonably prudent person of like age and experience in like circumstances. The same degree of care is not expected of children of the age of 7 and 11 years that could reasonably be exacted of mature persons, having the experience which comes as all experience does with maturing years. This circumstance of age, however, like all the other circumstances of the situation, is an element of proof to be considered by the jury in finding the presence or absence of contributory negligence. We conclude, therefore, that the circuit court erred in sustaining the general demurrer to plaintiff's declaration, for which error its judgment is reversed, and the cause is remanded to that court, with directions to overrule the demurrer and award the plaintiff a venire. Reversed and remanded.

OUSELEY v. LEHIGH VALLEY TRUST & SAFE-DEPOSIT CO.

(Circuit Court, E. D. Pennsylvania. November 23, 1897.)

No. 62.

1. FOREIGN JUDGMENTS—VALIDITY.

A default judgment between citizens of a foreign country, rendered by a court of that country having general jurisdiction and jurisdiction of the subject-matter, is valid and enforceable here, though the defendants, being out of that country at the time, were not personally served.

2. SAME—SUIT ON JUDGMENT—PARTIES.

Quere: Whether the assignee of a foreign judgment can sue thereon in his own name.

This was an action of assumpsit, brought by Frederick Arthur Gere Ouseley, in his own name, against the Lehigh Valley Trust & Safe-Deposit Company, as executor of Amable B. Bonneville, deceased. The statement of claim set out the following facts:

On July 26, 1876, Samuel M. Weeks, a subject of the queen of Great Britain, and a resident of Nova Scotia, recovered judgment against Amable B. Bonneville and another in the supreme court of the province of Nova Scotia, amounting, with costs, to \$2,242.27. That court was then a court of record, duly constituted, with general jurisdiction, and jurisdiction of the subject-matter of that suit. The defendants therein in 1878 and in 1882 acknowledged the validity and binding force of that judgment, and promised to pay it, but only \$190 has been received on account thereof. Amable B. Bonneville died on November 8, 1895, residing at Allentown, Pa. The corporation defendant was appointed his executor, and is in funds to pay this judgment. Samuel M. Weeks has assigned his rights under this judgment to the plaintiff, who is also a subject of the queen of Great Britain. Attached to this statement of claim is a copy of the record of the original cause. From this it appears that the defendants were residing in New York, and were not personally served therein within the territorial jurisdiction of the Nova Scotia court, and that the original judgment was obtained by default.

To this statement of claim a demurrer was filed by defendant, the grounds of which, so far as insisted on at the argument, are set out in the opinion.

Charles A. Chase, for plaintiff.

Edward Harvey, for defendant.

DALLAS, Circuit Judge. Four causes of demurrer are assigned by the defendant to the plaintiff's statement of his cause of action, but these need not be severally considered, inasmuch as in the brief presented on behalf of the defendant it is said that the questions intended to be raised by the demurrer are (1) whether this action can be maintained notwithstanding the fact that it appears that the judgment of the Canadian court now sued upon was obtained without service on the defendants, and without appearance by them; and (2) whether, aside from the first question, the plaintiff, as assignee of that judgment, can maintain an action thereon in his own name.

1. The first point is, in my opinion, not well taken. It need not be questioned—it is, I think, unquestionable—that, if the defendants had been then citizens of the United States, the judgment, which was entered by the Canadian court without actual notice to or appearance by them, of whatever validity there against property of the de-

fendants there situate, could have no validity here, even of a prima facie character. *Bischoff v. Wethered*, 9 Wall. 812, 814. But the statement of claim expressly asserts that the court which rendered the judgment was, at the time of its rendition, a court of record, duly constituted, and of general jurisdiction, and that it had jurisdiction not only of the subject-matter, but also of the parties to the action; and this general averment is supplemented by the specific allegation that Amable B. Bonneville, whose executor is defendant here, "was then a resident and subject of said dominion and empire." In view of these statements of fact, I cannot sustain the demurrer upon the ground now under consideration. The law upon the subject was, I think, well stated in *Schisby v. Westenholz* (1870-71) L. R. 6 Q. B. 155, where Blackburn, J., at pages 160 and 161, said:

"Again, it was argued before us that foreign judgments obtained by default, where the citation was [as in the present case] by an artificial mode prescribed by the laws of the country in which the judgment was given, were not enforceable in this country, because such a mode of citation was contrary to natural justice. Now, on this we think some things are quite clear on principle. If the defendants had been, at the time of the judgment, subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been, at the time the suit was commenced, residents in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them."

The application of this language to the case in hand need not be pointed out; it is obvious.

2. The brief on behalf of the defendant quite forcibly opposes the right of the plaintiff assignee to maintain this action in his own name, but, though otherwise quite exhaustive, the plaintiff's brief is wholly silent upon this question. Under these circumstances, and in view of the fact that this particular objection, if well founded, may, perhaps, be overcome by amendment, I deem it inadvisable to now pass upon it. Accordingly, the demurrer will be retained for further consideration, and with leave to either party to move the court in the premises as may be advised.

BARNES CYCLE CO. v. REED.

(Circuit Court, W. D. Pennsylvania. January 3, 1898.)

No. 1.

GUARANTY—NOTICE OF ACCEPTANCE.

Where a guarantor signs the guaranty without request of the guarantee, and in his absence, for no consideration except future advances to be made to the principal, the writing is a mere proposal, requiring acceptance and notice thereof to the guarantor in order to bind him. The mere recital of a nominal consideration, without stating whether it comes from the guarantee or the principal, does not affect this rule.

This was an action at law by the Barnes Cycle Company against C. M. Reed upon an alleged contract of guaranty. At the trial the court directed a verdict for the defendant, and the case is now heard upon a motion for a new trial.

Fish & Crosby, for plaintiff.
T. A. Lamb, for defendant.

BUFFINGTON, District Judge. This is a motion for a new trial. The court gave peremptory instructions in favor of the defendant, and therein, it is contended, committed error. A careful examination of the authorities has strengthened us in the view taken at the trial of the questions involved, and we are of opinion there was no error in the instructions given. The facts of the case are these: On November 20, 1895, one Schlaudecker entered into a provisional written contract or arrangement with the Barnes Cycle Company, the plaintiff, providing for his acting as that company's agent, and the future ordering of a large number of bicycles from it. This paper contained the proviso that the "contract shall not be considered as binding upon the first party (the Barnes Cycle Company) until approved in writing by the Barnes Cycle Company"; and upon the writing was a printed form for such approval and acceptance by that company. This writing was on February 10, 1896, taken by Schlaudecker to C. M. Reed, the defendant, who then signed his name to an indorsement thereon, which reads as follows:

"In consideration of the execution by the Barnes Cycle Company of the foregoing contract with Leo Schlaudecker, Erie, Pa., and the sum of one dollar, receipt whereof is hereby acknowledged, I hereby guaranty the payment, when the same becomes due, of all sums owing, or which may hereafter be owing, for bicycles and bicycle attachments, sold and delivered by said Barnes Cycle Company to said Leo Schlaudecker under this contract; and, for the like consideration, I further guaranty the performance by said Leo Schlaudecker of all the other provisions of said contract in his part to be performed.

"Dated Erie, Pa., 2/10, 1896.

Chas. M. Reed."

The paper was subsequently returned by Schlaudecker to the Barnes Cycle Company, which company, on February 15, 1896, approved and accepted the original contract, as follows:

"Syracuse, N. Y., Feby. 15, 1896.

"The above contract is hereby approved and accepted.

"The Barnes Cycle Co.,

"By A. R. Peck. [L. S.]"

No notice was given Reed of such signing or acceptance, and there is no evidence that he knew of any goods being furnished to Schlaudecker by the Barnes Company before August, 1896, at which time all deliveries were completed. Thereafter Schlaudecker failed, and, not having paid for the bicycles furnished him, the present suit was brought against Reed upon his said undertaking.

As we view this case, the writing of November 20, 1895, between Schlaudecker and the Barnes Company, was provisional only, and was not to, and did not, become a contract until its approval in writing by the Barnes Cycle Company. In this inchoate, incomplete form, in which it had remained for almost three months after its original signing, it was brought by Schlaudecker to Reed, and, as stated above, the indorsed agreement was signed by the latter.

It will be noted that when thus signed there was no valid, subsisting contract between Schlaudecker and the Barnes Cycle Company. It only became a valid, enforceable contract, as against the Barnes Company, five days later, when that company indorsed its acceptance and approval upon it.

Under the circumstances, we are of opinion that the undertaking of Reed was provisional, and not absolute. The Barnes Company was not bound to accept it, or, indeed, to enter into the contract with Schlaudecker. If it saw fit to contract with Schlaudecker, and accept Reed's offer, we are of opinion it was bound to notify Reed of that fact, and of its acceptance of his offer; for, as we construe Reed's undertaking, the future execution of the contract by the Barnes Company was the consideration for him making his agreement. Hence the necessity for notice. This view of the law is in accord with the authorities, both state and federal. The case of *Machine Co. v. Richards*, 115 U. S. 527, 6 Sup. Ct. 175, is strikingly in point. It was there said:

"But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract."

We see no difference between that case and the one in hand. Save that in the one at bar, the receipt of a nominal consideration is acknowledged, the facts are quite alike. But this difference should not be controlling, under the circumstances and writings of this case; for that this nominal consideration was paid by the Barnes Company does not affirmatively appear from the writing itself, and its payment by Schlaudecker may be quite as consistently inferred therefrom as its payment by the Barnes Company.

In *Davis v. Wells*, 104 U. S. 164, the question of the necessity of notice was considered, and, after a full discussion of the prior federal authorities, the court said:

"There seems to be some confusion as to the reason and foundation of the rule, and consequently some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise. In others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it, as a condition of the promise of the guarantor. The former is the sense in which the rule is to be understood as having been applied in the decisions of this court."

This principle is the ground upon which the Pennsylvania cases of *Coe v. Buehler*, 110 Pa. St. 366, 5 Atl. 20, and *Gardner v. Lloyd*, 110 Pa. St. 285, 2 Atl. 562, rest. In the former case the court said:

"The absence of notice of acceptance by the plaintiffs to the defendant is fatal to their claim. When the defendant signed the guaranty it was his proposition only. The contract which he proposed to guaranty had not been executed or accepted by the plaintiffs. True, they did execute it soon afterwards, yet they gave no notice thereof to the defendant."

In the latter the court, after discussing the pertinent Pennsylvania cases, says:

"In all of them the doctrine is enforced that where the event is future, and depends upon the will of the guarantee, he must give notice of acceptance to the guarantor before the latter becomes subject to any liability."

The motion for a new trial is refused.

In re KIRBY.

(District Court, D. South Dakota. January 19, 1898.)

1. ATTORNEYS—DISBARMENT—CONVICTION OF INFAMOUS OFFENSE.

A court will disbar an attorney convicted of an offense involving moral turpitude, and to which congress has attached an infamous punishment, though it is not a felony.

2. SAME—EFFECT OF WRIT OF ERROR.

The suing out of a writ of error to review a judgment of a federal court convicting an attorney of an offense, and the granting of a supersedeas thereon, do not vacate the judgment, so as to prevent its being ground for the defendant's disbarment.

Proceeding for the disbarment of Joe Kirby.

S. B. Van Buskirk, for petitioners.

Joe Kirby, in pro. per.

CARLAND, District Judge. On January 7, 1898, J. D. Elliott, United States attorney for this district, filed in this court his sworn petition, wherein it is charged that Joe Kirby, an attorney of this court, was at the April, 1897, term of said court duly convicted upon an indictment charging said Joe Kirby with having received and had in his possession and control, with intent to convert the same to his own use, certain postage stamps of the United States, he (the said Kirby) knowing the same to have been theretofore feloniously stolen and carried away from a certain post office of the United States; that on June 25, 1897, being a day of said April term, said Joe Kirby was duly sentenced upon said conviction to a term of two years in the penitentiary of South Dakota. Said petition prayed the judgment of this court in the premises, and that said Joe Kirby be disbarred and removed from his office as an attorney of this court. Upon the filing of said petition, said Joe Kirby was cited to appear before this court on the 17th day of January, 1898, and show cause why the prayer of the petition should not be granted. On the return day respondent appeared in his own behalf, and S. B. Van Buskirk, assistant United States attorney, in support of the petition.

Respondent first objected to the jurisdiction of the court on the ground that the matter charged against him could not be heard except at a special or general term of this court, and then filed an answer denying generally the allegations of the petition, except as said allegations might be admitted by other matters set forth in the answer. The answer then set forth that a writ of error had been sued out of the supreme court of the United States to reverse the judgment of conviction set forth in the petition, and that a supersedeas had been granted pending the decision of said supreme court, which writ of error was still pending and undetermined. A certified copy of the proceedings of this court in the case of the United States against Joe Kirby was introduced in evidence in support of the petition, from which it appears that the allegations of the petition are true. This court will take judicial notice, upon its attention being called thereto, of the issuance of the writ of error and the granting of a supersedeas. No other evidence was introduced on either side.

Respondent contends that the petition should be dismissed for the following reasons: (1) The court has no jurisdiction, for the reasons stated in the opening of the case in regard to the terms of court. (2) The offense of which respondent was convicted is not a felony. (3) The suing out of a writ of error and the granting of a supersedeas have rendered the judgment of conviction inoperative for any purpose, pending the hearing on said writ.

There is no force in the first point, as the record of the court shows that the regular October, 1897, term of this court had been regularly adjourned from time to time until the date of the hearing herein mentioned.

In considering the second point, it may be well to consider briefly the power of this court over its attorneys after it has once admitted them to practice before it. In *Ex parte Wall*, 107 U. S. 273, 2 Sup. Ct. 575, the supreme court said:

"It is laid down in all the books in which the subject is treated that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts, and in gross cases of misconduct to strike their names from the roll. If regularly convicted of a felony, an attorney will be struck off the roll as of course, whatever the felony may be, because he is rendered infamous. If convicted of a misdemeanor, which imports fraud or dishonesty, the same course will be taken."

There is no statutory definition of felonies in the legislation of the United States. *Reagan v. U. S.*, 157 U. S. 303, 15 Sup. Ct. 610. The supreme court has held, however, in *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, and in *Mackin v. U. S.*, 117 U. S. 350, 6 Sup. Ct. 777, that a crime which may be punished by imprisonment, with or without hard labor, in a state prison or penitentiary, is an infamous crime. It seems that the crime of receiving stolen property, knowing the same to have been stolen, was not a felony at common law. Neither has it been made such by any legislation of congress; and the supreme court, in the case of *Bannon v. U. S.*, 156 U. S. 464, 15 Sup. Ct. 469, said:

"Neither does it necessarily follow that, because the punishment affixed to an offense is infamous, the offense itself is thereby raised to the grade of felony."

But it is immaterial, for the purpose of this proceeding, whether the offense of which the respondent was convicted is a felony or not; for it makes little difference whether a man is rendered infamous by the mere fact of his committing a felony, or whether he is rendered so by the commission of a misdemeanor to which congress, in direct terms, has attached an infamous punishment, for the reason that the punishment has always determined whether the crime of which a person was convicted was infamous or not. There has been no attempt to argue that the crime of which respondent was convicted did not involve moral turpitude.

In regard to the third point, it is claimed that, as a writ of error had been sued out and a supersedeas granted, the judgment of conviction has no force whatever, and cannot be used as evidence of any fact adjudicated by it. In support of this contention numerous cases are cited, defining the status of judgments rendered in different state

courts which operated as a supersedeas. The principal case relied on is that of *People v. Treadwell*, 5 Pac. 686, wherein the supreme court of California, in a proceeding to disbar an attorney, held that under the statutes of that state an appeal duly perfected suspended the operation of the judgment for all purposes. But it must be remembered that the judgment of conviction, to establish which a certified copy of the record was introduced on this hearing, was rendered in a district court of the United States, and that the writ of error sued out was the common-law writ; hence, decisions of state courts, based upon state statutes, are not authority. It is necessary, then, to inquire as to what effect the common-law writ of error has upon the judgment to reverse which it was sued out. And in discussing this point I shall assume that the writ of error in the case of *Joe Kirby versus The United States* was properly sued out of a court having jurisdiction to review errors of law in that proceeding; for, since the act of January 30, 1897, the circuit court of appeals of the Eighth circuit would generally exercise the only appellate jurisdiction over the judgment rendered against the defendant. "An appeal is a process of civil-law origin, and removes a cause entirely, subjecting the fact as well as the law to a review and a retrial. A writ of error is a process of common-law origin, and it removes nothing for re-examination but the law." 2 Story, Const. § 1762. In the case of *Sharon v. Hill*, 26 Fed. 345, Judge Deady used the following language:

"There is some confusion and contradiction in the language and ruling of the authorities on this point, but this arises largely from the fact that the difference in the original mode and effect of reviewing a judgment in an action at law, and the decree of the court proceeding according to the civil law as a court of chancery or admiralty, is often latterly overlooked. A judgment in an action at law could only be reversed and annulled for error appearing on its face. For this purpose a writ of error issued out of the court above to bring up the record for examination. This was considered a new action to annul and set aside the judgment of the court below, and if the writ was seasonably sued out, and bail put into the action, it was a supersedeas, so far as to prevent an execution from issuing on a judgment pending the writ of error, but left it otherwise in full force between the parties, either as a ground of action, a bar, or an estoppel."

See, also, 2 Bac. Abr. 87.

In *Railway Co. v. Twombly*, 100 U. S. 81, the supreme court says:

"A writ of error to this court does not vacate the judgment below. That continues in force until reversed, which is only done when errors are found in the record on which it rests, and which were committed previous to its rendition."

It will thus be seen that the suing out of the writ of error in no wise affected the judgment of conviction against the respondent. The granting of the supersedeas simply stayed the execution of the judgment until the writ of error could be heard. A proper respect for the public, the legal profession, and this court renders it imperative that the respondent should be disbarred as an attorney of this court; and it is so ordered.

UNITED STATES v. MURPHY.

(District Court, D. Delaware. January 19, 1898.)

No. 2.

1. NEUTRALITY LAWS—INTERPRETATION.

The broad purpose of section 5286 of the United States Revised Statutes is to prevent complications between this government and foreign powers. It is not the intent of that section in any manner to check or interfere with the commercial activities of citizens of the United States or of others residing within the United States and interested in commercial transactions; but to prevent the use of the soil or waters of the United States as a base from which military expeditions or military enterprises shall be carried on against foreign powers with which the United States is at peace.

2. SAME—PROVIDING MEANS FOR MILITARY ENTERPRISE.

Providing the means of transportation for a military enterprise to be carried on from the United States against Spanish rule in Cuba is, within the meaning of section 5286, preparing the means for such military enterprise to be so carried on, and, if done with knowledge on the part of the person so providing the means of transportation, of the character and purposes of such enterprise, is denounced by the statute.

3. SAME—"MILITARY ENTERPRISE" DEFINED.

Where a number of men, whether few or many, combine and band themselves together, and thereby organize themselves into a body, within the limits of the United States, with a common intent or purpose on their part at the time to proceed in a body to a foreign territory, there to engage in carrying on armed hostilities, either by themselves or in co-operation with other forces, against the territory or dominions of any foreign power with which the United States is at peace, and with such intent or purpose proceed from the limits of the United States on their way to such territory, either provided with arms or implements of war, or intending and expecting and with preparation to secure them during transit, or before reaching the scene of hostilities, all the essential elements of a military enterprise exist within the meaning of section 5286.

4. SAME.

It is not necessary that the men shall be drilled or uniformed or prepared for efficient service, nor that they shall have been organized, according to the tactics, as infantry, artillery or cavalry. It is sufficient that the military enterprise shall be begun or set on foot within the United States; and it is not necessary that the organization of the body as a military enterprise shall be completed or perfected within the United States. Nor is it necessary that all of the persons composing the military enterprise shall be brought in personal contact with each other within the limits of the United States; nor that they shall all leave those limits at the same point. It is sufficient that by previous arrangement or agreement, whether by conversation, correspondence or otherwise, they become combined and organized for the purposes mentioned, and that by concerted action, though proceeding from different portions of this country, they meet at a designated point either on the high seas or within the limits of the United States.

5. SAME—TRANSPORTATION OF MILITARY ENTERPRISE.

A vessel may at the same time be engaged in transporting a military enterprise and also a cargo of arms and munitions of war, and while the transportation of the latter is lawful, the transportation of the former is unlawful, if carried on for the purpose of engaging in armed hostilities against the Spanish government in Cuba.

6. SAME—VENUE.

If a military enterprise within the definition above given was begun or set on foot in the United States for the purpose of committing hostilities in Cuba against the Spanish government in that island, whether in co-operation with the Cuban insurgents, or by itself, although such military enter-

prise may never have reached the shores of Cuba, and if the defendant prepared, within the District of Delaware, and with knowledge on his part then and there of the unlawful nature of the enterprise, the means of transporting such military enterprise from the high seas off Barnegat, either for the whole or any part of the way to Cuba, he violated section 5286.

7. REASONABLE DOUBT.

Reasonable doubt defined.

This was an indictment against Edward Murphy for violation of Rev. St. § 5286.

Lewis C. Vandegrift, U. S. Dist. Atty.

Geo. Gray, Herbert H. Ward, and Andrew C. Gray, for defendant.

BRADFORD, District Judge. Gentlemen of the Jury: The indictment in this case charges Edward Murphy, the defendant, with violating section 5286 of the Revised Statutes of the United States. That section comprises certain provisions of the legislation by congress commonly known as the neutrality laws of the United States. It provides that "every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor," &c. The indictment originally contained eight counts, of which six, namely, the first, third, fourth, sixth, seventh and eight were, before you were impaneled, disposed of on demurrer; leaving for present consideration only the remaining counts, namely, the second and fifth. The second count charges that the defendant on or about the fifth day of August, 1896, "did wilfully, knowingly and unlawfully provide the means for a certain other military expedition, to be carried on from within the territory and jurisdiction of the United States, to wit, from the District of Delaware, against the territory and dominions of the King of Spain, a foreign prince, or state, with whom the United States were then and are now at peace, the means provided by the said Edward Murphy being the steamship Laurada, of which he was then and there master, and her crew, of which he was then and there in command and control; the said Edward Murphy remaining master of the said Laurada and in command and control of her crew during the several weeks immediately subsequent to the said fifth day of August, A. D. eighteen hundred and ninety six, during which said last mentioned time the said military expedition was being conveyed and transported by the said steamship Laurada, of which he was master as aforesaid, from within the territory and jurisdiction of the United States, to wit, from the District of Delaware, to and against the island of Cuba, a dominion of the said King of Spain, a foreign prince, or state, with whom the United States were then and are now at peace; contrary to the form of the act of Congress," &c. This count, in short, charges that the defendant wilfully, knowingly and unlawfully, provided the means for a military expedition to be carried on from the District of Delaware to and against the island of

Cuba, a dominion of the King of Spain, with whom the United States then was and still is at peace. A conviction of the defendant under the second count could not be justified in the absence of evidence showing that an expedition, for which he provided the means, was to be carried on from the District of Delaware. No evidence has been adduced that any expedition, military or otherwise, was to be or was carried on from the District of Delaware. You are therefore instructed by the court to render a verdict of not guilty as to the second count.

The fifth count charges that the defendant on the fifth day of August, 1896, "did, within the territory and jurisdiction of the United States, to wit, at the said District of Delaware, wilfully and unlawfully prepare the means for a certain other military enterprise to be carried on from thence against the territory and dominions of a foreign prince, or state, with whom the United States were then and are now at peace, to wit, against the colony and district of Cuba, which said colony and district at the time herein mentioned was and still is a part of the territory and dominions of the King of Spain, the said United States then and there being at peace with the said state and with the said King of Spain; that the said Edward Murphy so prepared the means for such military enterprise in that he, on or about the date last aforesaid, being master of a certain steam vessel known as the 'Laurada' and in command of said vessel and her crew at the District of Delaware aforesaid, did then and there proceed with the said vessel and crew down the Delaware River into the Atlantic ocean and thence northward on the high seas off the coast of New Jersey where the said vessel was met under preconcerted arrangement by a certain steam launch known as the 'Richard K. Fox' containing men, and a certain lighter containing arms and ammunition and towed by a certain steam tug known as the 'Dolphin,' which said men and arms and ammunition were then and there transferred to the said 'Laurada' and thence carried by it to or near to the island of Navassa in the Caribbean sea where the said men and arms and ammunition were transferred from the said 'Laurada' to a certain steam vessel known as the 'Dauntless' and by it landed on the shore of Cuba, the said men acting together under a preconcerted arrangement and he, the said Edward Murphy, well knowing and intending that the said men and arms and ammunition should be so transported and transferred and finally landed on the island of Cuba for the purpose of effecting the said military enterprise as aforesaid and making war upon the territory and dominions of the King of Spain; contrary to the act of Congress," &c. This count charges, in substance, that the defendant on the fifth day of August, 1896, knowingly, wilfully and unlawfully prepared the means within the District of Delaware for a military enterprise to be carried on from the United States against the island of Cuba, a dominion of the King of Spain, with whom the United States then was and still is at peace; the means so prepared being the steam vessel Laurada and her crew. The count does not charge that the defendant began or set on foot a military enterprise, but

that he prepared the means for a military enterprise. In order to justify a verdict of guilty you must be fully satisfied from the evidence in the case that all the necessary ingredients of the alleged offence existed or occurred. It is necessary that it shall appear to your satisfaction that on or about the fifth day of August, 1896, the defendant prepared means; that the defendant prepared such means within the District of Delaware; that the means so prepared were means for a military enterprise to be carried on from the territory or waters of the United States; that such enterprise was to be carried on against the territory or dominions of the King of Spain in the island of Cuba; that the United States was at peace with Spain at the time the defendant so prepared means; and that the defendant knew, at the time he prepared such means, the character and purpose of such enterprise. The court takes judicial notice and instructs you that at the time of the alleged offence the United States was at peace with Spain; that the island of Cuba was at that time and still is part of the territory or dominions of the King of Spain; that at that time an armed insurrection or rebellion existed in Cuba against the Spanish authority and government in that island, and warlike hostilities were then and there in progress between the Cuban insurgents, on the one hand, and the military forces of the King of Spain, on the other. It appears from uncontradicted evidence in the case, of the effect of which, however, you are the ultimate judges, that the defendant was on the fifth day of August, 1896, the master of the *Laurada*, and that he then controlled her crew and her movements and thereafter continued in such control until after that vessel left the island of Navassa, after having transferred the men and munitions of war to the steam vessel *Dauntless* at or near that island. It further appears from the testimony, without contradiction, that on the fifth day of August, 1896, the *Laurada* with her crew was in the Delaware river opposite the city of Wilmington, and within the District of Delaware, and that about five or six o'clock in the evening of that day the defendant boarded her and assumed control as her master, and thereafter continued to control her crew and her movements as above mentioned.

Providing the means of transportation for a military enterprise to be carried on from the United States against Spanish rule in Cuba is, within the meaning of section 5286 of the Revised Statutes of the United States, under which the defendant has been indicted, preparing the means for such military enterprise to be so carried on, and, if done with knowledge, on the part of the person so providing the means of transportation, of the character and purpose of such enterprise, is denounced by the statute. If you shall be satisfied by the evidence in the case that the men taken on board of the *Laurada* on the high seas off Barnegat constituted a military enterprise, as hereinafter defined, from the United States against the Spanish authorities in Cuba, and, further, that the defendant, with knowledge of the character and purpose of such enterprise, and with intent to furnish transportation for it, took the *Laurada* with her crew from Wilmington to the place of transshipment on the high seas off Barnegat,

you should render a verdict of guilty. But unless you should be satisfied from the evidence in the case, beyond reasonable doubt, that all of the requisite ingredients or elements of the alleged offence existed, you should render a verdict of not guilty. The broad purpose of section 5286 is to prevent complications between this government and foreign powers. It is not the intent of that section in any manner to check or interfere with the commercial activities of citizens of the United States or of others residing within the United States and interested in commercial transactions. It is not an offence against the United States to transport arms, ammunition and munitions of war from this country to any foreign country, whether they are to be used in war or not; nor is it an offence against the United States for individuals to leave this country with intent to enlist in foreign military service; nor is it an offence against the United States to transport persons out of this country and land them in foreign countries, although such persons have an intent to enlist in foreign armies; nor is it an offence against the United States to transport from this country persons intending to enlist in foreign armies, and munitions of war, in the same ship. The purpose of the section in question is to prevent the use of the soil or waters of the United States as a base from which military expeditions or military enterprises shall be carried on against foreign powers with which the United States is at peace. What it prohibits is a military expedition or a military enterprise from this country against any foreign power at peace with the United States. It does not prohibit the transportation from this country in the same ship of few or many men whose known intention before leaving our shores is to engage in hostilities against the Spanish forces in Cuba, provided that such men do not constitute a military expedition or a military enterprise against the dominion of the King of Spain in that island. If they go from this country to Cuba merely as individuals and without concert of action between them, although for the purpose of taking part in such hostilities, no crime or offence against the United States attaches to anyone who has provided the means of their transportation with full knowledge, at the time he provided such means, of their purpose in securing such transportation. But if the men so transported are so combined and organized as to constitute a military expedition or a military enterprise against the dominion of the King of Spain in Cuba, the furnishing of the means of transportation with knowledge, on the part of the person furnishing such means, of the character and purpose of such expedition or enterprise, is an offence against the United States punishable under the section in question. A military expedition or a military enterprise may consist of few or many men. Eighteen or twenty four men may compose such an expedition or enterprise as well as eighteen hundred or twenty four hundred. The existence or character of the military expedition or the military enterprise does not require concerted action on the part of a large number of individuals. The defendant, as before stated, is charged in the fifth count, not with preparing the means for a military expedition, but

with preparing the means for a military enterprise. The words "military enterprise" are somewhat broader in meaning than the words "military expedition." Where a number of men, whether few or many, combine and band themselves together, and thereby organize themselves into a body, within the limits of the United States, with a common intent or purpose on their part at the time to proceed in a body to foreign territory, there to engage in carrying on armed hostilities, either by themselves or in co-operation with other forces, against the territory or dominions of any foreign power with which the United States is at peace, and with such intent or purpose proceed from the limits of the United States on their way to such territory, either provided with arms or implements of war, or intending and expecting and with preparation to secure them during transit, or before reaching the scene of hostilities, in such case all the essential elements of a military enterprise exist. It is not necessary that the men shall be drilled or uniformed or prepared for efficient service, nor that they shall have been organized, according to the tactics, as infantry, artillery or cavalry. It is sufficient that the military enterprise shall be begun or set on foot within the United States; and it is not necessary that the organization of the body as a military enterprise shall be completed or perfected within the United States. Nor is it necessary that all of the persons composing the military enterprise should be brought in personal contact with each other within the limits of the United States; nor that they should all leave those limits at the same point. It is sufficient that by previous arrangement or agreement, whether by conversation, correspondence or otherwise, they become combined and organized for the purposes mentioned, and that by concerted action, though proceeding from different portions of this country, they meet at a designated point either on the high seas or within the limits of the United States. Under such circumstances a military enterprise to be carried on from the United States exists within the meaning of the law. [The court here took up and disposed of various instructions prayed for on either side, and proceeded.] I now call your attention, gentlemen, to some of the evidence in the case, of the weight and effect of which, however, you, and not the court, are to judge. On Sunday, the ninth day of August, 1896, the Laurada, the Dolphin, the Richard K. Fox and the Green Point all met together on the high seas some ten or twenty miles off Barnegat. Did these vessels meet accidentally, on the one hand, or, on the other, by prearrangement and in accordance with some plan agreed upon in the United States? Rand, the chief mate of the Laurada, testified that he had a conversation with the defendant in Philadelphia, and indicated upon a chart where the Laurada should go, after leaving Wilmington, and that the point so fixed was on the coast of New Jersey. It appears from the uncontradicted testimony that the Laurada left Wilmington on the fifth day of August, 1896, under the command and control of the defendant and proceeded down to a point at or near Dan Baker shoal in the District of Delaware, where she took on board four surf boats, and then proceeded to sea. There is

no evidence showing that, after leaving the District of Delaware, and before arriving at the point off Barnegat, any communication was received either by the defendant or any person on the Laurada from any outside source. Horton testified that the Richard K. Fox about nine or ten o'clock in the evening of the eighth day of August, 1896, started out to sea from Gardener's Landing, at or near Atlantic City, with a number of men, who, with the exception of the crew of the Fox, did not return; and that John D. Hart who, according to the testimony of Rand, had transferred him, Rand, from the Bermuda to the Laurada, called out to the men who were about starting out on the Fox at the time above mentioned, "Cast off your lines and go to sea and you know the rest." Bruff testified that about the first week in August, 1896, he made a sale of arms and delivered them on the eighth day of August at pier No. 39 East River, New York City; that the sale amounted to about \$50,000, and included 2100 Remington rifles, 250 Remington carbines, 250 Manser rifles, 250 carbine slings, 858,000 cartridges of different sizes, 10 sets of pack saddles and harness, a lot of electrical supplies including wire and batteries, 2 Hotchkiss cannon with 500 rounds of cannon ammunition, a quantity of vaseline and glycerine, 12 revolvers, 10 holsters and belts, 200 burlap bags, 6 shovels, 3 pickaxes and 20 bundles, the contents of which the witness did not know, but which had been delivered to him and were by him delivered on the pier mentioned. McAllister testified that he was in the towing and transportation business in August, 1896, and at that time owned the barge Green Point and the tug Dolphin; that a gentleman, known as Mr. Cash, engaged the witness to take some ship stores from pier No. 39, East River, New York City; that he went with the Dolphin, towing the Green Point with this cargo, from the pier named out to sea and reached the place to which he was going between eleven and twelve o'clock on Saturday night, August 8, 1896; that he met at the point of his destination a vessel and put the Green Point alongside of that vessel which he believes to have been the Laurada; and that the cargo was taken from the Green Point and put on board of that vessel. McKillop testified that he was the master of the Dolphin in August, 1896, and was on board of her on the trip testified to by McAllister; that he had a pilot aboard whom he did not know; that the witness did not know who put that pilot on board; that he came aboard at the above mentioned pier; that he knew there was to be a pilot there; that he did not ask the pilot to show him any license; that he got the Green Point at the above mentioned pier and towed her around Sandy Hook, and some distance below that point met the Laurada and the Richard K. Fox; that no signals were exchanged when he met these vessels; that he "just run up and put the barge alongside"; that the pilot gave him information as to the boat which he was to place the Green Point alongside of; and that the cargo carried on the Green Point was transferred to the Laurada. Cowley testified that when the Fox came alongside of the Laurada a gentleman from the former vessel asked the defendant "if he had seen the other boat," and that "at the time they were talking we

sighted this other tow boat and a barge at her stern," which were the Dolphin and the Green Point. You are the sole judges of the weight to be given to all this testimony.

If you are satisfied from the evidence in the case that the men and munitions of war, transferred to the Laurada on the high seas off Barnegat were, pursuant to prearrangement in the United States, forwarded from the United States to the point of such transfer and there so transferred, and that the defendant was a party to such prearrangement and knew of it before he left the District of Delaware on the fifth day of August, 1896, it is for you as reasonable men to determine whether there was or was not a fixed purpose on the part of the parties to such arrangement, for the accomplishment of which the men and munitions of war were so transferred. If you are satisfied that there was a fixed purpose and that the defendant was, before he left the District of Delaware, aware of that purpose, then you are to determine what that purpose was. Was it or not to carry on merely a commercial venture or enterprise? If it was merely to transport arms and munitions of war to be used in Cuba against the Spanish forces, the purpose was lawful, and, while the cargo might have been seized by Spanish cruisers, no offence against the laws of the United States was committed. Unless you are fully satisfied that the transaction in question was not merely a commercial or industrial venture, you should acquit this defendant. And if the men taken on the Laurada off Barnegat were only passengers, although their destination was Cuba and their purpose was either to take part in armed hostilities against the Spanish forces, or, if the men so taken on the Laurada were not a military enterprise, but merely stevedores or men intended to handle the cargo, you should acquit the defendant. But you must bear in mind that a vessel may at the same time be engaged in transporting a military enterprise and also a cargo of arms and munitions of war, and that, while the transportation of the latter is lawful, the transportation of the former is unlawful, if carried on for the purpose of engaging in armed hostilities against the Spanish government in Cuba. The fact that the cargo of arms and munitions of war on the Laurada was in excess of the amount that could be used, in warlike operations, by the men who were transferred to the Laurada off Barnegat is not of itself inconsistent with the existence of a military enterprise on the Laurada; though the existence of such military enterprise must be proved beyond a reasonable doubt. Were or were not the men, so transferred to the Laurada, merely stevedores or persons intended to handle the cargo, legitimately transported as an industrial or commercial venture? This question you are to decide from the evidence in the case. It does not appear from the evidence to whom the shipment of the arms and munitions of war from pier No. 39 East River was consigned; nor does it appear whether any bill of lading accompanied the transaction; nor does it appear that the men who were transferred off Barnegat to the Laurada and who went on that vessel to or near Navassa, returned north after the Laurada discharged her cargo into the Dauntless at or near that island.

What, if any, inferences are to be drawn from these circumstances, or from the testimony relating to the stowaways in the chain locker of the Laurada, are for your determination only.

The burden rests upon the government to satisfy you, beyond a reasonable doubt, that the men transferred to the Laurada off Barnegat were a military enterprise directed against the Spanish government in Cuba. The uncontradicted testimony shows that the Laurada under the command and control of the defendant, after taking on the surf boats within the District of Delaware, proceeded to a point on the high seas off Barnegat and there received from the other vessels, meeting her there, men and munitions of war. There is some variance in the testimony as to the number of men there taken on the Laurada. But whether that number be 18, 20 or 24 is wholly unimportant. Rand, the chief mate of the Laurada, testified that there were 18, and that he could not say that they were all Cubans; that two of them were negroes; that he could not say that the rest were Englishmen; that they talked English; and that some of them were light and some dark. Cowley testified that he could not say positively how many men were transferred to the Laurada from the Fox off Barnegat, but that he learned there were about 20 or 24 of them; that he could not say of what nationality they were, with the exception of one of them whom he had known as a pilot in Cuba; that they were dark complexioned people; and that they spoke a foreign language as far as he knew. Nichols testified that 24 Cubans were transferred at that place from the Fox to the Laurada. Roberts testified that the men so transferred to the Laurada from the Fox "were not more than 16 or something like that"; that he did not know at that time of what nationality the majority of them were, and that he subsequently ascertained that they were Cubans, from having conversation with some of them. The weight and effect of this testimony you are to determine. Rand testified that at the place where the several vessels met off Barnegat he saw a man who, he was told, was General Roloff; that he talked with him on the voyage down to Navassa; that he answered to the name of General Roloff; that there was a man at the place of meeting off Barnegat called Captain by some and Capitan by others; that the men who came with this person called him Capitan; that on the way down to Navassa he saw some large boxes of the cargo which had been transferred to the Laurada off Barnegat opened and small boxes taken out; that at the point of meeting off Barnegat he saw Captain O'Brien of the Bermuda and also a man who was called Colonel Nunez; that Captain O'Brien and the man called Colonel Nunez did not go on the Laurada down to or near Navassa, but that they were both on the Dauntless when the Laurada met her at or near that island; that he was told by the defendant that "we had a certain time to be at Navassa island"; that the Dauntless when met by the Laurada had canvas over her bow and canvas over her stern and something over her smokestack; that while on the Laurada he believed he talked with some of the persons who had been taken on board that vessel off Barnegat about digging trenches; that he knew

"it was something about digging trenches and climbing hills. I told them they wouldn't find that as pleasant as going up eighth avenue, New York;" that he does not think that he said in what place trenches were to be dug; that he did not know, but only had an idea where they were to be dug. It appears from the testimony of Bruff that the arms and munitions of war which were transferred to the Laurada included shovels and pickaxes. Cowley testified that on the way down to Navassa there was a man on board the Laurada called Capitan who had the men, who were transferred from the Fox to the Laurada off Barnegat, in command; that on the way down to Navassa the witness said to the Cuban pilot, who, according to the testimony, had come on board of the Laurada off Barnegat, "there comes a Spanish man-of-war;" to which he replied that "he didn't care for a Spanish man-of-war, they could whip all the Spanish man-of-war ships"; that the Cuban pilot, after reaching Navassa, told the witness that they were going to Cuba "to fight the Spaniards"; that during the voyage to Navassa the man called Capitan and "those two young fellows who stowed away—before they stowed away, they came to Captain Murphy's room, the chart room, one morning. They spoke English, I was painting the floor. They looked over the chart, the map; and Capitan spoke in a foreign language to these young fellows, and they allowed to Captain Murphy that that was where they wanted to land in Cuba," and that "they pointed it out on the chart." Nichols testified that when the Fox came alongside of the Laurada off Barnegat, the men in the former vessel were hungry, and that the defendant "told me to give them something to eat, and I got a bucket full of coffee and lowered it down on the boat, and a dish of meat and bread and sent it down there;" that "Captain" Sutro came on board the Laurada from the Fox; that General Roloff, Colonel Nunez and the general's valet came in the Dolphin; that some of the men who, according to his testimony, came with Captain Sutro, "went on board the barge and with the crew of the barge, helped to put these boxes and bundles off it on board the Laurada"; that Captain Sutro was in charge of the men who came off the Fox; that a Cuban pilot was among them; that the witness can talk a little in the Cuban language; that after the cargo was discharged from the Green Point into the Laurada Colonel Nunez and Captain O'Brien went in the Fox, and that the Dolphin and Green Point went in another direction, and "we steamed out to sea"; that one day while the Laurada was on her way down to Navassa the witness "went down into the hold and Captain Sutro and his men were down there sorting these boxes, taking things out and getting small ones out of the larger ones. Then he opened one of the lid boxes and it had cartridges in it, and those bundles had machetes and there were rifles in there; and there was something like a cartridge that long (indicating), two of them, in a box; and some saddles. I saw those things"; that the men who had been transferred from the Fox to the Laurada were all under Captain Sutro and General Roloff, and that Roloff was over Sutro; that "the mess-room was right opposite the cabin where the general stayed; and any

time that these men would come where the general was and the general would come out, the men would run away forwards. He didn't want them to stay there. He would tell the captain to keep them where they belonged, he was commanding these men, and the general was commanding the captain;" that the witness "spoke to Ricardo, a little dark Cuban fellow on the Laurada and he said he was going to Cuba to fight the Spaniards." Roberts testified that the man called "Capitan" was in charge of the men who were transferred to the Laurada off Barnegat and that General Roloff was over him; that the Cuban pilot told him, the witness, that the men were going to Cuba to fight the Spaniards.

All this testimony, gentlemen, is for your consideration. It is solely your province to determine its weight and effect. While the court brings to your attention some of the testimony, you are instructed that you are not in the least controlled by anything which has been or shall be stated by the court in relation to the testimony in this case. While it is my duty to call your attention to such portions of the testimony as in the judgment of the court may aid you in arriving at a just verdict, you are to give to the testimony only such weight and effect as you consider it entitled to. The court instructs you that the testimony of Cowley, to the effect that the Cuban pilot after the return of the Dauntless to the Laurada at or near Navassa told him that "they landed men safe in Cuba," is to be treated by you solely as evidence tending to show the purpose and character of the enterprise, and not as evidence of the fact of the landing of men in Cuba. It is unnecessary that the government should prove that a military enterprise should have actually reached the shores of Cuba. If the destination of a military enterprise was that island it is wholly unimportant whether it reached Cuba or not. You will recollect the testimony relating to the transferring of the cargo and men on board of the Laurada to the Dauntless at or near Navassa, and the furnishing there by the Laurada of coal for the use of the Dauntless, and also the testimony relating to the stowaways in the chain locker of the Laurada. It is unnecessary that I should longer detain you by recapitulating that testimony. Was or was not the body of men who were transferred off Barnegat to the Laurada a military enterprise against the Spanish government in Cuba? Were they or not men who had combined and banded themselves together and thereby organized themselves into a body within the limits of the United States with a common intent or purpose on their part at the time, to proceed in a body to Cuba, there to engage in carrying on armed hostilities against the Spanish government there, either by themselves or in co-operation with the Cuban insurgents, and were they or not provided with arms and implements of war which they might use in Cuba as occasion required? If so, they were a military enterprise denounced by section 5286 of the Revised Statutes of the United States. Were or not the men who were conveyed on the Laurada to the Dauntless, and transferred to the Dauntless, free agents, on the one hand, or, on the other, subject to authority of a military character? These questions are for your determination. If you find that the men taken on board the Laurada off Barne-

gat were not a military enterprise from the United States against Spanish rule in Cuba, or, if you have a reasonable doubt whether such was the fact, the defendant must be acquitted. But if you are satisfied beyond a reasonable doubt that these men constituted, within the definition heretofore given to you by the court, a military enterprise from the United States against the authorities of Spain in Cuba, although such enterprise may never have reached the shores of Cuba, the next and final question with which you are confronted is whether or not the defendant, at the time he provided the Laurada and her crew within the District of Delaware as means for the transportation of the unlawful military enterprise, if such you find it to be, had knowledge of its real character. The defendant, admittedly, was in command and control of the Laurada and her movements from the time she left the District of Delaware until after she had transferred her cargo of arms and munitions of war, together with the men taken on board of her off Barnegat, to the Dauntless. You are familiar with the testimony as to occurrences and statements made or happening on the Laurada during her voyage to Navassa. If the men and arms and munitions of war were received by the Laurada off Barnegat in pursuance of a prearranged plan or scheme, it is for you to determine whether or not that plan or scheme, whatever it may have been, was abandoned during the voyage of the Laurada from off Barnegat to Navassa. If you shall be satisfied that such scheme or plan, if any existed, was not so abandoned and that the real nature of the enterprise was apparent to the defendant as well as to the others on board of the Laurada at any time after the Laurada left the high seas off Barnegat and before she finally left Navassa, and that the defendant accepted the situation as a matter of course, without the expression of surprise, remonstrance or protest, it will be for you to determine whether this circumstance would or would not have a tendency to show knowledge on the part of the defendant, before the Laurada left the District of Delaware, of the real nature, character and purpose of the enterprise, and if so, it should be taken with all the other evidence in the case.

If, from all the evidence in the case, you shall be satisfied, beyond a reasonable doubt, that a military enterprise, within the definition given to you by the court, had been begun or set on foot in the United States for the purpose of committing hostilities in Cuba against the Spanish government in that island, whether in co-operation with the Cuban insurgents, or by itself, although such military enterprise may never have reached the shores of Cuba, and that the defendant prepared within the District of Delaware, and with knowledge on his part then and there of the unlawful nature of the enterprise, the means, namely, the Laurada and her crew, of transporting such military enterprise from the high seas off Barnegat, either for the whole or any part of the way to Cuba, you should render a verdict of guilty. If you are not so satisfied, you should render a verdict of not guilty.

The commission of a criminal offence can be shown by circumstantial evidence as well as by direct evidence, provided the circumstances proved, together with reasonable inferences drawn from them, are such as to leave no reasonable doubt in the minds of a jury that

the defendant is guilty. You are to take into consideration all the evidence in this case, whether direct or circumstantial, together with all reasonable inferences to be drawn from that evidence, and, upon the evidence taken as a whole, determine upon your verdict. If that evidence does not satisfy you, beyond a reasonable doubt, that the defendant is guilty of the offence with which he is charged under the fifth count in the indictment, it will be your duty to render a verdict of not guilty. If, however, that evidence does so satisfy you, beyond a reasonable doubt, it will be your duty to render against the defendant a verdict of guilty in manner and form as he stands indicted under the fifth count.

A reasonable doubt is not a doubt created by the ingenuity of counsel or of the jury; nor is it a whimsical, arbitrary or speculative doubt; nor a trivial supposition; nor a mere conjecture or guess; nor is it such a doubt as is born of a merciful inclination to permit the defendant to escape the penalty of the law, nor one permitted by sympathy for him or those dependent upon him. The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty. You are further instructed that you cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt. The court further charges you that a reasonable doubt is a doubt based on reason and which is reasonable in view of all the evidence. If, after an impartial comparison and consideration of all the evidence you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence you can truthfully say that you have a settled and fixed conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt. The guilt or innocence of the defendant is to be determined by you as intelligent and conscientious men upon the evidence adduced in this case, and upon that alone. No public clamor, no sentiment of hostility or sympathy, no consideration of consequences which may result from your verdict, should be permitted in any manner to influence your deliberations. You will well and truly try the traverse joined between the United States of America and Edward Murphy, the defendant, and a true verdict give according to your evidence. The counsel engaged in this case have well and faithfully performed their duty. The court now closes its charge to you. Upon you rests the grave responsibility of deciding this case according to the facts, under the law as laid down to you by the court.

UNITED STATES v. CARTER.

(Circuit Court, S. D. New York. November 15, 1897.)

MURDER—COMMISSION ON UNITED STATES BATTLESHIP—EXCLUSIVE JURISDICTION—CESSION OF TERRITORY BY STATE LEGISLATURE.

Rev. St. § 5339, subd. 1, provides that "every person who commits murder within any fort, arsenal, dock yards, magazine, or in any other place or district of the county under the exclusive jurisdiction of the United States, * * * shall suffer death." C. was indicted under this section for a murder committed on board the United States battleship Indiana, then moored at Cob Dock, being within territory which had not been purchased by the United States, under Const. art. 1, § 8, subd. 17, but over which exclusive jurisdiction had been ceded to the United States by the New York legislature. *Held*, that the circuit court for the Southern district of New York had exclusive jurisdiction of the offense charged.

Indictment for Murder.

There are two indictments against the defendant, Philip F. Carter, for murder; one under section 5391 of the Revised Statutes of the United States, and the other under subdivision 1 of section 5339 of the same statute, which reads as follows: "Every person who commits murder within any fort, arsenal, dock yards, magazine, or in any other place or district of the county under the exclusive jurisdiction of the United States, * * * shall suffer death." Upon being arraigned to plead, the defendant pleaded not guilty to the indictment under section 5391, and to the indictment under section 5339 he interposed a plea to the jurisdiction of the court, alleging as a reason therefor that the offense charged in the indictment was not committed in any river, haven, basin, or bay out of the jurisdiction of any particular state, nor within any place purchased by the United States with the consent of the legislature of the state of New York for the erection of forts, arsenals, and other needful buildings, nor in any place within the exclusive jurisdiction of the United States, but, on the contrary, in a place within the exclusive jurisdiction of the state of New York; and demands judgment that defendant be discharged. To this plea the government files a replication, claiming exclusive jurisdiction in the United States of the offense charged in the indictment, and sets forth in support thereof the several acts of the legislature of the state of New York, and the various deeds of cession, whereby jurisdiction was ceded to the United States in and over the premises in which this offense was committed; and demands that defendant answer to the indictment. To this replication the defendant demurs upon two grounds: (1) That the place where the murder was committed was within the jurisdiction of the state of New York, and not within the jurisdiction of the United States, the same not having been purchased by the United States, with the consent of the state of New York, as required by article 1, § 8, subd. 17, of the federal constitution; and (2) that a war vessel is not a place, within the meaning of the United States statutes. Further facts appear in the opinion.

Wallace Macfarlane, U. S. Dist. Atty.
J. Grattan MacMahon, for defendant.

TENNEY, District Judge. The question here submitted is this: Has the United States circuit court for the Southern district of New York exclusive jurisdiction of the offense charged in the indictment, under section 5339 of the Revised Statutes, or must the defendant be tried for such offense in the state courts of New York? This alleged murder was committed on board the United States battleship Indiana, June 30, 1897. The vessel was then the property of the United States, and was moored at Cob Dock, in the waters of Wallabout Bay, in the East River. It is conceded that the waters of Wallabout Bay are

within the city and county of New York. In 1807 the legislature of the state of New York passed an act authorizing certain commissioners (naming them) to cede the jurisdiction of certain land in this state to the United States. Laws 1807, c. 51. This act was amended in 1808; and in April, 1810, these commissioners, in pursuance of said act, ceded to the United States jurisdiction over a certain tract of land, fully described by metes and bounds, adjacent to the navy yard on the east. The original deed was filed in the office of the secretary of state of New York, together with a map of said premises. The aforesaid act of the legislature and deed of cession declared that the United States had use and jurisdiction over said tract of land ceded as aforesaid, and covered with the waters of the East River, at Wallabout Bay, and that such use and jurisdiction was granted to the United States for the defense and safety of the city of New York; the United States to retain such use and jurisdiction so long as the said tract should be used and applied to the defense and safety of the city and port of New York, and no longer; the jurisdiction so ceded not to prevent the execution on said tract of land of any process, civil or criminal, under the authority of the state. 1 Rev. St. pt. 1, c. 1, tit. 3, § 8. In 1853 the legislature of the state of New York passed an act entitled "An act to vest in the United States of America jurisdiction over certain lands in the city of Brooklyn and adjacent thereto" (chapter 355, Laws 1853). This act ceded to the United States, for the use and purposes of a navy yard and naval hospital, jurisdiction over all the lands used and occupied by the United States as a navy yard and naval hospital, according to the plans furnished by the navy department. The statute gives, by metes and bounds, the boundaries of the territory over which jurisdiction is ceded. This act expressly provides that "the United States may retain such use and jurisdiction as long as the premises described shall be used for the purposes for which jurisdiction is ceded, and no longer." That the premises over which jurisdiction has been ceded as aforesaid were being used by the United States at the time of the alleged homicide, for the very purposes specified in the foregoing acts and deeds of cession, there can be no dispute. Though Cob Dock was not built in 1810, when the early deed of cession was made, yet there can be no question but that Cob Dock, and the waters of Wallabout Bay, in the East River, were included in the cessions of 1810 and 1853. It must be assumed, then, that the place where this homicide was committed was fully covered by the acts and deeds of cession as aforesaid.

There is no claim that the United States purchased these premises with the consent of the state of New York. All the jurisdiction the United States had in and over the waters and lands in question was obtained, if at all, by cession from the state of New York, as aforesaid. Without going into an extended discussion of the subject of purchase, or a lengthy review of adjudicated cases upon this question, it is enough to say that it has been repeatedly held by the supreme court of the United States that a state can cede exclusive jurisdiction to the United States of any part of its territory, making such reservation in the terms of cession as it may deem best, not inconsistent with

exclusive jurisdiction in the United States. *Railroad Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995; *Railway Co. v. McGlinn*, 114 U. S. 542, 5 Sup. Ct. 1005; *Benson v. U. S.*, 146 U. S. 325, 13 Sup. Ct. 60; *In re Ladd*, 74 Fed. 31. The ceding of these lands and waters to the United States was as much for the benefit of the people of the state of New York as for the people of the United States. The building of forts, arsenals, and other useful buildings, and the maintenance of a navy yard and naval hospital upon the premises ceded to the United States by the state of New York as aforesaid is as much for the protection and benefit of the state, its people and property, as for the protection and benefit of the people of the United States generally. The court, in the *McGlinn Case*, 114 U. S. 542, 5 Sup. Ct. 1005, in describing its decision in the *Fort Leavenworth Case*, 114 U. S. 525, 5 Sup. Ct. 995, used this language:

"We also held that it is competent for the legislature of a state to cede exclusive jurisdiction over places used by the general government in the execution of its power, the use of the places being in fact as much for the people of the state as for the people of the United States generally, and such jurisdiction necessarily ending when the places cease to be used for those purposes."

This would seem to be conclusive of the point in question, namely, that exclusive jurisdiction can be ceded by the state to the United States, and that absolute purchase by the United States is not necessary. In the *Benson Case*, 146 U. S. 325, 13 Sup. Ct. 60, the plaintiff in error was indicted and convicted in the circuit court of the United States for the district of Kansas for murder alleged to have been committed at the Ft. Leavenworth military reservation, within that district. The question of jurisdiction was here raised as in the case at bar. Ft. Leavenworth was a military reservation within the territorial boundary of the state of Kansas. Jurisdiction over the same had been ceded by the legislature of the state to the United States in 1875, by an act entitled "An act to cede jurisdiction to the United States over the territory of Fort Leavenworth military reservation." (Laws 1875, p. 95.) In this case the court held, Mr. Justice Brewer writing the opinion, that the United States circuit court had jurisdiction, and dismissed the writ of error.

The most recent case bearing upon this subject, decided in May, 1896, is *In re Ladd*, 74 Fed. 31. The petitioner, Ladd, was arrested by the state authorities for selling intoxicating liquors on the Ft. Robinson military reservation, without a license, as required by the laws of the state of Nebraska. He sued out a writ of habeas corpus in the United States circuit court, on the ground that the state authorities had no jurisdiction over this reservation, but that jurisdiction vested solely in the United States. It appears that exclusive jurisdiction over the Ft. Robinson military reservation had been ceded to the United States by the legislature of Nebraska in 1887, the first section of the act reading as follows:

"That the jurisdiction of the state of Nebraska in and over the military reservation known as Fort Robinson and Fort Niobrara, be and the same are hereby ceded to the United States: provided, that the jurisdiction hereby ceded shall continue no longer than the United States shall own and occupy said military reservation." Laws 1887, p. 628.

The court held, Mr. Justice Shiras writing the opinion, that this cession of jurisdiction clothed the United States with exclusive jurisdiction over the reservation, such exclusive jurisdiction to continue as long as the United States occupied the lands set forth in the cession act, and that the courts of the state ceased to have jurisdiction over crimes committed within such reservation, and discharged the petitioner from arrest.

The cases herein cited would seem to be conclusive of defendant's first contention, to wit, that the United States have no jurisdiction of the crime alleged to have been committed on board the battleship *Indiana* while lying in the waters of Wallabout Bay.

The second ground of defendant's demurrer is that the battleship *Indiana* is not a "place," within the meaning of the United States statutes; and cites upon the argument, as his authority, *U. S. v. Bevans*, 3 Wheat. 336. In the *Bevans* Case the defendant was indicted and convicted for murder on board the United States ship of war *Independence* while lying in the waters of Boston Harbor, and while such vessel was in commission, and in the actual service of the United States. In this case the supreme court held that it was not the offense committed, but the place in which it was committed, that determined the question of jurisdiction. It appeared that the United States had no jurisdiction over the waters of Boston Bay, in which the gunboat *Independence* was lying when the murder was committed, but that such waters were within the sole and exclusive jurisdiction of the state of Massachusetts. The very opposite is true in the case at bar. The *Indiana* was lying in waters wholly within the jurisdiction of the United States, while the gunboat *Independence* was lying in waters wholly within the jurisdiction of the state of Massachusetts. While the facts of these two cases are very similar, yet they are entirely different, and the direct opposite of each other in the matter of jurisdiction. The court, in its opinion, say, Chief Justice Marshall voicing the court:

"The place described is unquestionably within the original territory of Massachusetts. It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States."

We must, therefore, hold that the allegations in the indictment are sufficient, and that the battleship *Indiana* was a "place," within the meaning of the United States statutes, and that the United States circuit court for the Southern district of New York has exclusive jurisdiction of the offense charged in the indictment to have been committed by the defendant. The demurrer of the defendant must therefore be overruled, and his plea to the jurisdiction of the court dismissed. Let the defendant plead to the indictment.

UNITED STATES v. LEE.

(District Court, S. D. California. January 14, 1898.)

No. 1,038.

1. COURTS—JURISDICTION OF CRIMINAL CASE—WHEN ACQUIRED.

Under Act Cong. March 1, 1895, relating to the United States court in the Indian Territory, and providing (section 9) that after September 1, 1896, such court should have exclusive original jurisdiction of all offenses against the laws of the United States committed in the territory, "except such cases as the United States courts at Paris, Texas, Fort Smith, Arkansas, and Fort Scott, Kansas, shall have acquired jurisdiction of before that time," an outside court named did not acquire jurisdiction of a case by reason of the commission of the offense within its jurisdiction, nor merely by the return and filing of an indictment therefor, but the defendant must also have been arrested upon its process before the date fixed.

2. CRIMINAL LAW—REMOVAL OF PRISONER—DISCHARGE.

On an application for removal of a prisoner, under Rev. St. § 1014, where the only ground for the warrant is an indictment pending in the district court of the district to which the removal is sought, and it appears from said indictment that the court has no jurisdiction of the alleged offense, the defendant should be discharged.

Application by the United States, under Rev. St. § 1014, for a warrant for the removal of Noah Lee to the Eastern district of Texas for trial.

Frank P. Flint, U. S. Atty.

Curtis D. Wilbur, for defendant.

WELLBORN, District Judge. On May 28, 1895, an indictment was found in the district court of the United States for the Eastern district of Texas, against the defendant, and two other persons jointly indicted with him, charging that, on June 24, 1893, in Atoka county, in the Choctaw Nation, in the Indian Territory, the same constituting a part of the said district, defendants made an assault upon one W. P. Danforth, with the intent then and there to kill the said Danforth, and further charging, in a second count, that defendants, at the time and place named, made an assault upon certain and divers persons, whose names were unknown to the grand jurors, with intent then and there to kill said persons. On this indictment a capias was issued September 13, 1897, by the clerk of said court to the marshal of said district, for the arrest of the defendant, Lee. This defendant, having been committed in this district, the Southern district of California, on November 21, 1897, by George B. Cole, a United States commissioner, the government now asks for his removal to said Eastern district of Texas.

On this application the government has submitted said capias and certified copies of said indictment and commitment. The defendant has offered his own affidavit to the effect that, at the time of his examination by said commissioner, he was not informed of his right to the aid of counsel, nor was he represented by any one; that no witnesses were examined, and no proceedings had before said commissioner, other than reading the purported copy of the indictment, and asking defendant if his name was Noah Lee. In opposition to defendant's affidavit, the government has filed an affidavit of the

commissioner, which states, among other things, that at the preliminary examination defendant admitted that he was the Noah Lee referred to in the complaint, on which had been issued the warrant for his arrest, and announced his readiness for the examination, and requested that the same be proceeded with; that, in reply to the inquiry whether or not he had or wished an attorney, he said he would wait until he reached Los Angeles before he engaged one; that the government then, without objection, introduced in evidence and read to defendant a certified copy of said indictment in full, including all indorsements thereon; and, that, before said examination was had, defendant was apprised of all his legal rights. On the hearing before me the questions involved in the application for a warrant of removal were orally argued, and briefs have been since submitted both by the government and the defendant.

Said application is made under section 1014 of the Revised Statutes of the United States, which is as follows:

"Sec. 1014. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had." Rev. St. U. S. (2d Ed.) p. 189.

To authorize the warrant of removal now applied for, three things should be made to appear: (1) That the defendant has been committed in this district, the Southern district of California, to answer the indictment preferred against him in the Eastern district of Texas; (2) that said indictment sufficiently charges an offense against the United States; (3) that the United States district court for the Eastern district of Texas has jurisdiction over said offense. The first of these requirements is clearly expressed in the statute, —said section 1014; the other two, although not expressed in terms, are necessarily implied. *In re Doig*, 4 Fed. 193; *U. S. v. Pope*, 27 Fed. Cas. 593; *In re Buell*, 4 Fed. Cas. 587; *In re Greene*, 52 Fed. 104; *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. 407; *U. S. v. Rogers*, 23 Fed. 658; *In re Wolf*, 27 Fed. 606; *In re Terrell*, 51 Fed. 213; *U. S. v. Dana*, 68 Fed. 886.

There is no claim that the indictment fails to charge an offense against the United States, but defendant resists removal on the grounds that the district court for the Eastern district of Texas has no jurisdiction of the offense charged in said indictment, and that there has not been a lawful commitment in this district. The jurisdictional question just stated involves the construction of an act of congress, entitled "An act to provide for the appointment of ad-

ditional judges of the United States court in the Indian Territory, and for other purposes," approved March 1, 1895. 2 Supp. Rev. St. U. S. p. 392. Said act, among other things, divided the United States court in the Indian Territory into three judicial districts, and provided for the appointment of two additional judges of said court. Section 9 of said act is as follows:

"Sec. 9. That the United States court in the Indian Territory shall have exclusive original jurisdiction of all offenses committed in said territory, of which the United States court in the Indian Territory now has jurisdiction, and after the first day of September, eighteen hundred and ninety-six, shall have exclusive original jurisdiction of all offenses against the laws of the United States, committed in said territory, except such cases as the United States court at Paris, Texas, Fort Smith, Arkansas, and Fort Scott, Kansas, shall have acquired jurisdiction of before that time;

"And shall have such original jurisdiction of civil cases as is now vested in the United States court in the Indian Territory,

"And appellate jurisdiction of all cases tried before said commissioners, acting as justices of the peace, where the amount of the judgment exceeds twenty dollars.

"All laws heretofore enacted conferring jurisdiction upon United States courts held in Arkansas, Kansas, and Texas, outside of the limits of the Indian Territory, as defined by law, as to offenses committed in said Indian Territory, as herein provided, are hereby repealed, to take effect on September first, eighteen hundred and ninety-six; and the jurisdiction now conferred by law upon said courts is hereby given from and after the date aforesaid to the United States court in the Indian Territory:

"Provided, that in all criminal cases where said courts outside of the Indian Territory shall have, on September first, eighteen hundred and ninety-six, acquired jurisdiction, they shall retain jurisdiction to try and finally dispose of such cases. Every case, civil or criminal, pending in the United States court in the Indian Territory shall be tried and disposed of by the court where the same is pending, unless the venue therein be changed as herein provided."

The United States court in the Indian Territory was first established by an act of congress, approved March 1, 1889, and entitled "An act to establish a United States court in the Indian Territory, and for other purposes." 1 Supp. Rev. St. U. S. p. 670. Said act, however, provided that a certain portion of the Indian Territory, whose boundaries were defined in the act, should be annexed to, and constitute a part of, the Eastern district of the state of Texas, for judicial purposes, and that terms of the circuit and district courts of the United States for said Eastern district of Texas should be held at stated times at the city of Paris, in said state, and that said courts provided to be held at Paris should have exclusive original jurisdiction of all offenses committed against the laws of the United States within the limits of that portion of the Indian Territory attached to said Eastern judicial district of Texas by the provisions of said act, of which jurisdiction was not given by said act to the court which it established in said territory.

Defendant contends that the words, "acquired jurisdiction," as used in section 9 of the act of March 1, 1895, imply, not only the finding of an indictment, but an arrest and arraignment,—in other words, that jurisdiction, under said section, is retained by the "outside" courts only "as to cases at issue" on September 1, 1896, and, that, inasmuch as the defendant at that time had neither been arraigned nor arrested, the district court for the Eastern district of Texas has now no jurisdiction of the offense. The government, on

the other hand, maintains that said words, "acquired jurisdiction," refer to the subject-matter, but not to the person, and therefore that the district court for the Eastern district of Texas acquired jurisdiction when the offense was committed, June 24, 1893, or when the indictment was presented in court and placed on the files thereof, May 28, 1895.

At the oral argument the inclination of my mind was adverse to defendant's contention, but a closer examination of said acts of congress and a more extended review of precedents satisfies me that my first impression, that the arrest of the defendant was not essential to the jurisdiction of the court in Texas, was wrong. It is true that the word "jurisdiction" does sometimes refer to the subject-matter, i. e. "the nature of the cause of action or relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in the authority specially conferred." "Jurisdiction," however, in the clause now under consideration, "shall have acquired jurisdiction," was not used in the sense last mentioned; for jurisdiction of that sort would be acquired by the mere commission of the crime, and, if that were so, the courts "outside" the territory would have retained jurisdiction over all offenses committed prior to the date when the jurisdiction of the court in the territory was to take effect, which idea is wholly inconsistent with other clauses of said section. If it had been intended that the jurisdiction of the courts "outside" of the territory should be retained over all offenses committed prior to the date when the jurisdiction of the court in the territory, transferred thereto by said section, was to take effect, it would have only been necessary for the first paragraph of the section to have provided that the court in the territory, "after the first day of September, eighteen hundred and ninety-six, shall have exclusive original jurisdiction of all offenses * * * committed in said territory thereafter." It will be observed that, to meet the hypothesis suggested, I have substituted "thereafter" for the clause, "except such cases as the United States court at Paris, Texas, Fort Smith, Arkansas, and Fort Scott, Kansas, shall have acquired jurisdiction of before that time." Again, since the word "jurisdiction," in that clause of the first paragraph of said section which confers jurisdiction on the court in the territory, refers to "offenses,"—that is, the subject-matter,—if the words "acquired jurisdiction," in the succeeding clause, "except such cases as the United States court at Paris, Texas, Fort Smith, Arkansas, and Fort Scott, Kansas, shall have acquired jurisdiction of before that time," were construed as referring also to the subject-matter, the exception would be as broad as the conferring clause, and, both clauses thus becoming nugatory, the whole object of the paragraph, so far as it purports to transfer jurisdiction from the "outside" courts to the court in the territory, would be defeated. Furthermore, if the word "jurisdiction" in the proviso to said section referred to the subject-matter, as does the word "jurisdiction" in the fourth paragraph, then the object of the proviso could have been fully accomplished by using, instead thereof, the simple expression "except as to cases then pending."

There are yet other features of the statute which indicate that the words "acquired jurisdiction" refer, not to the subject-matter, but to the person. For instance, the word "cases," in said proviso, means "actions." This appears, not only from its immediate context, but from a comparison of the proviso, wherein the word occurs, with the preceding clause, wherein occurs the word "offenses," and, further, from a comparison of the two clauses of the first paragraph of said section 9, wherein said words also respectively occur. "Criminal action" is thus defined: "The proceeding by which a party charged with a public offense is accused and brought to trial and punishment is known as a criminal action." Pen. Code Cal. § 683. Although this definition is statutory, I think it gives correctly the general meaning of "criminal action." There cannot, of course, be a criminal case, or action, until an indictment has been found. *Post v. U. S.*, 161 U. S. 583, 16 Sup. Ct. 611. The words "acquired jurisdiction," in the proviso, then, imply more than the mere filing of an indictment, since the language is, "That in all criminal cases where said courts * * * shall have acquired jurisdiction." Two things are thus declared essential to the jurisdiction, which is retained in the "outside" courts: (1) A criminal case,—that is, the finding of an indictment; (2) the acquirement by the court of jurisdiction in said case. Since there is no property involved in a criminal case, the only jurisdiction which could be acquired, after the finding of an indictment, is jurisdiction of the defendant's person. Again, in the last sentence of said section, which provides for the trial of certain cases in the court in the territory, the words "acquired jurisdiction," employed in the proviso immediately preceding, are changed to "every case, civil or criminal, pending." This change of language imports change of meaning. If it had been intended that the "outside" courts should retain jurisdiction in all cases where indictments had been found, such intent, as already stated, could have been readily and unequivocally expressed by using, instead of the proviso, the simple expression, "except as to cases then pending"; and it is incredible that an elaborate proviso would have been framed for the purpose indicated, when, as appears from the act itself, the simpler terms were present in the mind of congress, and devoted to another and appropriate use. The words "acquired jurisdiction," therefore, denote something more than the pendency of a case, and, as already stated, the only other element of jurisdiction they could possibly include is the service of process upon the defendant, or, more accurately, his arrest under a *capias*. The several clauses of the act of March 1, 1895, to which I have adverted, are unfavorable to the contention of the government, and support strongly the theory that defendant's arrest was essential to the acquirement of jurisdiction in the case against him.

Precedents, based upon facts precisely similar to those here involved, have not been cited, either by the defendant or the government, nor have I been able to find them, although my researches have been diligent. I have found, however, numerous decisions on a kindred question, which, I think, are conclusive here. The question I refer to is the general rule of law, applicable to criminal as

well as civil cases, that, when different courts may entertain cognizance of the same subject, that court which first acquires will retain jurisdiction until the litigation is ended. In construing this rule, the unbroken current of authorities is to the effect that priority of jurisdiction is determined by the date of the service of process. *Craig v. Hoge* (Va.) 28 S. E. 317; *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 358, note 3, 76 Fed. 296; *Gaylord v. Railroad Co.*, 10 Fed. Cas. 121; *Bell v. Trust Co.*, 3 Fed. Cas. 110; *Union Mut. Life Ins. Co. v. University of Chicago*, 6 Fed. 443; *Owens v. Railroad Co.*, 20 Fed. 10; *Foley v. Hartley*, 72 Fed. 570; *Wilmer v. Railway Co.*, 30 Fed. Cas. 73; *Schuehle v. Reiman*, 86 N. Y. 271.

In *Craig v. Hoge*, *supra*, the court says:

"Jurisdiction is acquired by a court by the issue and service of process, and in a case of conflict of jurisdiction the priority of jurisdiction is determined by the date of the service of the process."

In *Union Mut. Life Ins. Co. v. University of Chicago*, *supra*, the rule was thus applied:

"As I have said, the bills were filed on the same day, the one in the circuit court of Cook county, and the other in this court. It seems that the bill in the state court was filed before the bill in this court, although on the same day. No process of either court was served on the day the bill was filed. On the 19th of February, the day following, the process of this court was served on all the defendants before 11 o'clock a. m. of that day. The process issuing from the state court was not served until after 2 o'clock p. m. of the same day. So that the process issuing from this court was first served, and the question is whether this court obtained jurisdiction of the case for the purposes contemplated by the bill, viz. for the foreclosure of the mortgage. Although the bill was filed in the state court first on the same day, the rule, I take it, is well settled that the right of a court to take jurisdiction of a party depends upon the service of process upon the party. If a party commences a suit, and process is not served, it does not take effect as against the party defendant, howsoever long process may remain in the hands of the officer. The process of this court being first served upon the defendants, the University of Chicago, and upon Boone, gave this court jurisdiction, and the right to go on and foreclose this mortgage."

In *Owens v. Railroad Co.*, *supra*, the court says:

"But it is claimed that the filing of the bill first in the Sixth circuit, which in this proceeding is the commencement of the suit, confers jurisdiction. This, of necessity, cannot be so. Other necessary steps must be taken to bring the parties before the court, before a complete jurisdiction is acquired. Until that is done, the court could make no order that would affect the rights of a party. The usual mode is by service of process. It may be, and in some cases is, done by an order of the court, directing a seizure of the property, when some urgent necessity requires it, before service is had. In this case no such order was made, and we must therefore look to the service of process to ascertain which court first acquired jurisdiction. It is true that process was sued out first under the bill filed in the sixth circuit, but service of process was first had under the one filed in this circuit. We therefore conclude that, as between these proceedings, the process of this court being first served on the defendant company, it gave to this court full, complete, and prior jurisdiction over it, and the right to grant the relief prayed for in the bill."

In *Wilmer v. Railway Co.*, *supra*, it is true that the court says:

"The commencement of the action and service of process, or, according to some cases, the simple commencement of the suit by filing of the bill, is sufficient to give the court jurisdiction, to the exclusion of all other courts."

I have not been able to find a case, however, in which it was directly held, upon the facts before the court, that jurisdiction was

acquired by the mere filing of a bill or complaint. There are two cases which, on cursory reading, seem to so hold, but careful examination of them shows otherwise. These cases are *Shoemaker v. French*, 21 Fed. Cas. 1331, and *Gamble v. City of San Diego*, 79 Fed. 487. From the syllabus in the former case it appears that the order by which it was held the federal court had acquired jurisdiction was not only passed, but served, before any proceedings were commenced in the state court. In the latter case, that of *Gamble v. City of San Diego*, while the opinion of the court speaks of jurisdiction having been acquired by the institution of the suit, yet the facts were that in the state court, which it was held had first acquired jurisdiction, defendants entered their appearances before process was served in the federal court.

In *Gaylord v. Railroad Co.*, *supra*, the court, in the earlier paragraphs of the opinion, seems to refer to the filing of the bill as the act which gives jurisdiction, but later on, to avoid misconstruction, says:

"Of course, in all that has been said it is assumed, what was the fact in this case, that the bill was not only filed first in this court, but that the process had been issued and duly served upon the parties, and that they were in court, subject to its jurisdiction, before any proceeding was instituted in the state court."

So that, it may, I think, be fairly stated that, in applying the rule that, where different courts have concurrent jurisdiction of the same controversy, that court which first takes cognizance will hold it until the litigation is finally disposed of, the authorities uniformly hold that jurisdiction is acquired, not by filing the bill or complaint, but by service of process. And the rule applies to both civil and criminal cases. *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 358, note 3, 76 Fed. 296; *Taylor v. Taintor*, 16 Wall. 366; *In re James*, 18 Fed. 853.

The phrase, "acquired jurisdiction," having been so often and unequivocally defined by the courts, I cannot do otherwise than assume that congress used it in the sense thus approved by authority and long usage. This assumption, together with the peculiar provisions of section 9 of said act, to which I have already adverted, forces me to the conclusion that, under said section, the courts "outside" of the Indian Territory were to retain jurisdiction, after September 1, 1896, only over those offenses committed in the territory for which the defendants were indicted and arrested on or prior to said date. This ruling makes it unnecessary for me to pass upon the objections which have been urged to the commitment.

On an application for a warrant of removal under section 1014, Revised Statutes of the United States, where the only ground for the warrant is an indictment pending in the district court of the district to which the removal is sought, and it appears from said indictment that said court has no jurisdiction of the alleged offense, the defendant should be discharged. The power of the district judge to so order, although not expressly declared in the section, is a necessary implication therefrom. *U. S. v. Brawner*, 7 Fed. 86; *In re Wolf*, 27 Fed. 607; *In re Dana*, 68 Fed. 886; *In re James*, 18 Fed. 853. The application for a warrant of removal is denied, and the defendant will be discharged.

In re ALEXANDER.

(Circuit Court, W. D. North Carolina. January 19, 1898.)

FEDERAL AND STATE COURTS—HABEAS CORPUS.

One in custody for an offense against state laws will not, except in a peculiar and urgent case, be released on habeas corpus by a federal court, in advance of a final decision of his case by the state courts; and especially not where the prisoner has himself instigated the prosecution against him for the purpose of testing the validity of a state law.

This was a petition by A. W. Alexander for a writ of habeas corpus.

Armfred & Williams, for relator.

SIMONTON, Circuit Judge. This matter comes up on a petition for a writ of habeas corpus, and the return to the rule entered therein, to show cause why the writ should not issue. The petitioner is a resident of the town of Monroe, Union county, N. C., and alleges that he is the agent of N. D. White, a wholesale liquor merchant in the city of Augusta, Ga. He sold a pint of whisky, in an original package, to one Andrew Trantham, who thereupon obtained a warrant before C. N. Simpson, a justice of the peace, charging him with violating chapter 449 of the Acts of the State of North Carolina of 1897, "An act to regulate the sale of liquor in Union county." At the hearing the petitioner denied the constitutionality of the act, as an interference with interstate commerce, and so unconstitutional and void. At the return of the rule it appeared that the petitioner had imported three or four of these original packages as the agent of his principal in Augusta, and that he had himself caused the prosecution to be instituted, and so went before the justice of the peace; none of the public officials charged with the enforcement of the act being concerned in it. When the justice ordered him to be bound over for trial at the superior court, he refused to give bail, and so was committed to the custody of the sheriff. It thus appears that he voluntarily went into the state court, and in the first instance, of his own accord, submitted his rights to the state tribunals. Without doubt, the courts of the United States are invested with authority to issue writs of habeas corpus and to inquire into the cause of imprisonment of any one who alleges that he is in custody in violation of the constitution or the laws of the United States. Rev. St. U. S. § 753. But, except in peculiar and urgent cases, the courts of the United States will not discharge a prisoner by habeas corpus in advance of a final determination of his case in the courts of the state; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course, by writ of error from the superior court. *Whitten v. Tomlinson*, 160 U. S., at page 242, 16 Sup. Ct. 301; *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734; *Ex parte Fonda*, 117 U. S. 516, 6 Sup. Ct. 848; *Cook v. Hart*, 146 U. S. 195, 13 Sup. Ct. 44. In this last-named case the supreme court says:

"While the power to issue writs of habeas corpus to state courts which are proceeding in disregard of rights secured by the constitution and laws of the

United States may exist, the practice of exercising such power, before the question has been raised or determined in the state court, is one which ought not to be encouraged."

There are no special circumstances in the case at bar which demand the interference of this court. The petitioner of his own motion, by his own friend, instituted the prosecution. He has no stock of goods imported into the state under the protection of the interstate commerce law. He only wishes to try the question in advance. He selected his own tribunal, and it decided against him. He can pursue his remedy in that tribunal, and, if his rights are denied, his remedy in the federal courts will remain unimpaired. *Cook v. Hart*, 146 U. S. 195, 13 Sup. Ct. 40. The rule is discharged.

UNITED STATES v. BERNARD et al. SAME v. KELLAR et al. SAME v. EBERMAN et al. SAME v. CLARKSON.

(Circuit Court, S. D. New York. January 13, 1898.)

INDICTMENT—SECTION 5480, REV. ST.—SCHEME TO DEFRAUD—FALSE REPRESENTATIONS—INTENT TO CONVERT NOT ALLEGED.

Upon an indictment under section 5480, Rev. St., for the use of the mails in furtherance of a scheme to defraud, the scheme is sufficiently alleged by averments setting forth an endeavor by the defendants to induce persons to send their money to defendants for investment in a business enterprise by certain specified false representations and allurements, even though no intent by the defendants to convert such moneys to their own use is stated. *Held*, also, that a count is sufficient, which charges a scheme to induce persons to send their money to the defendants for pretended investment in a business enterprise on account of the persons who send the money, but with the real intent to convert the money to the defendants' own use. *Held*, further, that in a count upon a scheme to defraud by means of false representations, it is necessary to aver clearly and definitely the making of some specific representations, and the falsity of the same.

These were indictments for using the mails in furtherance of a scheme to defraud.

Wallace Macfarlane, U. S. Atty., and Max J. Kohler, Asst. U. S. Atty., for the United States.

Abram J. Rose, William H. Murray, Abraham Levy, and William A. Sweetser, for defendants.

BROWN, District Judge. The above indictments are all of the same general character. They are based upon section 5480 of the United States Revised Statutes, and charge the defendants in each case with having deposited a letter in the post office of this district in execution of a scheme to defraud, to be effected by the use of the United States mails. The fraudulent scheme alleged, was the endeavor "to induce the persons addressed to send and intrust their moneys to the defendants," acting in the one case under the corporate name of E. S. Dean & Co.; in another under the name of Talcott & Co.; in the third, under the name of Sam Kellar & Co.; and in the fourth, under the name of W. F. O'Connor & Co., "for investment and employment of such moneys in trade and commerce,

for the use and benefit of the several persons, who should so send and intrust such moneys"; that the inducements held out therefor were certain false, fictitious and fraudulent statements and representations, made in circulars or letters, which were sent by mail, concerning the previous history, status and business prospects and expectations in reference to the enterprise specified in such letters. The first count in each indictment, while setting forth the scheme and the falsity of certain representations made, and stating in general terms a design to defraud the persons to whom the letters were addressed, does not allege any intent by the defendants to convert the moneys thus procured to their own use. This constitutes the first ground of the demurrer to these counts.

Upon this branch of the demurrer the question arises whether a scheme to obtain money for investment in a regular business enterprise (since no other is alleged) for the benefit of those from whom it is procured, but to obtain it by means of false representations as to past or expected profits, is a fraudulent scheme, even though the persons who thus procure the money intend to use it legitimately for the benefit of those who remit it. In most of the reported cases of this kind, the indictments have charged, not merely an intent to defraud, but an attempt to convert or appropriate the moneys obtained to the defendant's own use. The second counts in all these indictments contain this averment. I am of the opinion, however, that this is not indispensable in order to constitute "a scheme or artifice to defraud" within section 5480. To induce a person to part with the possession of his money by false representations of fact, and by holding out expectations which it is known cannot be realized, is obtaining the possession of money fraudulently; and any scheme which by such means aims at inducing other persons to part with their money and enable others to get it, is a scheme to defraud, though no doubt less heinous than if the intent was also to convert the money thus obtained to the defendant's use. The owner is fraudulently deprived of the possession of his money; and any scheme to effect that by false representations is a scheme to defraud within this act.

2. A further ground of the demurrer is that of duplicity, in that the indictments charge two offenses in the same count, as it is argued, inasmuch as it is therein alleged that the scheme to defraud was to be effected "by opening correspondence, etc., and by inciting the person addressed to open correspondence," etc. The statute declares it to be an offense to deposit a letter in the attempt to execute a scheme to defraud which is to be effected by opening correspondence, etc., or by inciting others to open correspondence. The gravamen of the offense, however, is in depositing a letter in the post office in order to effect the fraudulent scheme, or in taking such a letter therefrom. In this case, the allegation is the deposit of a single letter in execution of the scheme alleged. The scheme referred to infringes the statute if it is designed to be effected, either by opening correspondence, or by inciting others to open correspondence. But when the scheme is to be carried out by opening correspondence through the mails, almost of necessity it includes the in-

vitation and incitement to a response by correspondence through the mails. The deposit of such a letter, which thus opens correspondence and invites a reply, is certainly only a single offense. The averment in the indictment that the scheme to defraud was intended to be carried out by opening correspondence and inciting others to correspond in reply, does not import necessarily anything more than this, and is, therefore, not subject to the objection of duplicity.

3. In some of the indictments, the second count, while alleging the intent to convert any moneys sent them to the defendants' own use, does not allege the falsity of any specified statements contained in the letters or circulars quoted and alleged to have been sent by mail. I do not think this is necessary where the count explicitly charges, as the second counts charge, that the money was sought for the ostensible purpose of investment in business for the sender's account, but with the real intent to convert the moneys to the defendants' own use.

4. In the third count of the indictment against Bernard and others, there is no averment of any intent to convert the moneys to defendants' own use. It can only stand, therefore, upon the procuring of money by false representation; and in such a count it is necessary that the particular false statement should be pointed out. In this respect the third count in that indictment is, in my judgment, defective. The other counts are sustained.

UNITED STATES v. PRICE.

(District Court, S. D. New York. October 28, 1897.)

REMOVAL OF PRISONER—SECTION 1014—PRELIMINARY COMPLAINT—DIFFERENT OFFENSE.

In this district, it is not the practice to order the prisoner sent to a distant place for trial under section 1014, Rev. St. U. S., except upon the production to the court at the time the application for removal is made, if not before, of a copy of the indictment, information or complaint, showing that criminal proceedings are pending, and that the prisoner is wanted for trial in the district to which his removal is sought, and for the same offense for which he has been committed by the commissioner. An indictment for stealing silver certificates is for a different offense than for the stealing of coin or United States notes, for which the prisoner was in this case held. After adjournment of the proceedings, upon production of an indictment charging the stealing of United States coin, *held* that the prisoner should be removed; also *held* that upon a preliminary complaint, charging the stealing of United States notes, the prisoner might be committed and removed for trial for the offense of stealing United States coin, such practice being "agreeably to the usual mode of process against offenders," under section 1014, and Code Cr. Proc. N. Y. § 208.

This was a proceeding to remove the prisoner, John Price, to the District of Columbia, for trial, on the charge of larceny.

Wallace Macfarlane and Max J. Kohler, for the United States.
Abram J. Rose, for defendant.

BROWN, District Judge. I do not think it is proper, and in this district for a considerable time at least it has not been the practice,

to remove a prisoner for trial under section 1014 to a distant district, except upon the production at the time the application for removal is made, if not before, of a copy of the indictment or information or complaint showing that criminal proceedings are pending and that he is wanted for trial in the district to which his removal is sought, and also that such proceedings are for the same offense on which he has been committed by the commissioner. In the present case the defendant was charged before the commissioner with having feloniously stolen and carried away at Washington, in the District of Columbia, certain "United States notes" and certain coins of the United States. An indictment produced before the commissioner from the District of Columbia, charged the defendant with stealing and carrying away United States "silver certificates," but not the stealing of coin or United States notes. The commissioner has held the prisoner for the stealing of the United States notes and coins. United States notes and United States silver certificates being substantially different, I do not think that an indictment for the latter would be sustained by proof of the former; and the defendant should therefore not be removed to a distant district upon the production of such an indictment only. Upon an adjournment of the proceedings an indictment is produced before me in proper form, charging the felonious stealing and carrying away of United States coin, being the same offense for which the commissioner has held the prisoner. This being the same offense, the prisoner should be removed for trial upon the last-named indictment.

Objection is made that no examination was had before the commissioner upon the last-mentioned charge, for the reason that the original complaint did not contain the averment which the last-named indictment contains, that the city of Washington, where the offense is stated to have been committed, was within the exclusive jurisdiction of the United States. The court, however, must take judicial notice of that fact, and I cannot conceive it to be necessary that such an express averment should be required to be made in a mere preliminary proceeding before a magistrate or United States commissioner for the purpose of binding the prisoner over for trial. Section 1014 of the United States Revised Statutes provides that the proceedings shall be "agreeably to the usual mode of process against offenders" in the state where the preliminary proceedings are held. Under such proceedings in this state, as authorized by the New York Code of Criminal Procedure (section 208), if it "shall appear from the examination that a crime has been committed and that there is sufficient cause to believe the defendant guilty thereof," the magistrate is required to indorse on the depositions an order to the following effect:

"It appearing to me by the within depositions and statement, if any, that the crime therein mentioned, or any other crime, according to the fact, stating generally the nature thereof, has been committed, and that there is sufficient cause to believe the within named guilty thereof, I order that he be held to answer the same."

In re Paul, 2 N. Y. Cr. R. 6. And see *People v. Wheeler*, 73 Cal. 252, 14 Pac. 796. The same precision and formality are not required

in complaints that are required in indictments. See Bish. New Cr. Proc. § 230 (5); *Ex parte D'Olivera*, 1 Gall. 474, Fed. Cas. No. 3,967; *In re Kelly*, 46 Fed. 653; *Southworth v. U. S.*, 151 U. S. 184, 14 Sup. Ct. 274.

The new indictment produced before me is not treated as any evidence of the commission of the offense; but only as showing the pendency of criminal proceedings under which he may be brought to trial for the offense on which he stands committed, and this is sufficient under the last clause of section 1014 to require the district judge to sign the warrant of removal.

UNITED STATES v. WARREN CHEMICAL & MANUFACTURING CO.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

No. 50.

1. CUSTOMS DUTIES—CLASSIFICATION—COAL TAR PRODUCTS.

In paragraph 443 of the act of 1894, the words "products of coal tar" are not within the excepting clause, but are part of the enumeration of articles entitled to free entry.

2. SAME—CLASSIFICATION—DEAD OIL.

"Dead oil" (also called "tar oil," "creosote oil," and "coal tar creosote"), which is produced from coal tar by distillation, was free, under paragraph 443 of the act of 1894, as a product of coal tar, not a color or dye, and not otherwise specially provided for, and was not dutiable, under paragraph 60, as a "distilled oil."

This is an appeal by the United States from a decision of the circuit court, Southern district of New York, reversing a decision of the board of general appraisers, which affirmed the decision of the collector of customs at the port of New York in respect to the classification for duties of certain merchandise.

Jas. T. Van Rensselaer, for the United States.

Albert Comstock, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The article in question is a product produced from coal tar by a process of distillation, is known generally in commerce as "dead oil," and is sometimes called "tar oil" and "creosote oil" and "coal tar creosote." The collector classified the importation under paragraph 60 of the tariff act of 1894, which reads:

"60. Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts, not specially provided for in this act, twenty-five per centum ad valorem."

The importer protested, contending that the importation was entitled to free entry under paragraph 443, which reads:

"443. Coal tar, crude, and all preparations except medicinal coal tar preparations and products of coal tar, not colors or dyes, not specially provided for in this act."

The government contends that "products of coal tar" are, by the phraseology of this paragraph, excepted from its operation. We do not so read the act. On the contrary, free entry is accorded to "coal tar, crude"; "all coal tar preparations, except medicinal coal-tar preparations"; and "products of coal tar, not colors or dyes." There is no dispute, on the testimony, that the article in question is one of the five products of distillation of coal tar, and, unless it is shown to be specifically provided for elsewhere, is entitled to free entry, under paragraph 443. The only "special provision" relied upon by the appellant is paragraph 60, it being contended that the article is therein referred to as distilled oil. The testimony, however, abundantly sustains the proposition (which, indeed, was conceded on the argument) that this "dead oil" was not known, commercially, as a distilled oil; and the government chemist testified that in the terminology of his profession, and according to his understanding, "dead oil" would not be classed as a distilled oil. Since it is neither commercially nor scientifically known as a distilled oil, it does not come within the enumeration of paragraph 60. In view of the testimony, it will not be necessary to discuss the other questions raised on the argument, viz.: Whether the words "known as" should not be construed as meaning "known commercially as"; and whether paragraph 443, providing for all "products of coal tar," is not more specific than is paragraph 60, providing for "products or preparations known as * * * distilled oils," but without any such restriction as to use as was found in the paragraph for "acids," which was discussed by this court in *Matheson & Co. v. U. S.*, 18 C. C. A. 143, 71 Fed. 394. The decision of the circuit court is affirmed.

WM. ROGERS MFG. CO. v. ROGERS.

(Circuit Court, E. D. New York. January 31, 1898.)

No. 2.

TRADE-NAMES—INFRINGEMENT—UNFAIR COMPETITION.

One selling goods in packages prominently marked with his own name and initials, not collocated with other words tending to induce greater confusion than would naturally result therefrom, cannot be restrained by another of the same name, having a long-established business thereunder, even though the former expected that unscrupulous dealers would offer his goods as the goods of the latter.

This was a suit in equity by the William Rogers Manufacturing Company against William A. Rogers for alleged infringement of a trade-name. The cause was heard on a motion for preliminary injunction.

C. E. Mitchell, for the motion.

Wm. C. Beecher, opposed.

LACOMBE, Circuit Judge. Defendant's right to use the ordinary abbreviation of his name, "Wm. A. Rogers," was settled by the decision of the circuit court of appeals (17 C. C. A. 575, 70 Fed. 1019); and

in no instance does it appear that he has put up his goods, or offered them for sale, in any form of package which directly or indirectly describes them otherwise than as the goods of "Wm. A. Rogers." There seems very little doubt that he has availed of the similarity of name, which naturally tends to confound his goods with those of the original Rogers, who built up a valuable trade in plated ware years before defendant went into the business. But, so far as the mere name produces such confusion, plaintiff has no cause of complaint. It is a reasonable inference from all the testimony that defendant expected that unscrupulous dealers would offer his goods as those of one or other of the original manufacturers, whose name was well known to, and popular with, consumers. The two advertisements reproduced in complainant's brief are most persuasive to that conclusion. But both of those advertisements contain his own name in prominent type, and the statements, "Our goods are 'Rogers' goods," and "The genuine Rogers goods, as used by U. S. government," etc., are technically accurate. There are some points of resemblance between this case and those of *Baker v. Sanders*, 26 C. C. A. 220, 80 Fed. 889, and *Hoff v. Tarrant*, 22 C. C. A. 644, 76 Fed. 959, but there is not enough to warrant an injunction, so long as defendant's goods are packed and labeled with his own name, Wm. A. Rogers, not collocated with other words in such manner as to induce any greater confusion in the minds of purchasers than would naturally be produced by the use of such name. Motion denied.

AIR-BRUSH MFG. CO. v. THAYER et al.

(Circuit Court, N. D. Illinois, N. D. April 14, 1897.)

1. TRADE-MARKS—DESCRIPTIVE NAMES—"AIR BRUSH."

Whether or not a given word is a trade-mark is a question of fact. The evidence does not show the words "air brush" to be used as a mark of origin by complainant. These words are apparently used descriptively by both parties.

2. FEDERAL TRADE-MARK STATUTE.

The case rests on the federal statute; but defendants have not affixed complainant's registered mark to merchandise of substantially the same descriptive properties as that described in the registration.

This was a suit in equity by the Air-Brush Manufacturing Company against Thayer and others for alleged infringement of a trade-mark.

L. L. Morrison, for complainant.

Barton & Brown, for defendants.

SHOWALTER, Circuit Judge. I do not find from the evidence that complainant in fact uses the words "air brush" as a mark of origin. Complainant calls the patented article made by it an "air brush." The name of the complainant company, "Air-Brush Manufacturing Company," is stamped on said article; but the mark "air brush," as a sign of origin, is not there. In the specification of patent No. 310,754 the patentee says: "My invention relates to that class of instruments or machines designated as 'air brushes,' for the distribution of pigments by means of an air blast to produce portraits, land-

scapes, etc." Complainant preferred the name "air brush" to the name "paint distributor" or "atomizer." But the term "air brush," as complainant uses it, is the name of the article, and it is plainly descriptive, and not arbitrarily selected as a mark of origin. Any licensee of complainant under the patent referred to would speak of his product descriptively as an "air brush," and when the patent expires the public may make the article, and call it by that name. Not only so, but the name is generic. It is so used in the patent office, and was so used at the Columbian Exposition. In the patent, as above quoted, it is declared that the word "air brush" indicates a class of articles. Moreover, the defendants, while they call the particular air brush made by them the "fountain" air brush, do not put said mark on the article. What they make is entirely different in appearance from the article made by complainant. There is no mark on defendants' article which could possibly signify that it was made by complainant. The parties here are citizens of Illinois. This court entertains jurisdiction over the case, therefore, as being strictly a trade-mark case. But these defendants have not affixed complainant's registered mark to merchandise of substantially the same descriptive properties as that described in the registration, within the meaning of section 7 of the national trade-mark statute (21 Stat. 502). Even if a case of unfair competition were shown, the complainant would have no right to litigate in this court, since the parties are citizens of Illinois. The bill is therefore dismissed for want of equity.

SPRAGUE ELECTRIC RAILWAY & MOTOR CO. v. UNION RY.
CO. et al.

(Circuit Court, S. D. New York. January 24, 1898.)

PATENTS—NOVELTY AND INVENTION—INFRINGEMENT—ELECTRIC MOTORS.

The Sprague patent, No. 324,892, for an electric railway motor, consisting of a field magnet, journaled, at one end, on the axle of the driving wheels, and hung, at the other, on a spring from the truck or car body, and carrying the armature shaft upon its pole pieces parallel with the shaft of the driving wheels, and connected to them by gearing, *held* valid as to claims 2, 6, and 9; and said claims *held* infringed by structures differing in some respects from those of the patent, and containing improvements thereon, but having all these parts working together in the same relation, for the same purpose, and producing the same result.

This was a suit in equity by the Sprague Electric Railway & Motor Company against the Union Railway Company and others for alleged infringement of a patent.

Frederic H. Betts, for plaintiff.

Charles E. Mitchell and Henry B. Brownell, for defendants.

WHEELER, District Judge. This suit is brought upon patent No. 324,892, dated August 25, 1885, and granted to Frank J. Sprague, for an electric railway motor consisting of a field magnet, journaled on the axle of the driving wheels at one end, and hung upon a spring from the truck or the car body, at the other, and carrying the armature

shaft upon its pole pieces parallel with the shaft of the driving wheels, and connected to them by gearing. The specification as to this arrangement says:

"The armature being carried rigidly by the field magnet, these two parts must always maintain precisely the same relative position under every vertical or lateral movement of the wheels or of the car body; and, as the field magnet which carries the armature is itself centered by the axle of the wheels to which the armature shaft is geared, the engaging gears, also, must always maintain precisely the same relative position. At the same time the connection of the entire motor with the truck is through springs, so that its position is not affected by the movements of the truck on its springs."

The claims in question are:

"(2) The combination of a wheeled vehicle and an electro-dynamic motor, mounted upon and propelling the same, the field magnet of said motor being sleeved upon an axle of the vehicle at one end, and supported by flexible connections from the body of the vehicle at the other end, substantially as set forth."

"(6) The combination, with a wheeled vehicle, supported upon its axles by springs, of an electro-dynamic motor flexibly supported from such vehicle, and centered upon the driving axle thereof, substantially as set forth."

"(9) The combination, with a wheeled vehicle, of an electro-dynamic motor centered upon the driving axle thereof at one end, a spring support for that end of the motor from the truck or body of vehicle, and relieving axle wholly or partly of dead weight, and a spring support for the other end of motor from the truck or body of vehicle, substantially as set forth."

This patent was before the circuit court of appeals for the Eighth circuit in *Adams Electric Ry. Co. v. Lindell Ry. Co.*, 23 C. C. A. 223, 77 Fed. 432, which was brought upon patent No. 300,827, dated June 24, 1884, and granted to A. Wellington Adams for improvements in electric motors, against structures made according to this patent as infringements. The position of Sprague's invention with reference to prior structures, inventions, and patents is there well and comprehensively set forth by Judge Sanborn in the opinion of the court; and the decree dismissing the bill appears to have been affirmed because, in short, Sprague's invention was independent of Adams'. And if Sprague's patent was for merely hanging and centering one end of a motor of a carriage upon the axle of the driving wheels, and suspending the other by a spring from the body of the vehicle or the truck, it would be shown from that case to be wholly lacking in novelty, and void. He was not a pioneer here, and could have a valid patent for only what was new in his method of making the power of the electrical current turn the driving wheels. No one had before, however, hung a field magnet at one end upon the axle of the driving wheels, and at the other upon a spring from the body of the car or the truck, and an armature axle upon the pole pieces of the magnet, parallel with, and geared to, the axle of the driving wheels, for driving a car by a current of electricity. This combination simplified greatly the required structures, improved their results, and came into immediate use. The invention of it seems to well support these claims of the patent. The defendants' structures differ in some respects from those of the patent, but have all these parts working together in the same relation to each other, for the same purpose, and producing the same result. They are altered by the addition of a joint in the motor, and of another

spring to help carry it, but not by dispensing with any of the parts; they are improved upon, but not departed from. The defendants' improvements are not made independent of, and clear from, Sprague's, but upon his; and his patent appears to be infringed by this taking of his invention to so improve upon.

CLERK et al. v. TANNAGE PATENT CO.

(Circuit Court of Appeals, Third Circuit. January 18, 1898.)

No. 25.

1. PATENTS—PROCESS OF TANNING LEATHER.

The Schultz patents, Nos. 291,784 and 291,785, for processes of tanning leather, held infringed by one who used substantially the baths of the patent, although, prior to immersion in the first bath, the skins were "struck" in alum and salt; this being a mere addition to the process, not avoiding infringement.

2. SAME—LICENSES.

The owner of a patent for processes does not, merely by publicly offering to sell licenses, confer upon third parties the right to make reasonable experimental tests, so as to enable him, when sued for infringement, to escape liability on the ground that he was only testing its desirability or utility.

Appeal from the Circuit Court of the United States for the District of Delaware.

This was a suit in equity by the Tannage Patent Company against William B. Clerk & Co. for alleged infringement of certain patents for processes of tanning hides. The circuit court granted a preliminary injunction, and the defendants have appealed therefrom.

Hector T. Fenton, for appellants.

Charles Howson, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

KIRKPATRICK, District Judge. The bill in this cause was filed to restrain the defendants from infringing the complainant's patented process for tanning hides and skins, as specified in letters patent Nos. 291,784, and 291,785. After a hearing upon bill and answer, with affidavits annexed, the circuit court granted a preliminary injunction. For the purposes of the hearing in the circuit court, the validity of the complainant's patents was not denied, nor was that question raised here. The issues presented by the assignment of errors are whether the proofs show infringement, and, if so, whether the defendants had a special permission from the complainant to make reasonable experimental or trial tests of the patented process. It appears from the testimony in the record that the defendants are willing infringers. From September, 1894, to May, 1895, they employed one Corrigan, as tanner, "because," as stated by William B. Clerk, the president of the defendant corporation, and himself a defendant in the cause, "he claimed to know how to practice the complainant's patented chrome-tanning process"; and, after Corrigan's discharge, they tried it them-

selves. The process adopted by the defendants is described by Mr. Clerk as follows:

"We 'struck' the skins first in alum and salt, then submitted them to a bath of bichromate of potash and acid, and then submitted the skins to a water bath containing a solution commonly sold in the market, and called 'McMane's Solution.' "

It appears that this McMane's solution, which constituted the defendants' second bath, is one evolving sulphurous acid, and therefore equivalent, in its action and result upon the skin, to the particular second bath of the complainant's patent No. 291,785, while the "striking" of the skins in alum and salt preparatory to their submission to the first bath of bichromate of potash and acid is a mere addition to the first step of the complainant's process. "The defendant does not use the process any the less because he uses something in addition to the process." *Lelance & G. Mfg. Co. v. Habermann Mfg. Co.*, 53 Fed. 380; *Tilghman v. Proctor*, 102 U. S. 730.

The special permission to the defendants to make reasonable experimental or trial tests of the patented process is based upon the acts of the complainant in publicly offering to sell licenses. No authority is cited to the court for this proposition, and we hold that it is not the law. It cannot be that the owner of a patent may not offer to sell licenses under it without thereby giving to all the world the right to its limited use. Intending purchasers or others might, by contract, obtain special privileges; but a mere expression of willingness to grant or sell licenses will not, of itself, confer upon any, the privilege to use the specialty of the patent, and claim exemption from a charge of infringement on the ground of being simply engaged in experimentally testing its desirability or utility. The order granting the preliminary injunction is affirmed, with costs.

FORD MOROCCO CO. v. TANNAGE PATENT CO.

(Circuit Court of Appeals, Third Circuit. January 18, 1898.)

No. 23.

PATENTS—PROCESS OF TAWING LEATHER.

The Schultz patents, Nos. 291,784 and 291,785, for a process of tawing hides, consisting in subjecting them to the action of a bath prepared from a metallic salt, such as bichromate of potash, and then to the action of a bath evolving sulphurous acid, are infringed by one who merely modifies this process by adding some sulphate of aluminum to the bath, where the result is a chrome-tanned leather differing from that produced by strictly following the patent only in the presence of a small per cent. of aluminum, rendering it more soluble.

Appeal from the Circuit Court of the United States for the District of Delaware.

This was a suit in equity by the Tannage Patent Company against the Ford Morocco Company for an alleged infringement of certain patents for improvements in processes of tawing hides. In the circuit court an order was entered granting a preliminary injunction, from which the defendant has appealed.

Hector T. Fenton, for appellant.
Charles Howson, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

KIRKPATRICK, District Judge. This matter is brought before the court on an appeal from an order of the circuit court granting a preliminary injunction restraining the appellant (the defendant below) from infringing certain letters patent issued to Augustus Schultz, bearing the date January 8, 1884, and numbers 291,784 and 291,785. These patents were sustained in this court in *Patent Co. v. Zahn*, 17 C. C. A. 552, 70 Fed. 1003, and again declared valid in this circuit, after full hearing upon allegations of newly-discovered evidence, in *Patent Co. v. Adams*, 77 Fed. 191. This latter case was affirmed on appeal (26 C. C. A. 326, 81 Fed. 178); his honor, Judge Dallas (speaking for this court), declaring that the decision of the court in *Patent Co. v. Zahn*, supra, "should be regarded as a finality until sufficient reason for departing from it shall have been made to plainly appear, and that the appellees should not, upon a motion to dissolve a preliminary injunction, be deprived of the advantage they hold as owner of a patent adjudged by a court of appeals to be valid, upon anything less than thoroughly convincing additional proofs." None such have been offered upon this hearing. The sole question, therefore, is one of infringement. In determining the validity of the patents in question (*Patent Co. v. Zahn*), this court described them as being a process for tawing hides and skins by subjecting them to chemical action, with the definite object of converting them into leather." The steps of the process consisted in "subjecting the hides or skins to the action of a bath prepared from a metallic salt, such as bichromate of potash, and then to the action of a bath evolving sulphurous acid," etc., "substantially as described." It appears from the record in this case that the defendant is engaged in the tanning of hides and skins, and that for that purpose it uses a process which consists in first subjecting the hide or skin to a bath consisting of sulphate of alumina, muriatic acid, water, and bichromate of potash; the proportion of these elements being $2\frac{1}{2}$ pounds of sulphate of alumina, $2\frac{1}{2}$ pounds of muriatic acid, and 5 pounds of bichromate of potash, to each 100 pounds of hides or skins. After the hide or skin has been subjected to this first bath, it is put in a second bath, evolving sulphurous acid, which does not differ from that prescribed by the complainant's process. The question at issue, then, is whether the defendant has merely modified the complainant's process by adding some sulphate of alumina to its first bath, or whether, by its addition, it thereby actually taws the hides, and uses the bichromate of potash merely for coloring, or as a mordant. The admixture of sulphate of alumina, bichromate of potash, and muriatic acid does not form a compound; but they will each form a compound, with the skin or hide, of aluminum and chromium. Each will have its own independent results. What these results will be can be best determined

by a quantitative analysis of the product. Such an analysis has not been made upon any of the skins or hides of the defendant (it has not produced any); but upon hides or skins subjected to such tests after treatment in the first bath, such as is used in defendant's process, it is clearly shown that the addition of the sulphate of alumina to the bath does not prevent the thorough absorption by the hide or skin of the bichromate of potash; the proportion of chromic oxide to alumina taken up being as over 7 to 1. It is also found that by subjecting this skin so treated to the second bath used by the defendant, which is the same as that used by the complainant, the result is a chrome-tanned leather differing from that produced by the complainant's process only in that the presence of a small per cent. of aluminum renders it more soluble. That the result attained by the defendant's first bath at least partakes of the nature of a chrome-tawed hide, rather than that of an alum-tawed hide, is further evidenced by the fact that when an alum-tawed hide is subjected to the second bath, evolving sulphurous acid, it returns to its natural state of raw hide, instead of becoming leather, as does the chrome-tawed hide. It may be that in the first bath both the sulphate of alumina and the bichromate of potash act independently upon the hide, and that the skin first takes up, by reason of its greater affinity therefor, the alumina salt, and afterwards the chrome salt; but, if this be so, it is evident that the alumina salt is practically displaced, and the skin so saturated with bichromate of potash, that, after subjection to the second bath, evolving sulphurous acid, it becomes chrome-tawed leather. The defendant "does not use the process any the less because he uses something in addition to the process." *Lalace & Grosjean Mfg. Co. v. Habermann Mfg. Co.*, 53 Fed. 380. Infringement is not averted by a mere addition to the patented process. *Tilghman v. Proctor*, 102 U. S. 730. We are of the opinion that the addition of the sulphate of alumina by the defendant to the first bath in complainant's process is immaterial, and does not affect the result attained. The order granting the preliminary injunction will be affirmed, with costs.

BERRY v. WYNKOOP-HALLENBECK-CRAWFORD CO. et al.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

No. 24.

PATENTS—INVENTION—SAFETY CHECKS.

The Berry patent, No. 268,988, for an improvement in safety checks or other papers representing value, consisting in the use of marginal tables of figures comprising one or more compound columns, each composed of two or more simple columns of figures of different denominations, the simple columns being arranged out of line with and one below another, is void for want of invention, in view of prior United States patent No. 163,462 to E. Rezean Cook. 77 Fed. 833, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The complainant's bill in equity in the circuit court for the Southern district of New York alleged the infringement by the defendants of letters patent No. 268,988, dated December 12, 1882, and issued to Marcellus F. Berry, for an improvement in checks or other papers representing value. This appeal is from the decree of the circuit court, which dismissed the bill upon the ground of the invalidity of the patent for want of invention. 77 Fed. 833.

W. Laird Goldsborough and Edwin N. Brown, for appellant.

Wallace Macfarlane, U. S. Atty., and Robert Grier Monroe, Asst. U. S. Atty., for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The patentee, in his specification, described the relation of his improvement to the preexisting art as follows:

"My invention is applicable to checks, certificates, and other papers which are filled out for certain amounts of money, and which it is desired to prevent being raised or changed so as to call for different amounts from those for which they are made out. Various plans have been proposed for this purpose; but my invention relates to that class of safety checks and analogous papers which are provided with marginal tables of figures of different denominations, and which are to be torn through the tables, so as to indicate exactly or approximately the amount for which the check or paper is intended. My invention consists in a novel formation of, or arrangement of, the figures in these tables, whereby the tearing through the tables is facilitated, and a check or paper is produced which may be more conveniently used, and which will afford greater security against fraud."

Although the improvement is easily understood by an examination of one of the drawings in the patent, it is not easy to describe it very succinctly. The following excerpt from the description given by the complainant's expert states the peculiarities of the improved check:

"The patent shows and describes a check or other paper representing value, which is provided with one or more compound columns, each composed of two or more simple columns of figures of different denominations, arranged consecutively, the simple columns of each compound column being arranged out of line with and one below the other, so that a person wishing to tear off so much of the columns as is necessary for designating the amount for which the paper is made out, begins at the top and tears down along one of the simple columns, then across this simple column at the desired figure, then down along the next simple column and across the same at the desired figure, and so on, the paper being torn parallel with the length of the column until the desired figure is reached in the simple column, and then tears across the simple column being always made in one and the same direction, * * * whereby a stepped end or edge of the paper is produced, and, when the ends of this stepped line are connected by a straight line this straight line will be an oblique line from the upper left corner to the lower left corner of the paper. The torn edge of the paper thus has an offset at each figure that is used to designate the value of the paper. * * * There are no projecting tongues, flaps, or wings formed on the end of the paper, and the tear is practically continuous in an oblique line, as no return movements are necessary in tearing off the paper in the manner I have described."

The single claim is as follows:

"A check or other paper representing value, provided with a table comprising one or more compound columns, each composed of two or more simple columns of figures of different denominations, the simple columns in each compound column being arranged out of line with and one below another, substantially as and for the purpose herein described."

The defendant corporation is a contractor, which prints the well-known postal money orders for the United States government, and which contain the identical improvement which is described and claimed in the complainant's patent. It was, like the revenue stamp which was the subject of discussion in *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. 717, both new and useful, and the material question is whether it had the third requisite for patentability, and was the product of inventive skill. The two important devices which mark the pre-existing state of the art are shown in letters patent No. 163,462, dated May 18, 1875, to E. Rezean Cook, for an improved railroad ticket, and in English letters patent No. 1,906, dated May 27, 1873, to Frederick Stanfield for an improved means for preventing fraudulent alterations in bankers' checks. The Cook patent describes a railroad ticket which has two parallel rows of numbers arranged consecutively from the lower end upward. They indicate successive sums of money between any of which the ticket may be torn off, leaving one portion to inform the proper officer of the amount of fare received by the conductor. The columns are not arranged out of line with each other, and one below the other. The Stanfield invention is shown in 12 different forms. The one shown in Fig. 5 is the nearest approach to the arrangement of figures described in the patent in suit. It has a table containing three vertical rows of numerals, each having the lowest denomination at the bottom and extending upward in irregular order, the several vertical rows being out of line, and below each other. The column for thousands is at the bottom of the check. The following is a representation of No. 5:

	London,	18
Messrs.		
Pay to.....	or Bearer	
£1357.		

The figures do not advance without a break, the tear begins at the bottom, and runs back and forth across the columns, so that a series of protruding tongues or tabs remains on the check after it has been cut from the stub; whereas the tear of the Berry check approaches an oblique line, is swiftly made, and leaves no protruding tongues of paper.

It will be remembered, as stated in the patent, that at its date, tables or rows of figures had been placed in consecutive order on the border of a check, so that the amount for which a check was drawn could be indicated by punching out the appropriate figures. The Cook ticket and the Stanfield check each arranged the tables so that the proper figures could be displayed by tearing from the table instead of by punching them out, but in each instance there must be two or more separate tears which run across the columns in different directions. The needed improvement was a rearrangement of the figures, so that those which were to be torn away could be torn across the columns in one direction by a natural oblique movement of the hand. This was easily done by arranging the columns in the Cook ticket out of line with each other, and one below the other, instead of having the columns in parallel lines,—an idea which Stanfield had already indicated. The necessary change of the Cook columns was

not the work of an inventor, but of an intelligent bank or money-order clerk of ordinary clerical skill, and the rearrangement of old methods did not call for inventive power. The decree of the circuit court is affirmed, with costs.

HANIFEN v. E. H. GODSHALK CO. et al.

(Circuit Court of Appeals, Third Circuit. January 17, 1898.)

No. 19.

1. PATENTS—ANTICIPATION BY FOREIGN PATENT.

A patent is not anticipated by a prior foreign patent, unless the descriptions or drawings of the latter exhibit a substantial representation of the invention in such full, clear, and exact terms as to enable any person skilled in the art to practice it without the necessity of making experiments.

2. SAME—EXPERT EVIDENCE.

Mere opinions of experts, unsupported by convincing and satisfactory reasons, that a patented article may be produced by following the directions of a prior foreign patent, will not bind the court against its own judgment.

3. SAME—KNITTED FABRICS—ASTRAKHAN CLOTH.

The Bywater patent, No. 374,888, for improvements in knitted fabrics, whereby a cloth is produced having the appearance of Astrakhan cloth, held not anticipated by the prior Booth British patent, No. 756, of 1881, nor shown to be invalidated by abandonment or prior use in this country.

Butler, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit in equity by John E. Hanifen, trading as John E. Hanifen & Co., against the E. H. Godshalk Company and E. H. Godshalk, for alleged infringement of letters patent No. 374,888, dated December 13, 1887, to Levi Bywater, for improvement in knitted fabrics, whereby an article is produced having the appearance of looped or Astrakhan cloth. The circuit court held that the patent was anticipated by the Booth British patent, No. 756, of 1881, and accordingly dismissed the bill. 78 Fed. 811. The complainant has appealed.

Joseph Fraley and Wm. P. Preble, Jr., for appellant.

Strawbridge & Taylor and Edmund Wetmore, for appellees.

Before SHIRAS, Circuit Justice, ACHESON, Circuit Judge, and BUTLER, District Judge.

ACHESON, Circuit Judge. The Bywater patent in suit is for a new manufacture, namely, a knitted fabric whose face is matted and curly, presenting the appearance of Astrakhan cloth. To produce this knitted fabric, the face yarn must be of mohair or a curly, crinkly wool, and the yarn must be put in in long floats, so that it will mat and curl, thus imparting to the face of the fabric an Astrakhan like appearance. The specification and drawings of this patent seem to be perfectly intelligible to skilled knitters, giving them all needed directions. No witness has testified, nor is it

alleged, that the patent fails to give to any practical knitter such full and clear information as will enable him to make the patented fabric. This fabric has become a well-known article of commerce, and is now extensively used.

Infringement of the second claim of the patent is here complained of. That claim is as follows:

"(2) A knitted fabric, composed of face and back yarns of different materials, the face yarn being looped at regular intervals, and on alternate stitches of adjacent rows of the back yarn, and being matted and curly, and having a smooth back, whereby the said fabric has the appearance of looped or Astrakhan cloth, as described."

It appears from the brief of the appellees (the defendants below) that four defenses are relied upon, viz.: (1) "Anticipation of the patent in suit by the patents set up"; (2) "public use and sale in the United States of the patented fabric more than two years prior to the application for the patent in suit"; (3) "abandonment"; and (4) "noninfringement." All these defenses were overruled by the court below, except the single defense of anticipation by the British patent of 1881, to James Booth.

Now, taking up the defenses in an order the reverse of the above enumeration, and first dealing with the question of infringement, we find in this record positive evidence showing the manufacture by the defendants of the fabric described in the patent in suit, and covered by its second claim. The evidence is certainly sufficient to sustain the allegation of infringement made in the bill.

With respect to abandonment, a careful examination of the proofs leads to the conviction that that defense is not well founded. Bywater's application for the patent in suit was filed on December 22, 1883. If he abandoned his invention to the public, it must have been prior to that date. Under all the circumstances shown, it would be going a great length to impute to him the intention to relinquish his invention. Then, we do not perceive any just ground for an estoppel against him. It does not appear that he misled any one by what he did or by what he omitted to do. Moreover, the court below found that the proofs did not carry back Bywater's perfected invention beyond the date of his application for this patent. That position was taken in the court below by the defendants, who thus successfully met the attempt of the plaintiff to antedate Booth. But, if Bywater's invention was not in a completed form until the date of his application, it is very hard to see how an abandonment is to be ascribed to him. The court below did not err in disallowing this defense.

The defense of two years' prior use and public sale in the United States rests upon the importation by H. Herman Sternbach & Co., at the port of New York, in May, 1881, of certain pieces of "kyrie" cloakings. We agree, however, with the learned judge of the court below, that there is "room for very grave doubt" whether those goods were the knitted Astrakhan of this patent; and we also concur in his view that there is a failure of satisfactory evidence to show that they passed into public use, or were put on sale. The evidence of prior use or sale did not reach the standard of cer-

tain proof required to sustain such defense. *Cantrell v. Wallick*, 117 U. S. 689, 695, 6 Sup. Ct. 970.

We have carefully considered the British patent of 1849 to Henry Dunnington, the British patent of 1857 to Ball & Wilkins, the United States patent of 1875 to Kent & Leeson, and the United States patent of 1883 to S. N. Levy, which are insisted upon by the defendants as anticipating Bywater. In our judgment, these patents, taken singly or together, do not embody or disclose the Bywater invention. We adopt the views of the court below as expressed in its opinion touching this branch of the defense, and we concur in its conclusion that none of the four above-named patents are anticipatory of the invention of the patent in suit.

This brings us to a consideration of the British patent of 1881 to James Booth. The case, we think, turns upon the question whether the Booth patent disclosed the Bywater invention. Now, it is a well-settled and familiar doctrine that an invention patented here is not to be defeated by a prior foreign patent unless its descriptions or drawings contain or exhibit a substantial representation of the patented invention in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains, without the necessity of making experiments, to practice the invention. *Seymour v. Osborne*, 11 Wall. 516, 555; *Cahill v. Brown*, 3 Ban. & A. 580, 587, Fed. Cas. No. 2,291.

Mr. Robinson, in his work on Patents (volume 1, § 329), discussing the kindred defense of prior publication, states the rule thus:

"The invention described in the publication must be identical in all respects with that whose novelty it contradicts. The same idea of means, in the same stage of development, as that which the inventor of the later has embodied, must be thereby communicated to the public."

Again, the same learned author (section 335), in treating of the defense of a prior patent, says:

"So, when the inventor of the patented invention has included in his art or instrument some act or part, without perceiving its significance, and thus, in patenting it, fails to specifically describe such part or act, although, if his invention had been practically employed, such act or part might have become known to the public, his patent does not place it in their reach."

Applying these principles here, can it fairly be said that Booth's patent disclosed the Bywater invention, or brought it within the reach of the public? If any such disclosure was made, it must be found in the following cited clauses of Booth's specifications. After stating that his invention relates "to means whereby a novel description of fabric is produced on that class of knitting machinery known as the circular or French frame," Booth proceeds thus:

"For this purpose I form the back of the fabric of the ordinary looping threads, using ordinary wool yarn for such purpose, and I form the face of the fabric on that part which has usually been considered the back. For this purpose, I employ worsted or long fibered yarn for the face, which is laid in between the needles in any desired order; such face yarn being tied to the looping thread by the tie thread usually employed in the manufacture of fleecy backed hosiery. The fabric, after removal from the machine, is subjected to the process known as 'fulling,' or 'felting,' whereby the back

or knitted portion of the fabric becomes considerably shrunk, and the fibers thereof felted together, whilst the face yarn, being laid in straight, and tied to the body or back at longer or shorter intervals, is caused to project from the back or body of the fabric in the form of loops, thereby producing a very ornamental appearance."

Booth's claim reads thus:

"The manufacture of a novel description of fabric on that class of knitting machinery known as the circular or French frame, by employing woolen (felting) yarn for the body or back of the fabric, and longer fibered (unfelting) yarn for the top or face of the fabric, which is made on that side usually considered the back, and afterwards fulling or felting such fabric, substantially as herein described."

The foregoing is the entire information touching Booth's fabric contained in his patent. His drawings do not show the fabric either during the process of manufacture or in a finished state. His patent makes no reference to Astrakhan or Astrakhan cloth. It contains no hint that his fabric is to have an Astrakhan like appearance. It gives no directions whereby a resemblance to Astrakhan cloth can be attained. It says nothing about a curly or wavy surface. It does not state that his loops are to be matted and curled. On the contrary, his statement is that, by the process of fulling or felting, the back of the fabric "becomes considerably shrunk," and the face yarn is caused to project "in the form of loops, thereby producing a very ornamental appearance." Evidently, the described loops thus produced are plain loops. The essential features of Astrakhan cloth are lacking. It is clear to us from the face of Booth's patent that the product therein described and thereby attained is something altogether different from the fabric described and produced by Bywater in and by the patent in suit.

The contrary conclusion, which the able judge of the court below reached, was based upon the effect which he felt constrained to give to the testimony of the defendants' professional expert, their foreman, and two knitters. We have examined that testimony with the utmost care, and we are obliged to say that, in our opinion, it does not justify a decree adverse to the patent in suit. This testimony strikes us as very meager. It consists of little more than the bare opinions of the witnesses that Booth's patent discloses the Bywater fabric. The witnesses really give no reasons for their conclusions. No detailed analysis of Booth's specifications is made by any of them. None of them pretend that any of the terms employed in Booth's patent require explanation by an expert. No such elucidation is attempted by any of them. These witnesses call the Booth fabric "Astrakhan cloth," and say that, by following the directions of Booth's patent, without more, Astrakhan cloth can be produced; and one of them states that he has done this. This is the whole substance of their testimony. Ought it to be controlling? We think not. Testifying in 1896, it was impossible for these witnesses to divest their minds of their then knowledge respecting the Bywater fabric and the mode of its production, even if they had been unbiased. But what a willing witness

in 1896 might read into the Booth patent is no fair test. The true question is, what did that patent disclose to the public in 1881? We are well satisfied that the expert testimony of the defendants' witnesses furnishes no safe aid in the solution of that question. The Booth patent speaks for itself, and its meaning is to be determined by the court.

The language of the Booth patent which we are called upon to consider is of easy comprehension. The following observations of the supreme court are here pertinent:

"The words used are not technical, either as having a special sense by commercial usage, nor as having a scientific meaning different from their popular meaning. They are the words of common speech, and, as such, their interpretation is within the judicial knowledge, and therefore matter of law." *Marvel v. Merritt*, 116 U. S. 11, 12, 6 Sup. Ct. 207.

In *Norton v. Jensen*, 1 C. C. A. 452, 49 Fed. 859, 864, the circuit court of appeals for the Ninth circuit well said:

"If the reasons given by the expert witness are deemed reasonable and satisfactory, the court may adopt them; but, if they are unsatisfactory, the court will discard the testimony, and act upon its own knowledge and judgment. It is always the duty of the courts to construe the patent by reference to the language of the claims and an examination of the specifications and drawings accompanying the same."

In *National Co. v. Belcher*, 71 Fed. 876, 879, this court, speaking by Judge Butler, in refusing to give controlling effect to the testimony of a competent mechanic, who stated that, by following the directions of an earlier patent, he had made a device identical with the one in controversy, said:

"If a valuable patent might be overthrown in this manner by the testimony of an expert, without careful inquiry into, and virtual demonstration of, its correctness, the rights of patentees would rest upon the testimony of such witnesses, rather than the judgment of the court."

Here the defendants' expert witnesses fall very far short of demonstrating the correctness of their testimony. They do not give any satisfactory reasons to sustain their statements. Virtually their testimony is the expression of mere opinions. But, convinced by our investigation that Booth's patent neither described Bywater's fabric nor disclosed to the public the means for its production, we must follow our own judgment. The decree of the circuit court is reversed, and the cause is remanded to that court, with directions to enter a decree in favor of the complainant in the bill.

BUTLER, District Judge (dissenting). I am unable to unite in the conclusion above stated. Passing over the questions of abandonment and prior use raised, and putting the case on the ground of anticipation by Booth's patent, I believe the decree of the circuit court should be affirmed. It is not important that Booth does not call his fabric "Astrakhan cloth"; his method of manufacture described, in my judgment, covers everything described by Bywater; and the expert witnesses called testify positively that the methods described in both patents are the same; that Booth's description if followed will produce Astrakhan cloth—one of them saying he tested it by experiment and proved this to be so. The

appellant has allowed this testimony to stand without contradiction. It is not justifiable to say that the witness could not have made Astrakhan cloth by Booth's method at the date of Bywater's patent though he may have done it in the light of subsequent knowledge, in the absence of evidence tending to prove it. The question involved is one of fact which the circuit court, as its opinion shows, considered with unusual care; and its judgment is entitled under the circumstances to much weight.

Granting however that there is some difference in the two methods, it is not such, in my judgment, as involves the exercise of invention.

WESTERN ELECTRIC CO. v. STANDARD ELECTRIC CO.

(Circuit Court of Appeals, Seventh Circuit. January 25, 1898.)

No. 422.

PATENTS—INTERPRETATION AND INFRINGEMENT—DYNAMO-ELECTRIC MACHINES.

The Scribner and Warner patent, No. 496,449, for an improvement in perforated pole-pieces for dynamo-electric machines, if valid at all, is very narrowly limited by the prior state of the art, as shown in the Hochhausen patent, No. 404,848, and others. And claim 2, which is for a machine "having consequent pole pieces cut away or perforated on a line coincident with a plane passing through the axis of the armature shaft, such perforations being symmetrical with regard to said plane, whereby a uniform magnetic field is produced, regardless of the direction of rotation of the armature," is not infringed by machines made under the Loveridge patent, No. 500,403. 81 Fed. 192, affirmed.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Henry A. Seymour, George P. Barton, and Charles A. Brown, for appellant.

Francis W. Parker and Donald M. Carter, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge. The ruling of the circuit court in this case was that the second claim of letters patent of the United States No. 496,449, issued May 2, 1893, on the application of Charles E. Scribner and Earnest P. Warner, to the Western Electric Company, as assignee, is so far limited by the prior art as not to be infringed by devices made by the Standard Electric Company in conformity with letters patent No. 500,403, issued June 27, 1893, to F. H. Loveridge. The opinion delivered (81 Fed. 192), it is conceded, displays "an appreciation of the points at issue," intricate as in some respects they have been made to appear, but is criticized because its review of the prior art is confined to the patent of Hochhausen, No. 404,848, which it is said, is without significance, because it is for an electric machine which has no pole-pieces. But that objection was considered, and, as we think, sufficiently answered, in the opinion, and, without going again into the details of the subject, we deem it enough to declare our concurrence in the views of the circuit court concerning that patent. A further examination into the prior art, perhaps,

might have strengthened, but could not have changed, the conclusion.

The two claims of the patent in suit are closely related, the one being for a process, and the other for a product or result of the employment of the process upon the pole-pieces of an electric machine; and it is evident, upon the face of the patent, that neither claim embodies a pioneer discovery, and, if invention is shown, it is of a very narrow scope. The specification describes, in general terms, a process for discovering variations or lack of uniformity in the lines of force cut by the coils of the armature of an electric dynamo when the resistance in the circuit is gradually cut out or shunted, and the brushes rotated, meanwhile, from the maximum to the minimum point of commutation. In the claim it is called:

"The method of creating a uniform field for the short-circuited portion of the armature coils of a dynamo, which consists in shunting the brushes from the maximum to the minimum, varying the resistance in the circuit as the said brushes are shifted, and maintaining during said shifting freedom from sparking at the commutator by shifting the brushes slightly from the position that they would occupy if the field were uniform, in order to determine the amount and character of the variation in the distribution of the magnetic lines of force, and then perforating the pole-pieces to the degree thus found to be necessary, substantially as described."

It will be observed that neither in the claim nor specification is there disclosed any means or method of determining different degrees of irregularity of force, discovered by the experimental movements of the brushes between the maximum and minimum points of commutation; and in this respect the process of this patent differs, apparently to its disadvantage, from the process shown in the earlier patents, Nos. 402,200 and 410,656, granted to J. G. Statter, in which a volt meter is used to obtain from the different positions of the brushes "relative indications of the electro-magnetic force of the current (which are also relative indications of the resultant magnetic intensity produced by the mutual action upon each other of the field magnets and the armature) flowing through the coils." If the process of Scribner and Warner differs otherwise essentially from the process of Statter, it is not perceived, and whether there are other differences it is not important for the present purpose to inquire. Reference is made in the specification of the patent in suit to the first patent of Statter, in which, though the process is explained, the claims are for a dynamo-electric machine or motor having one or more pole-pieces cut away or incised, to neutralize irregularities of force to prevent sparking as the brushes are shifted; but it is pointed out that the pole-pieces there shown are salient, and, consequently, the armature can be rotated only in one direction, "since when the poles are incised for rotation in one direction the lines of force will not be properly distributed for rotation of the armature in the opposite direction." The special and characteristic advantage claimed for the dynamo of the patent is that its armature rotates in either direction, with no necessity for other change except the obviously expedient if not necessary one of making the brushes reversible. This is demonstrated by the statement in the specification that "our invention consists in producing, in the field, lines of force uniformly distributed as to generating or current producing effect throughout the arc or

segment traversed by the coils of the armature opposite the faces of the different pole-pieces, whereby the machine is made capable of running in either direction." The claim is for "a dynamo-electric machine having consequent pole-pieces cut away or perforated on a line coincident with a plane passing through the axis of the armature shaft, such perforations being symmetrical with regard to said plane, whereby a uniform magnetic field is produced, regardless of the direction of the rotation of the armature, substantially as described." It appears from the file wrapper that a claim in the same terms as this, except that it contained the words "at the center" immediately after the word "perforated," and did not contain the clause, "such perforations being symmetrical with regard to said plane," was rejected as containing nothing patentable over the references Statter, No. 402,200, and Hochhausen, No. 404,848. Those patents show ample knowledge of the irregularities in the field of force, and of the distortion of the lines of force due to armature reaction, to which imperfect short-circuiting and the consequent sparking or burning are attributable, and also show the method, not essentially unlike that of the patent in suit, and applicable equally to salient and consequent pole-pieces, of making the field of force uniform. With a knowledge of the earlier patents in the art it could not be invention to produce uniformity in the field of force of a consequent pole-piece or pieces, and it is difficult to believe that it was not evident from the beginning that, in a pole-piece of ordinary form, the boring or cutting requisite for that purpose must be at or near the center, and, once the advisability of rotation in either direction was thought of, it must likewise have been manifest that symmetry of construction was essential, and that to accomplish the end it was only necessary that the pole-pieces be cut away or perforated symmetrically, and to the proper extent, "on a line coincident with a plane, passing through the axis of the armature shaft." To what extent the cutting or boring must go seems to be a matter of experiment in each case. The specification says that "every dynamo must have its pole-pieces specially constructed and adjusted, as no two dynamos contain the same character of iron with respect to magnetism." The one expert, on whose testimony the appellant relied, made repeated statements to the same effect. For instance, in his examination in chief, he said:

"This operation requires the exercise of caution and good judgment, because, to produce the desired result, the exact amount of metal necessary to the uniform distribution of the lines of force must be cut away, and one-half of such amount must be taken from each side of a line that is coincident with a plane passing through the axis of the armature shaft, in order that the dynamo shall run sparkless and maintain a steady current, which under all conditions of load, or when operated in either direction, shall always be the same in amount."

On cross-examination, after a similar statement, he said:

"In other words, there is just a correct amount of metal to be removed, and a correct disposition of that metal remaining, which will produce a uniform field, and any variation therefrom produces nonuniformity."

When asked whether the separation of the upper or north poles of the machine shown in figure 10 of the Houston patent, No. 258,648, tends to make the field more uniform than it would be if the poles

were not separated, he answered that that "could be determined only by experimental tests."

The proposition announced in Thomson-Houston Electric Co. v. Western Electric Co., 34 U. S. App. 186, 256, 16 C. C. A. 642, and 70 Fed. 69, that, "when such tests are necessary to distinguish one device from another, it is manifestly an impracticable, not to say dangerous, proposition that the making or using of either under a given patent may be declared to be an infringement of a different patent upon the other," would seem to apply with equal or greater force here. But, that aside, it is clear that the earlier electric machines, of which patents No. 184,966, to Holcombe; No. 233,047, to Thomson; No. 258,648, No. 272,256, and No. 286,612, to Houston; No. 330,836, to Johnson; No. 332,682, to F. G. Waterhouse; No. 335,998, to Fisher; and No. 389,029, to A. G. Waterhouse,—are examples, in which the pole-pieces were cut away or perforated or entirely severed at or near the line of the plane of the axis of the armature shaft, were or were not anticipations of the patent in suit according to the result of experimental tests, and, such tests not having been made, it remains a question of reasoning or conjecture, in the light of the evidence, whether the particular construction shown in any of the prior devices was such as to produce, or to tend in a substantial degree to produce, the desired uniformity in the field of force. It is not enough to exclude those patents from consideration to say that the incisions or perforations or separations of the parts of the pole pieces were intended, or were described as intended, for some other purpose than to produce a uniform field, as, for instance, for the purpose of ventilating the machine. Ventilation was necessary only to prevent or to restrict the consequences of sparking, which results from irregularities in the field of force; and in the light of the learning contributed by the experts it seems probable, if, indeed, not certain, that the beneficial effect accomplished was more the result of decreased irregularities in the field of force than it was of the ventilation, whether the patentees so understood or not. It was common knowledge that the distribution of the lines of force depended largely upon the form of construction or distribution of metal in the pole-pieces, whether salient or consequent; and that the reason why this was so was also well understood, if not otherwise proved, is demonstrated by the patents to Statler and Hochhausen. It is therefore not to be believed that when other and earlier patentees constructed electric generators or motors with pole-pieces incised, severed, or perforated at or near the center, or elsewhere, they did not know that the incision or other particular change of form given to the pole-piece would have a certain and definite effect upon the working of the dynamo, and whether they knew just what the effect would be, or why it would result, is immaterial. It was an inevitable result, and not merely an accidental phenomenon, like the formation of fat acid in Perkins' steam cylinder, which in *Tilghman v. Proctor*, 102 U. S. 107, 111, was declared to be of no consequence. Whatever others had done in the way of shaping pole-pieces, and whatever the effect upon the field of force of what was so done, before the patent to Scribner and Warner, the appellee had the right to do

after the issue of that patent; and unless done by the process of that patent, which for the purpose of this statement is assumed to be valid, the machine produced could not be deemed to infringe the second claim in question, though shown by experimental tests to have pole-pieces with a uniform field of force. It is beyond doubt that the particular construction or adjustment of material used in the construction of the pole-pieces of the earlier patents had a direct effect upon the distribution and regularity of the lines of force, and the necessary inference is that in the machines which had, as most of them did have, incisions, perforations, or separations located at or near the center of the pole-pieces, and symmetrical, or nearly symmetrical, with reference to a line coincident with a plane passing through the axis of the armature shaft, the fields of force were thereby made in some degree more uniform, and that any one skilled in the art would have so understood before the patent in suit was granted or its contents made public. As already explained, it was well known in the art that sparking and like irregularities in the action of electric dynamos were due to unequal distribution and to distortion of the lines of electric force cut by the moving coils of the armature, and it was known, too, that the amount of distortion or irregularity of distribution of the lines depended, other things being equal, upon the form and proportion of parts of the pole-pieces. It was therefore open to every one to make his pole-pieces in any possible form for the purpose of producing a uniform field. There were known methods of overcoming the consequences of an irregular field, such as automatically variable brushes, an air blast at the point of the brushes to blow out the spark, and dividing the commutator into numerous segments, and connecting therewith correspondingly small coils of wire around the armature; but, to produce uniformity of the field, there was, as it was well understood, no way except to obtain the best adjustment of metal in the pole-pieces, and the accomplishment and determination of that result, if the statements quoted from the patent and from the testimony of the appellant's expert be accepted, depended and must continue to depend largely on experimental tests. A process for accomplishing the end might well be the subject of a patent, and possibly the discovery of an exact form of construction, possessing a distinct advantage over other forms, might also be protected by a patent (*Caverly's Adm'r v. Deere & Co.*, 24 U. S. App. 617, 631, 13 C. C. A. 452, and 66 Fed. 305); but it is impossible, in view of the prior art, to concede to the appellant a monopoly of the right to produce a uniform field in a consequent pole-piece, by giving it a symmetrical shape of the character stated, in order that there may be rotation of the armature in either direction. If the patent covers a pole-piece so incised or perforated as to have a uniform field, it covers one so shaped in the first instance, without boring or cutting, as to have a uniform field. That the device is not new, merely because rotation in either direction is made possible, is clear, because such rotation is shown in several of the prior patents already mentioned.

That the decree below should be affirmed we have no doubt, and it is so ordered.

PALMER PNEUMATIC TIRE CO. v. LOZIER.

(Circuit Court, N. D. Ohio, E. D. January 12, 1897.)

No. 5,404.

1. INTERFERING PATENTS—EQUITY SUIT.

In a suit in equity, under Rev. St. § 4918, for relief against an interfering patent, the better opinion is that no issue is involved, other than that of priority of invention as between the interfering patentees.

2. SAME—OPINIONS OF PATENT OFFICE—CONCLUSIVENESS.

The opinions or conclusions of the patent office in interference proceedings upon the construction of the language used in the claims, or as to the scope and meaning of earlier patents, does not operate as an estoppel upon the applicant, except in cases where he is required to abandon some part of his claim, or accept alterations narrowing their scope.

3. SAME—PRODUCT PATENTS.

The rule that similarities and differences in a machine or process do not depend on mere names of things, words used to describe them, or immaterial matters by which they may be distinguished, applies also to a patented product.

4. SAME—IMPROVED FABRICS.

The Huss patent, No. 539,224, for "a new and useful improvement in fabrics" (being fabrics made and used mainly for bicycle tires), *held*, on the evidence in an interference proceeding under Rev. St. § 4918, to be prior, in point of invention and reduction to practice, over the Palmer patent, No. 493,220, for the same invention.

This was a suit in equity by the Palmer Pneumatic Tire Company against Henry A. Lozier to determine a question of interference between certain patents, both covering "a new and useful improvement in fabrics."

E. L. Thurston and Dyrenforth & Dyrenforth, for complainant.
Gilbert & Hills and William A. Redding, for respondent.

LURTON, Circuit Judge. This is a bill filed under section 4918 of the Revised Statutes. That section provides that:

"Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to the adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment."

The complainant company is the assignee of patent No. 493,220, issued March 7, 1893, to John P. Palmer, for "a new and useful improvement in fabrics." The defendant is the assignee of patent No. 539,224, issued May 14, 1895, to Roudolph W. Huss, for "a new and useful improvement in fabrics." The only claims of the Huss patent are literal copies of the three first claims of the Palmer patent. The Huss patent was issued upon an application filed October 9, 1893, or seven months after the Palmer patent had issued. The specifications of the Huss application were also, for the most part, but

a verbatim copy of the specifications of the Palmer patent; the principal difference between them being as to the method, described, of producing the fabric covered by the claims. This similarity of application, specification, and claims was confessedly resorted to by the solicitors for Huss to insure an interference issue with the Palmer patent. This object was attained, and on the 20th of October, 1893, an interference was declared between the Huss application and the complainant Palmer's patent. The subject-matter of this interference, as defined by the commissioner of patents, was declared to be "a fabric made of elastic and impervious material, such as rubber, having imbedded within the surface, threads, substantially out of contact with each other." Preliminary statements were filed by each of the parties to this interference, and voluminous proofs submitted, and the questions at issue aggressively contested. March 4, 1895, the examiner of interferences rendered a decision awarding priority of invention to Huss, and filed a written opinion giving his reasons for this conclusion. From this decision an appeal was prayed to the board of examiners, but through some mishap the appeal fee was not paid within the time allowed for appeal, whereupon the application of Huss, under the rules of the patent office, was sent back to the primary examiner, who at once issued the patent. Though the commissioner of patents subsequently accepted the appeal fee, there was no way to recall the patent so that the appeal might be prosecuted. This bill was thereupon filed, under the provisions of the statute, to further contest the matter of priority.

This bill presents no other issue than that of priority. It charges that the patents are interfering patents, and that they are for substantially the same improvement. The answer concedes this to be the case, and neither bill or answer so much as suggests that the subject-matter of the patents is not patentable for any reason. Neither does the bill assail the Huss patent as void or voidable for any reason other than that Palmer was the first inventor, and had properly received the only valid patent. But, aside from this state of the pleadings, the better opinion seems to be that a proceeding under section 4918 involves no other question than that of priority between interfering patents. *Sawyer v. Massey*, 25 Fed. 144; *Pentlarge v. Pentlarge*, 19 Fed. 817; *Lockwood v. Cleveland*, 20 Fed. 164; *American Clay-Bird Co. v. Ligowski Clay-Pigeon Co.*, 31 Fed. 466; *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602-608. The last two cases cited were decided in this circuit,—one by Judge Sage, and the other by Judge (now Justice) Brown. In *Foster v. Lindsay*, Fed. Cas. No. 4,976, a contrary view was announced by Judge Treat. That case has been considered in each of the five cases we have cited, and repudiated as an unsound construction of the statute. The proceeding permitted by section 4915, where a patent has been refused, necessarily involves patentability, and every other reason for which a patent might be refused. The construction of that section in *Hill v. Wooster*, 132 U. S. 693, 10 Sup. Ct. 228, and by other cases cited by counsel, seems to have no proper application to such a bill as that now under consideration. Entertaining this view of the scope of a bill under section 4918, I shall not consider the questions argued

by counsel for complainant which go to the invalidity of the Huss patent for want of a sufficient description of a process by which the fiber covered by his claims may be produced, or to the patentability of the fabric described by his claims and specifications.

In approaching the question of priority of invention, it is essential that a clear understanding shall be had of what it is that both Palmer and Huss claim to have invented. This involves, collaterally, the utility of the material, and the object each had in view in the experiments they each rely upon as evidence of first conception and production. The fiber which is the subject of this controversy is primarily and chiefly useful in the construction of the tires of bicycles, and is well described by the interference issue framed by the commissioner of patents. That issue may be profitably restated. It was in these words:

"A fabric made of elastic and impervious material, such as rubber, having imbedded within the surface, threads, substantially out of contact with each other."

The interfering claims of each patent are in identical words, and are as follows:

"(1) A fabric made of elastic and impervious material, such as rubber, having imbedded within the surface, threads, substantially out of contact with each other, substantially as described. (2) A fabric made of elastic and impervious material, having imbedded and vulcanized therein substantially parallel fibrous threads, substantially as described. (3) A fabric made of vulcanized, elastic, and impervious material, having embedded and vulcanized therein substantially parallel fibrous and nonextensible threads, substantially as described."

Both Palmer and Huss were poor men, working for others upon meager salaries. Neither knew anything of the rubber business, and neither had been engaged in the making of bicycles. Both were experts in the use, and familiar with the structure and mechanism, of such machines. Both knew of the defects in the original form and structure of bicycle tires, and each, before the date of conception of the present invention, had given much thought to the improvement of tires, and each had theretofore either obtained or applied for patents covering improvements upon pneumatic tires. The particular attention of both had been especially directed to strengthening the cover protecting the air tube on the tires of bicycles against punctures, which, while not adding to the weight, would increase resilience and avoid vibration as much as possible when passing over obstacles in its path. It was conceived that it was desirable to avoid any prolonged depression of the tire caused by such obstructions, by producing a tire which would yield readily at the point of immediate contact with such obstacles. If the cover was so constructed as to be strengthened against lateral extension or expansion, and yet easily extensible longitudinally, it was conceived that resilience would be increased, and vibration of the wheel diminished, in passing over an obstruction. This condition, it was believed, would result if the fabric used in the construction of such tires could be made substantially nonstretching in one direction, while capable of considerable elasticity in another. It was old, in the rubber art, to incorporate a woven or braided fabric in sheets

or tubes of rubber. The oldest form of producing a rubber cloth or fabric was to dissolve pure rubber in a suitable solvent, forming a paste, which was spread over a cloth fabric with a knife or brush; the solution of rubber being forced by pressure, either cold or hot, applied by means of rollers, into the meshes of the cloth, which formed a coating on the side to which it was applied. Many old patents have been exhibited to show, not only the state of the art before their issuance, but the improvements which were covered by these patents. The most notable of these are the Newall patent, of 1861, for the manufacture of elastic cloth; the Bickford, originally issued in 1850, for a process of rolling rubber cloth; the Coles, Jacques & Fanshaw patent, of 1864, and Mayall patent, of 1869, both being for improvements in the manufacture of rubber hose. This old art was well known to both Palmer and Huss, and both make references to old methods of production, and to the defects in the old fabrics which it was their object to obviate. This part of their respective applications and specifications is an important part of every patent, as a statement of the object of the inventor, and the novelty and utility of his invention. That an invention shall be novel is not enough. It must have some utility,—must be capable of being put to some useful and practical purpose. It was therefore proper that these rival inventors should not only distinguish their invention from that which was old and well known, or the subject-matter of other patents, but should show to what useful end their discovery, invention, or manufacture might be put. Thus, the object they had in view in eliminating something which was objectionable in that which was old and well known, in order that new and useful results might be produced, furnishes a key by which the claims of an inventor may be read for the purpose of understanding their meaning, and ascertaining that which is material and vital, and distinguishing that which is merely model or immaterial. From the evidence of each of these inventors, and from the specifications of their respective patents, it is obvious that each was working upon precisely the same line. Each desired to get an elastic and impervious cloth, which should contain no interwoven or interlaced threads, and yet should have both strength and elasticity. The reason for this is found in the defects known touching the old form of rubber fabrics, and in the new and wide use of such fabrics resulting from the popularity of the bicycle. The elastic and impervious fabrics theretofore employed in the manufacture of tires, belting, and hose had incorporated therein or united therewith a woven or braided textile fabric, of linen, cotton, or other material. This contact of interwoven threads at point of crossing resulted in a sawing or cutting of the threads, one against the other, resulting finally in the severance of threads and the weakening of the fabric, when subjected, as in the case of belting and bicycle tires, to rapid and continuous vibration. To avoid this sawing and cutting action of interwoven threads is stated by each to be the primary object to be attained by producing a fabric in which the substantial parallelism of the threads is preserved, and all cutting and sawing at crossing points avoided. Both therefore state that the primary ob-

ject of their inventions was to produce a fabric "which shall be made up of flexible threads, which are not interwoven, but are held together by the rubber or equivalent material employed therewith." By having the threads of such a fabric lie parallel to each other, this objectionable sawing action of the threads, one upon another, was avoided. The second object stated by each was to get a fabric which would be substantially nonstretchable in one direction, and capable of stretching in another. This object is also clearly obtained by having the threads parallel to each other.

Having in mind the object which each of these inventors had in view, we come to the consideration of what each did in order to obtain the desired fabric. Here we are at once struck with the striking similarity of the methods employed, and of the fabrics first produced. The first actual reduction to practice of a conception touching the desired fabric was made by Huss. This was in March, 1892. What Huss then did was this: Obtaining access to the factory of the Chicago Rubber Works, he caused a layer of linen threads to be closely wound around a tube having a diameter of $3\frac{1}{2}$ inches and a length of 25 feet. These threads were laid on this tube smoothly, and in close lateral contact with each other. He then spread over this layer of threads a heavy coating of rubber in solution. Upon this was then placed a thin sheet of unvulcanized rubber, which was rolled down upon the threads so covered with rubber in solution with a heavy iron hand roller, such as used in rubber factories for that purpose. The effect of this operation was to imbed the threads, to a certain extent, in the solvent rubber, and to cause a uniting of the threads in the solvent rubber and the rubber sheet. This fabric was then split across the threads, and lengthwise with the tube, and removed therefrom. The result was a sheet of unvulcanized rubber, to which a layer of threads was united, which ran transversely across the sheet. In length and width, it was adapted to be cut into two strips suitable for bicycle tires. One of those strips was thereupon placed around an iron ring or core, after which a strip of linen, having wood imbedded in its edges, was placed on the outer periphery of the core, in order to fill up the mold properly into which the core or ring was placed. The mold was then taken to a heated hydraulic press, and subjected to a high pressure, in which it remained until the rubber was vulcanized. The result of the entire operation was to incorporate the threads and rubber sheet into one mass, the rubber being forced between the threads in such way as to almost completely immerse them in the rubber. This fabric was at once used in the construction of several bicycle tires, which proved, after use, to possess every advantage which it was the object of the invention to secure. Palmer's reduction to practice was later. In July or August, 1892, he obtained access to certain rubber works at Akron, Ohio. What he did was this: He took a thin sheet of unvulcanized rubber. Upon this he placed linen threads after they had been immersed in a solution of pure rubber. These threads were laid parallel to each other, and separated by a space about equal to the diameter of each thread. Another coating of the rubber solution was put on, and allowed to dry. These threads were rolled with an ordi-

nary hand roller, just as had been done by Huss. The further operation is thus described by Mr. Palmer:

"After the whole had dried, the threads were rolled down with an ordinary iron hand roller, to insure close adhesion. After this was done, another coat of solution was applied with a brush, and, I think, a third one. After the whole had dried, the piece of rubber, with the threads adhering to it, in length about twelve feet and in width about seven inches, was divided, longitudinally of the threads, in the middle, leaving each strip about three and one-half inches wide by twelve feet in length. An ordinary unvulcanized air tube was placed upon a straight, round mandrel, and the two strips of fabric or material I have mentioned wound thereon spirally; the threads in one strip running at an angle opposite to the threads in the other, as shown in Fig. 2 of my patent 489,714; the whole being rolled with the small iron roller, to secure close adhesion between the several layers. Upon the last layer of thread was superimposed a layer of rubber, the same being rolled down as before. The tube was then cut to a proper length (about six feet nine inches), an airtight joint made in the inner tube, and a joint made in the threads by intermingling the opposing ends; they having been freed from the solution for the purpose. The joint was then covered with a piece of sheet rubber corresponding in thickness with the last layer applied to the tube, and the tire placed upon a ring-shaped mandrel of a section shown in Fig. 3 of my patent No. 489,714, wrapped thereon by a spiral winding of muslin, and then vulcanized."

The covers thus made were used upon bicycles, and found to satisfactorily answer the conditions required, and the objects sought to be attained by Palmer.

It is not at all disputed that Huss' reduction to practice antedated that of Palmer. The contention is that Palmer first conceived the invention, made a drawing, and disclosed it to others in February or March, 1891, though he did not produce the fabric until July or August, 1892. This issue was the one to which the evidence was chiefly directed on the interference trial, and upon which the decision was adverse to Palmer. Palmer produces a drawing dated March 21, 1891, signed by him, and witnessed by H. J. Hughes and Milton Mill. This exhibit does not show the distinctive idea of a fabric having threads parallel to each other. Upon the contrary, it shows, in the most unequivocal way, a sectional view of a tire in which the threads are woven or braided. Palmer's explanation of this drawing and of the then state of his mind is not at all satisfactory, and the evidence of the witnesses who signed it is equally unconvincing. Whatever idea Palmer then had in his mind of a rubber sheet in which should be incorporated threads out of contact with each other, and substantially parallel, was evidently a dim intellectual notion, which had taken no form, and was abandoned, as shown by his drawing, in favor of a woven or braided fabric incorporated in, or united with, rubber sheets. His alleged conception of the advantages of threads parallel with one another found no expression in his drawing, which clearly shows a woven or braided fabric united with the rubber sheets. The sawing action of crossing threads was not guarded against. Neither was it possible, if his drawing is evidence of the then state of his mind, to see how, from a woven or braided envelope for his inner tube, he was to get a fabric nonextensible in one direction, and stretchable in another. I entirely agree with the opinion of the patent office that Palmer has failed to produce such evidence of conception earlier than his reduction to practice as to justify a holding that his invention

should be carried back to a date antecedent to the actual production of the fabric in question.

But it is said that Huss is not entitled to priority of invention unless the fabric which he made in March, 1892, is identical with the fabric described and claimed by the Palmer patent, and that as the question of priority depends upon Huss' earlier reduction to practice, the question of identity of the fabric first made by him with that described and claimed in the Palmer patent is pertinent. The question thus presented must turn primarily upon the proper meaning and reasonable limitation of the claims of the Palmer patent. For the Palmer patent, it has been most strenuously urged that the first claim covers an unvulcanized fabric, elastic and impervious, "having imbedded within the surface threads substantially out of contact with each other, as described," and that the second and third claims cover the same fabric vulcanized. It is urged that complete and entire imbedment of the threads within the surface of the rubber sheet is essential to constitute the fabric described by these claims. The first three claims of the Palmer patent were rejected by the primary examiner upon a reference to the Mayall patent of April 13, 1869, Crone patent of June 4, 1882, and the Jones patent of August 28, 1883. Upon an appeal to the board of examiners this action was reversed, and those claims allowed, upon the ground that the Crone and Jones patents were not for an elastic and impervious material, but for a fabric of paper, and that the Mayall fabric did not have threads "imbedded within the surface," "or imbedded and vulcanized within the material," as called for by the first three claims of the Palmer application. It is now urged that this ruling of the patent office operates as a construction and limitation of the claims in question, and limits the Palmer patent to a fabric in which parallel threads are completely buried or immersed within the surface of a single sheet of elastic and impervious material. We cannot accept the opinion of the patent office as to the legal construction of the claims allowed Palmer as a conclusive determination of their scope. These claims had been rejected because the examiner regarded these earlier patents as covering the same invention. The board of examiners did not agree with this conclusion, and distinguished the claims in question from those of the patents supposed to interfere. The question involved was a mixed question of law and fact, and is one for judicial determination. *Andrews v. Hovey*, 124 U. S. 694, 717, 718, 8 Sup. Ct. 676. It is not a case where an applicant was compelled, as a condition to receiving a patent, to abandon claims, or make changes operating to narrow their scope. There is no estoppel growing out of the opinion entertained by the patent office as to the legal effect of the language employed by applicants, either in their specification or claims, nor as to the scope and meaning of earlier patents. It is undoubtedly the duty of the patent office to allow or disallow applications, as it may deem the matter patentable or not, and for this purpose to inquire into the state of the art, and compare with patents supposed to interfere. But we are not aware that the conclusions of the patent office operate as an estoppel upon the patentees, except in cases where the applicant is required to aban-

don some part of his claims, or accept alterations narrowing their scope. Neither are the courts any more concluded by a construction of the claim presented by a patentee which removes a supposed conflict with an existing patent, than they would be by an interpretation of a patent whereby it was distinguished from the old art. That some claim has been rejected, or that some amendment has been accepted, which was imposed as a condition to the allowance of a claim, is essential to an estoppel on a patentee. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 429, 14 Sup. Ct. 627; *Leggett v. Avery*, 101 U. S. 256; *Thomas v. Spring Co.*, 23 C. C. A. 211, 77 Fed. 420. The mere opinion of one of the boards of the patent office upon a supposed interference is no more an estoppel upon the patentee or the public than would be the opinion of the same board as to the meaning of claims as they were affected by the prior art. In neither case would the courts be concluded from giving to the language of both claims and specifications their true and proper meaning under ordinary rules for the interpretation of such contracts.

Was the fabric produced by Huss in March, 1892, the fabric described by the identical claims of both patents? In answering this, it is proper to bear in mind that these claims are not for a process, nor for a design, but for a fabric. There may be many ways for producing the fabric, and it is immaterial as to the method, provided the result is the manufacture or article described and protected by the patent. We have already seen that the object of both patents was the same. Both had in mind a fabric primarily useful in bicycle tires,—a fabric which should take the place of the canvas and rubber fabric theretofore used in such tires. What each wished was a fabric which should be substantially nonstretchable in one direction, and capable of stretching in another. The material conditions of such a fabric are all found in that made by Huss in March, 1892. The threads were united, and, to a degree, imbedded in an unvulcanized sheet of rubber. They were so far incorporated with the rubber, as a result of the application of rubber in solution, and pressure applied by hand, as that the threads were securely held in position parallel to each other. The fabric thus produced was soft and tacky, and, so far as the evidence shows, unfit for any particular use until after vulcanization. But this is also true of the fabric described by Palmer's first claim. Vulcanization further imbedded the layer of threads, hardened the fabric, and retained it in the form given to it before vulcanization, still leaving it resilient. Both before and after vulcanization the parallel position of the threads, whether laterally in contact or not, prevented the sawing or cutting incident to the incorporation of a woven or braided fabric with a sheet of rubber. It is now sought to differentiate the fabric thus produced by Huss from that described by the claims of the Palmer patent. To do this, great stress is laid upon the degree of imbedment of the threads in the unvulcanized fabric of the first claim. This contention is a very narrow one. So far as it is rested upon the interpretation placed on Palmer's claims by the board of examiners when considering the reference to the Mayall patent, it is

not to be sustained upon the theory that such interpretation constitutes a limitation. This question I have already dealt with. There were quite a number of much more material differences between the Palmer fabric and that described in the Mayall patent. Palmer's first fabric did not differ in any substantial particular from that first made by Huss. Neither used calender rolls to imbed the parallel threads in the sheet of unvulcanized rubber. Both used a solution of rubber as a cement to unite the layer of threads with a rubber sheet, and both used hand pressure to cause a more close adhesion and unification. The next step (that of vulcanization) was taken after the fabric had been placed in a tire, and the result in both instances was to increase the unification of threads and rubber, and blend them by heat and pressure into an almost inseparable mass. If the fabric first made by Palmer in July, 1892, was the fabric described and protected by his patent, it must follow that the fabric first made by Huss in March, 1892, was also the fabric described and protected by the identical claims of Huss' patent. But it is said that afterwards Palmer produced the fabric of his patent through the instrumentality of heated calender rolls, and that he thus made a fabric in which the threads were completely imbedded within the surface of the sheet without the aid of cement or vulcanization, and that the fabric described by his claims is one in which there is a complete imbedment within the surface of an elastic and impervious sheet, and that subsequent vulcanization adds nothing to the degree of imbedment. In other words, the claim is that the identity of the fabric turns upon the degree of imbedment. To this we cannot assent. The verb "imbed" does not necessarily imply entire inclosure or complete immersion. It is defined by Webster as follows: "To sink or lay as in a bed; to deposit as in a partly inclosing mass, as of earth," etc. Thus imbedment of the thread would exist if it was partly inclosed by the sheet of rubber, or if sunken so as to be partly inclosed. Neither does the context of the sentences in which the word "imbedded" or "imbedment" occurs require complete inclosure within the sheet of rubber. The imbedment is to be "within" (that is, by "the surface" of) the rubber sheet. Now, it is evident that, if the diameter of the thread to be imbedded was greater than that of the sheet in which the imbedment was to occur, there could not be a complete inclosure. This is recognized by complainants, who produce one exhibit of the fabric described by Palmer's first claim, which shows that the outside of the layer of threads is not inclosed by the surface of the rubber sheet, which fact is explained by the greater diameter of the imbedded threads. If we look to Palmer's specifications, to ascertain the object of the imbedment, we find that any degree of imbedment which results in holding the threads parallel to each other, and united to the rubber, secures the ends sought by the inventor. Is it possible that a suit by Palmer for infringement would not lie against one who made and sold a fabric such as that first produced by him, in which the layer of threads was united with the rubber by means of a solution of rubber, and such degree of imbedment as resulted from hand pressure? Would an infringement depend upon the degree to which the threads

were sunken in, or inclosed by, the rubber sheet? We think not. It could not be said that a fabric in which parallel threads were only partially incorporated was not the same article. Its qualities, uses, and capabilities are overwhelmingly shown to be identical. All that can be done with the fabric when the threads are united by entire incorporation can be done when such incorporation is only partial. To render the article, manufacture, or fabric something new and different from that described by the claims and specifications of the Palmer patent, it must present some new properties, and be more or less efficacious. If it was substantially identical in its properties and uses, it would be the same, though distinguishable in immaterial particulars. Whether the threads be entirely or only partially incorporated in a sheet of unvulcanized rubber, the properties and uses are the same. Similarities and differences in a machine, process, or product do not depend on mere names of things, words used to describe them, or immaterial matters by which they may be distinguished. *Glue Co. v. Upton*, 97 U. S. 3; *Glue Co. v. Upton*, Fed. Cas. No. 9,607. There is no reason for applying one rule to a patented machine, and another to a patented product. In *Bates v. Coe*, 98 U. S. 31-42, the court said, touching a question of infringement, that:

"In determining about similarities and differences, courts of justice are not governed merely by the names of things, but they look at the machines and their devices in the light of what they do, or what office or function they perform, and how they perform it, and find that a thing is substantially the same as another if it performs substantially the same function or office in substantially the same way, to obtain substantially the same result, and that devices are substantially different when they perform different duties in a substantially different way, or produce substantially a different result."

It is said that the method of production stated by Huss in his specification is inoperative, and results in a fabric not answering to the description of his claims. It is doubtful whether an objection to the sufficiency of description in specifications will lie, in the absence of an averment in the pleadings that the description was ambiguous and defective, with intent to deceive the public. *Loom Co. v. Higgins*, 105 U. S. 580. Huss claims, as he may well do, that his fabric is protected without regard to method of production. He makes no claim to process. Touching the way in which the fabric may be made, he says:

"In order to produce the within-described fabric, I may employ any suitable means for laying the threads, and for causing the same to be incorporated within the sheet of rubber."

The expert evidence shows no less than seven different ways in which this might be done, all well known to persons skilled in the rubber art. As an example of one such way, Huss says:

"I have arranged a layer of thread and a layer of rubber upon a large, straight rod or mandrel, and imbedded or incorporated the thread within the sheet of rubber by pressure and vulcanization."

It is said that this method permits the use of neither heat nor cement, and that without one or the other there can be no such degree of imbedment of the threads within the rubber from cold pressure as will hold the threads parallel with each other, or united to the rub-

ber sheet. If it be conceded that the test of the sufficiency of this method of production depends upon the results of pressure applied to a layer of threads upon cold rubber to sufficiently unite the one to the other to permit the next step (that of vulcanization), then the method will serve, though clumsy and most expensive. The experiments made by the witness Ives, and the exhibits of fabric made by means of cold pressure alone, and of the same fabric after vulcanization, demonstrate that if the narrowest construction be placed upon Huss' method of production, the result is not in any material matter distinguished, for the practical purposes to which such material is to be put, from that made by the more economical and scientific method of calendering rolls. But I am not prepared to admit that Huss' description is to be so narrowly interpreted. Such instructions are addressed to those familiar with the art to which the invention belongs. While sheets of unvulcanized rubber are soft, pliable, and tacky, still it is difficult to imbed or unite threads with such material by mere cold pressure. If such pressure is great enough, and continued long enough, there will occur a degree of imbedment as shown by the Ives exhibit. Of course, the operator would be required to use whatever degree of pressure was necessary, and continue it for the necessary time, before it could be said that the fabric could not be made, and the patent was void for insufficiency of description. But it is well known in that art that a low degree of heat would make sheets of unvulcanized rubber quite plastic, so that pressure when in that condition would make it quite easy to incorporate a foreign body within such a sheet. The direction to use pressure to incorporate such threads may well be taken as implying pressure with heat, just as heat is implied by the use of calender rolls. Certainly, if that knowledge was a part of the common knowledge of those familiar with the properties of rubber and with the rubber art, as is abundantly shown in this case, then the direction might well be construed as requiring the use of the knowledge of the art which those to whom it is addressed are presumed to have. In *Klein v. Russell*, 19 Wall. 433, which involved a patent for treating certain articles with a patent process, the description of the method of application stated that it was "desirable to heat the liquor to or near the boiling point." There was evidence that, if applied while in that state, it would greatly injure the articles to which it was applied. There was also evidence that, if this liquor was suffered to cool before being applied, it possessed great virtue. The court was asked to charge "that, if cooling the fat liquor after boiling is an essential point of the plaintiff's process, then the patent is void for not indicating that such process of cooling is necessary, or how it is to be accomplished." This was given, but modified by adding, "Unless the common knowledge of persons skilled in the art of treating this leather to produce softness and pliability would make the operator wait until it was partially cooled." *Klein v. Russell*, 19 Wall. 433, 444, 467. Such a specification is sufficiently full and specific when expressed in such terms as are intelligible to persons skilled in the art, "for that which is common and well known is as if it were written out in the patent and delineated in the draw

ings." *Loom Co. v. Higgins*, 105 U. S. 580-586; *Seabury v. Am Ende*, 152 U. S. 561-566, 14 Sup. Ct. 683. But this is a digression, and need not have been said. No such issue is made by the pleadings, and no such question is admissible under the bill filed to settle a question of interfering patents under section 4918. Neither need I discuss the effect of describing this fabric in earlier applications made by Huss for patents upon improved pneumatic tires in which this fabric was used. Whatever effect that disclosure and subsequent division of his application would have upon the patent now in question, is a question to be made under some other form of litigation. The same question, too, would have a like effect upon the Palmer patent, by reason of a like disclosure in an earlier application. Holding as I do that the only question properly open upon this bill is that of priority, no other question is decided. The three first claims of the Palmer patent must be declared void. A decree will be so drawn, and taxing all costs to complainant.

NATIONAL HARROW CO. v. WESCOTT et al.

(Circuit Court, N. D. New York. January 27, 1898.)

No. 6,469.

PATENTS—INVENTION AND INFRINGEMENT.

In the West & Chase patent, No. 244,100, for a spring-tooth harrow, claim 2, for a tooth "having the egg-shaped or bowed portion located as specified," etc., if valid at all, is limited to a tooth so placed that the egg-shaped part hangs well in advance of the beam to which it is attached, and over the next forward beam, so that, in hard soil, it rests thereon, so as to deprive the tooth of a large degree of elasticity.

This was a suit in equity by the National Harrow Company against Pulaski D. Wescott and others for alleged infringement of a patent for a spring-tooth harrow.

Edwin H. Risley, for complainant.
Strawbridge & Taylor, for defendants.

COXE, District Judge. This is an equity suit based on letters patent, No. 244,100, granted July 12, 1881, to L. C. West and N. Chase for a spring-tooth harrow. The second claim, which is the only one involved, is as follows:

"(2) The harrow tooth having the egg-shaped or bowed portion of the tooth located as specified, and terminating on top of the beam in a convex shank, all substantially as set forth."

The defendants insist that they do not infringe. The other defenses need not be considered.

The complainant argues regarding the claim that the words "the egg-shaped or bowed portion of the tooth located as specified" have no reference to the location of the tooth in relation to the other parts of the harrow, but are confined solely to the tooth itself; that is to say, the egg-shaped portion of the tooth must be located with reference to its shank and working point as shown and described. It is

contended that such a tooth, no matter where located, is an infringement. This construction rests the sole claim to novelty and invention upon the shape of the tooth. Assuming that such a construction is permissible, to adopt it would be to invalidate the claim for the reason that the prior art shows spring teeth of almost every conceivable shape, and, in the absence of testimony showing that the patentees have added something of value to the tooth by imparting to it the shape described, the court would not be warranted in basing patentability upon changes, apparently, so insignificant. If these patentees may have a patent for an egg-shaped tooth, the next applicant may secure one for a pear-shaped tooth, the next for a heart-shaped tooth, and so on ad infinitum. But the complainant's construction is not maintainable; it is strained and illogical. The claim states that the bowed portion is "located as specified." If the exact location were not pointed out in the specification and drawings there might be some plausibility for the complainant's contention, but it is. The tooth is placed so that the egg-shaped part hangs well in advance of the beam to which it is attached and extends over the next forward beam for about half the width of said beam. The principal advantages of the patentees' harrow are declared, by the description, to reside in this location. When in operation in average soil there is a space between the egg-shaped portion of the tooth and the forward beam, but when the tooth strikes a hard strip of soil the egg-shaped portion rests on the beam "which temporarily deprives the tooth of a large degree of elasticity." To produce this result was the object of the invention. It could only be produced by locating the teeth in the manner described with reference to the forward beams. By means of this location the patentees assert that they produce great contraction of the tooth frame, less rearward spring, increased vertical oscillation and also automatic control of the elasticity of the teeth in relation to the consistency of the soil. The defendants' harrow is so constructed that by no possibility can the bowed portion of the spring touch the forward beam. Upon no theory, therefore, can the complainant recover. If the claim be construed to cover the defendants' teeth it is void, and it is not infringed if restricted as required by the specification. The bill is dismissed.

NATIONAL HARROW CO. v. WESCOTT et al.

(Circuit Court, N. D. New York. January 27, 1898.)

No. 6,470.

1. PATENTS—INVENTION—MECHANICAL SKILL—SPRING-TOOTH HARROWS.

The adaptation of spring-teeth to harrows being once accomplished, it only required mechanical skill to attach them by devices already known to adjustable beams already in use, so as to make a spring-tooth harrow, with teeth adjustable both independently on the bars and in series, by turning the bars themselves.

2. SAME.

The Cobb patent, No. 224,273, for an improvement in spring-tooth harrows, in which the teeth are adjustable both separately and in series, is void for want of invention as to claim 1.

This was a suit in equity by the National Harrow Company against Pulaski D. Wescott and others for alleged infringement of a patent for an improvement in spring-tooth harrows. On final hearing.

Edwin H. Risley, for complainant.

Strawbridge & Taylor, for defendants.

COXE, District Judge. This is an equity action founded upon letters patent No. 224,273, granted February 10, 1880, to S. C. Cobb for an improvement in spring-tooth harrows. The alleged invention consists of pivoted tooth-bars in combination with spring-teeth attached to the bars by devices which permit the teeth to be adjusted thereon, and which secure them rigidly in any desired position. The teeth may be adjusted independently on the bars, or in series, by turning the bars themselves. The specification describes specific devices for adjustably attaching the teeth to the bars. It says:

"Whenever it is desired to adjust a tooth it is only necessary to loosen the nuts sufficiently to permit the end of the tooth to be raised out of the slot in which it is held, when the tooth may be turned in either direction around the bar and the end placed in another slot, when the fastening is again secured. Thus the lower end of the tooth may be raised or lowered and its pitch changed, as desired. The same result may be accomplished, however, by employing some other attaching device which will permit the tooth to be adjusted on the bar."

The first claim only is in dispute. It is as follows:

"(1) In a spring-tooth harrow, the tooth-bars B, hinged or pivoted to the frame so as to be adjustable, in combination with elastic teeth attached to the bars by devices which permit them to be adjusted thereon and which secure them rigidly in any position to which they may be adjusted, whereby the teeth may be either adjusted independently on their respective bars or in a series by adjusting said bars themselves, substantially as described."

The patent expired pendente lite. Infringement is not denied. The defenses are defective title and want of patentability.

The two features of which invention is predicated are the adjustable tooth-bars and the elastic teeth attached adjustably to the bars so that there may be a simultaneous adjustment of all the teeth and an independent adjustment of each tooth separately. Were it not for the fact that the claim is limited to spring-teeth the precise combination would be found in the prior art. Before the alleged invention of Cobb, spring-teeth had been attached to tooth-bars by devices which permitted them to be adjusted thereon, but it does not appear that the bars themselves were adjustable. Adjustable rigid teeth had, however, been attached to adjustable bars. The patent to Reed, No. 201,946, shows an adjustable spring-tooth. The patent to Waterbury and Miller, No. 205,449, for which the application was filed in 1877, and not in 1878, as the complainant's counsel inadvertently supposes, shows "means of fastening and adjusting the tooth (spring) to the standard" so that, "any elevation or depression of the tooth may be obtained." The patents to Easterbrook and Hochstein, numbered respectively 49,867 and 79,829, show axial bars for rigid teeth pivoted to the frame bars so as to set the teeth at any desired angle. In the former patent the specification says:

"This invention consists mainly in fixing the teeth of harrows in pivoted cross-bars, which are connected by a rod or rods to a hand lever by which they may be set and secured in any desired position, either for dragging heavy or light soil or 'quack grass,' weeds, etc."

The patent also shows an attachment by which the teeth can be raised and lowered in the eye bolt. In the Hochstein patent the claim is as follows:

"The combination of the adjustable teeth-supporting beams B, independent of each other, and the set-screws b', b', substantially as and for the purpose described."

Various patents showing similar combinations are in proof, but it is unnecessary to multiply references. Unquestionably the adaptation of spring-teeth to harrows was a pioneer invention of great value. When, however, this basic principle had been established it required only the skill of the mechanic to do with spring-teeth precisely what had previously been done with rigid teeth. The improved results were due to the elastic teeth and not to the mechanism used in fastening them to the frame. If Reed had attached spring-teeth to the Easterbrook frame by his fastening-clip he would have had the Cobb combination. If spring-teeth had been known when Hochstein made his harrow he would certainly have attached them to his adjustable beams instead of the teeth then in use. Cobb knew the value and efficiency of adjustable beams and of spring-teeth, he took out the old teeth and substituted the new ones, Reed showing him how to fasten them to the beam. It cannot be pretended that Cobb invented any of the valuable features of the harrow described in his patent; he simply took a well-known tooth and fastened it to a well-known frame by well-known means. There was nothing original in this; it was what any skilled operator would do after the value of the spring-tooth became apparent. The claim must, therefore, be held invalid for lack of invention. The court is of the opinion that the defendants are not estopped in this action from insisting upon this defense by reason of their relations with Hench and Dromgold and the latter's relations with the complainant. The bill is dismissed.

NATIONAL HARROW CO. v. WESCOTT et al.
(Circuit Court, N. D. New York. January 27, 1898.)
No. 6,346.

PATENTS—VALIDITY—SPRING-TOOTH HARROWS AND CULTIVATORS.

The Davis patent, No. 329,371, for improvements in roller spring-tooth harrows and cultivators, is to be construed as covering a harrow composed of separate frames detachably connected, each provided with spring teeth, and supported independently by rollers, and each, when supplied with ordinary handles, capable of separate use as a cultivator. Thus construed, the claim was not anticipated by the prior art.

This was a suit in equity by the National Harrow Company against Pulaski D. Wescott and others for alleged infringement of a patent for improvements in roller spring-tooth harrows and cultivators.

Edwin H. Risley, for complainant.

Strawbridge & Taylor, for defendants.

COXE, District Judge. This is an equity suit, based on letters patent No. 329,371, granted October 27, 1885, to R. W. and A. W. Davis for improvements in roller spring-tooth harrows and cultivators. The novel feature mainly relied upon by the complainant is the construction of the harrow with separate detachable frames, each frame, with the addition of suitable handles, being capable of use as a cultivator. In short, the structure is a roller spring-tooth harrow and cultivator combined. Three separate and distinct cultivators are united to form one harrow; they can, by simple manipulation, be separated again and used as cultivators and thus can be used interchangeably in one capacity or the other as occasion arises. The two rear frames, being narrow, are best adapted to use as cultivators and need only the addition of handles of the well-known form to make them operative tools. The first claim only is involved. It is as follows:

"A harrow composed of separate and distinct frames detachably connected, and each provided with a set of teeth and supported independently of the other by rollers connected with said frame, substantially as set forth and shown."

The defense is lack of patentability. Infringement is not denied. The idea of constructing a spring-tooth wheel harrow so that it could be used, at the option of the operator, either as one harrow or two cultivators, seems to have been new with the patentees. If anything of this kind had been done before, the record fails to disclose it. Thus to combine two necessary agricultural implements was plainly a saving to the farmer of time, labor and money. Harrows had been constructed in sections prior to the Davis invention but these sections were not intended for use as cultivators, never were so used and could not be so used without radical changes which would have destroyed their usefulness as component parts of a harrow. The court would be doing injustice to the complainant were it to construe the claim as covering broadly a three-part harrow, each part provided with rollers and teeth. To do this would be to ignore the specification, the drawings and the avowed object which the patentees had in view. When the claim is construed to cover a harrow composed of separate frames detachably connected, each provided with spring teeth and supported independently of the other by rollers connected with the frame, and each, when supplied with ordinary handles, capable of use as a cultivator, it is not anticipated or invalidated by anything in the prior art. The complainant is entitled to the usual decree.

WILLIAM SCHOLLHORN CO. v. BRIDGEPORT MFG. CO. et al.

(Circuit Court, D. Connecticut. January 12, 1898.)

1. PATENTS—NOVELTY AND INVENTION—PLIERS.

The Bernard patent, No. 427,220, for pliers having parallel jaws, to which sheet-metal handles may be attached, so as to apply the power equally at both sides of the jaws, and having an unobstructed opening between the jaws for the passage of a rod, wire, or tool, held valid as to claim 1; and held, that this claim was infringed by pliers of similar make, excepting that the passage between the jaws was in part blocked up.

2. SAME.

The Bernard patent, No. 427,497, for a punch, which is added to the pliers of his patent No. 427,220, *held* void for want of invention, in view of the prior state of the art.

This was a suit in equity by the William Schollhorn Company against the Bridgeport Manufacturing Company, Willis F. Hobbs, Ellie N. Sperry, and Adolf Schatz, for alleged infringement of certain patents for inventions.

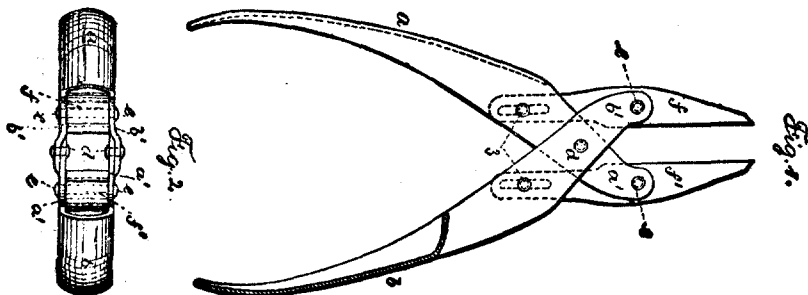
Robinson & Fisher and John K. Beach, for complainant.
Schreiter, Van Iderstine & Matthews, for defendants.

TOWNSEND, District Judge. This is a bill in equity charging infringement of the first claim of patent No. 427,220, for pliers, and the second claim of patent No. 427,497, for punches, both dated May 6, 1890, and granted to William A. Bernard, and assigned to complainant. The defendants contend that the patents are void for want of patentable novelty, and deny infringement.

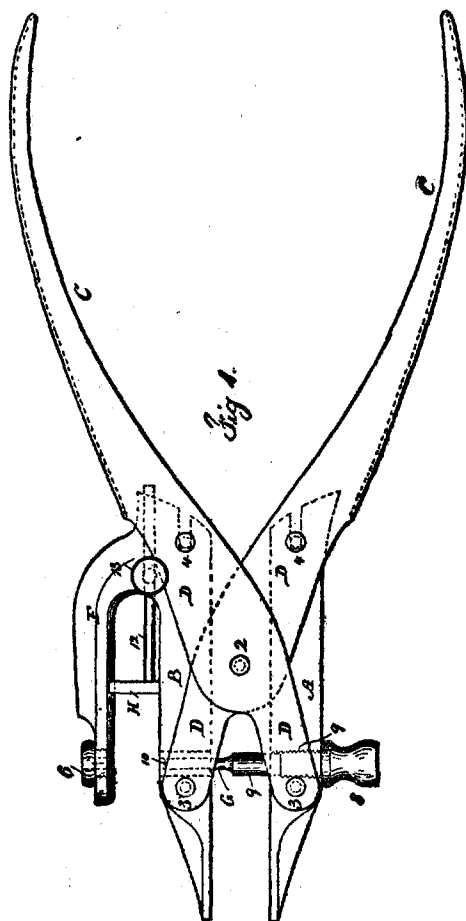
Four facts are uncontroverted or clearly proved. The principal patent, No. 427,220, was refused by the primary examiner, and allowed by the board of examiners in chief, on appeal. The pliers manufactured under these patents have been very successful in the market, and are having a large sale, having superseded all former parallel pliers, and created a demand for such articles where parallel pliers were not before used. The defendant Schatz, who manufactures the alleged infringing articles (the other defendants being his jobbers), was in the employ of the complainant for a long time, having had charge of the manufacture of its punches, and while so in its employ applied for the patent under which he claims that his pliers and punches are made. He was notified that the manufacture of pliers under that patent would be an infringement upon the patents in suit, and, after leaving the employ of the complainant, he commenced manufacturing his pliers and punches in competition with those of complainant. Public acquiescence has continued for about six years.

The claims alleged to be infringed are as follows:

Patent No. 427,220: "(1) The combination, with the solid jaws, *f* and *f*, of the lever handles, *a*, *a*, *b*, *b*, of sheet metal, bent up to form hollow hand portions, the parts, *a'*, *b'*, being flat, or nearly so, and crossing each other at opposite sides of the jaws, and connected by the pivot, *d*, substantially as set forth."



Patent No. 427,497: "(2) The combination, with the lever handles having crosspieces riveted together, of the jaws, A, B, and the rivets or screws connecting the same to the lever handles; the jaw, B, having an arm, F, formed with or connected to it, and extending along the back of the jaw, and a punch, G, passing transversely through the parallel moving jaws, and a counter die in the end of the arm, against which the punch acts, substantially as set forth."



The prior patent, No. 427,220, for pliers, will be considered first. The principal patents cited as proofs of anticipation were considered at the patent office before granting the patent. The board of examiners in chief, in allowing the patent, give the following reasons:

"The patent to Russell (Ex. 19) shows the parallel motion in a pair of pliers with solid forged handles. Broadbrook's (Ex. No. 33) shows the central passage for wire in a wire-cutting nippers. Ellis' (Ex. 26) shows spring tweezers formed of sheet metal. The British patent, No. 14,065, 1886 (Ex. No. 39), shows a method of making pliers, pincers, and like nipping tools out of sheet metal; also German patent, No. 35,406 (Ex. 42). Appellant does not claim broadly the parallel motion nippers, nor the making of pliers out of

sheet metal, nor the wire passage, but a specific construction of pliers, having the parallel motion construction and the wire passage, when constructed, as described, out of blanks of sheet metal, the use of the latter serving the purposes of two former constructions by a combination involving some ingenuity to work out."

The defendant Schatz, in making his pliers, has imitated complainant's pliers, except that he has substituted for the slots and pins which control the motion of the rear ends of the jaws, a kind of cam movement, which is a mechanical equivalent, but which partly blocks up the wire passage referred to in the reasons of the examiners in chief.

The object of the invention, as stated in the specification, "is to provide an unobstructed opening through between the parallel jaws for the passage of a rod, wire, or tool, and to attach sheet-metal handles to the jaws in such manner that the power will be applied equally at both sides of the jaws, to insure a proper strength and uniformity of motion."

Defendants insist that the essential purpose of the invention was an unobstructed wire passage, and that, as Schatz has blocked this up, his pliers do not infringe. The merits of Bernard's invention, however, as shown by actual experience, do not consist wholly, or necessarily, in providing the wire passage. The jaws are solid or block-shaped. The whole width of the jaws is between the side portions or cross levers of the handles. The gripping surfaces of the jaws extend back to the fulcrum or pivot. The rear ends of the jaws extend into hollow portions of the handles. As a whole, a much stronger and more effective instrument is produced, with a firmer and more even grip. This element of grip, also, the defendants have appropriated, as appears from their catalogue, in which, referring to the infringing pliers, they say: "The gripping strength is greater, and the twisting strength double, that of any other tool made." Even if it were true that, by having dispensed with one of the features of complainant's patent, defendants had produced a plier which was therefore inferior, this would be no defense. But defendants have not so blocked the passage as to dispense with said feature, but have appropriated it by retaining the unobstructed passage back as far as the fulcrum.

The prior art cited is old, and between the dates of the patents cited and the complainant's invention no pliers of equal merit were produced. While defendants show that many, if not all, of the different elements of complainant's pliers may be found in the prior art, some in one device and some in another, no former instrument of the kind contains them all. The construction covered by the claim in suit does not widely depart from the prior art, and yet I am satisfied that it shows patentable novelty. Sheet-metal handles and pivotal jaws having a parallel motion are old. But when Bernard so devised his plier that "the power will be applied equally at both sides of the jaw, to insure the proper strength and uniformity of movement" and thereby uniformity of pressure, which it was the object of his invention to provide, he invented a new tool, with a greater possibility of application of power and adaptation to more extended uses. Compare

this plier with the Russell plier, patented in 1877, which is evidently the strongest reliance of defendants. Its grip is limited, and its strength diminished by the skeleton jaws slotted in two directions, and the object to be gripped is not only outside the center of strain, but substantially outside of the forward ends of the levers. For this reason, and because of said slotted skeleton jaws, said plier is much more liable to break than in complainant's construction, with outside cross levers where the gripping surfaces extend back to the fulcrum.

Defendants are in no position to question the utility of the Bernard device. It is new. The board of examiners have found that it showed invention. The public for six years have acquiesced. Defendants' pliers and punch come within the terms of the claim. I conclude that claim 1 of patent No. 427,220 is valid.

Patent No. 427,497 adds to the pliers of No. 427,220 a punch having its head fixed in one of the parallel jaws, with a screw and thread connection, which punch extends through and is guided by the companion jaw, so that, when the jaws are closed, the end of the punch enters a die or hole in the end of a bracket arm, which is fastened upon the outside of this latter jaw, and so as to be parallel to it. Although both patents were issued on the same day, the application for the punch patent was filed several months after that for the pliers. In view of the many instances of a similar punch added to pliers in the prior art, it is difficult to see any invention in this second patent, distinct from that contained in the first.

Let a decree be entered for an injunction and an accounting as to the first claim of patent No. 427,220.

THE DAYTON.

FLANNERY et al. v. THE DAYTON.

(District Court, E. D. New York. November 18, 1897.)

SALVAGE COMPENSATION—BURNING LIGHTER.

\$2,000 awarded on a salvaged value of \$14,000, for the services of 16 tugs, occupying about two hours, in extinguishing a fire on a lighter and beaching the latter, with slight risk to either the persons or property of the salvors; the amount to be distributed, two-thirds to the various owners of the tugs, and one-third to the crews, in proportion to their wages.

These were libels by the owners of 16 tugs against the steam lighter Dayton and her cargo, to recover salvage. The suits were consolidated on motion.

Cowen, Wing, Putnam & Burlingham, for the Atwood and five other tugs.

Peter S. Carter, for the Hudson and four other tugs.

Alexander & Ash, for the J. & J. McCarthy.

Hyland & Zabriskie, for the Atalanta and two other tugs.

Stewart & Macklin, for the John D. Pratt.

Wilcox, Adams & Green, for claimants.

TENNEY, District Judge. On July 5, 1894, the steam lighter Dayton, about 105 feet in length, was proceeding from the Atlantic

docks to Jersey City, and when near Governor's Island, in the East river, a fire broke out in her cargo. She at once sounded her alarm signal, and 16 tugs, lying in and about the harbor of New York, hastened with commendable promptness to the aid of the imperiled lighter. Her cargo was very inflammable, consisting of 45 bags of nitrate of soda, 51 coils of old rigging, 19 cases of dolls, and 78 bales of old bagging. The day was pleasant; the hour of the fire opportune, being between 3:45 and 5:30 o'clock in the afternoon; the wind was blowing lightly from the northwest; the risk to the property and danger to the persons of the salvors slight; the time employed in extinguishing the flames and beaching the lighter was about two hours. The amount of property saved, including cargo, was a fraction over \$14,000. The claimants' steam tug Van Houten, and the New York Central boat, No. 13, rendered excellent service, but make no claim for same. Taking into consideration this fact, and after a careful consideration of the evidence and all the circumstances attending this fire, I am of the opinion that \$2,000 would be a fair and reasonable award, the same to be apportioned among the several tugs as follows: Hudson and Atalanta, \$325 each; Municipal, \$200; Bentley, \$175; Pratt, \$150; Garrison, Dinsdale, and Dumont, \$125 each; Leader, Fuller, and Petty, \$100 each; Welcome, McCarthy, Atwood, Raymond, and Lohman, \$30 each. The sums awarded to be distributed as follows: Two-thirds to the owners, and one-third to the crew, in proportion to their wages. Let decree be entered accordingly, with costs.

THE LADY FURNESS.

STEINDL v. THE LADY FURNESS.

(District Court, E. D. New York. December 1, 1897.)

1. SEAMEN'S WAGES—DESERTION.

The mere fact that a fireman on a steamship is required to perform extra watches, in place of sick seamen, does not justify desertion, in the absence of any claim of bad treatment or deviation; nor is the desertion justified by the fact that the contract under which he was serving may have been harsh, or the term thereof long (three years). And one so deserting cannot recover wages.

2. SAME—JURISDICTION—FOREIGN SHIPS AND CREWS.

Whether the court shall take jurisdiction of a suit by a foreign seaman against a foreign ship for wages is a matter largely in its own discretion, and it may do so notwithstanding a request to the contrary by the consul of the country to which the ship belongs.

This was a libel in rem by Anton Joseph Steindl against the steamer *Lady Furness* to recover seaman's wages.

Hyland & Zabriskie, for libelant.

Robinson, Biddle & Ward, for claimant.

TENNEY, District Judge. This is a libel against the British steamship *Lady Furness* for seaman's wages. It appears that on or about September 3, 1895, the libelant entered into a contract, or signed certain shipping articles, for a voyage, as fireman on said

steamship, to China and Japan, and other ports or places within the limits of 75 deg. north and 60 deg. south latitude, the maximum time to be three years, trading in any rotation, and ending in the United Kingdom. The *Lady Furness* was an English vessel. The contract, though made at Hamburg, was to be interpreted according to English laws. The libelant entered upon such contract, and continued to act as fireman until on or about September 3, 1896, when he left said steamship, while at the port of New York, and when she was about to sail for Cape Town and Cape ports. The captain was thereupon obliged to secure another fireman, at increased wages, and at more or less inconvenience. It is claimed, however, that the libelant had cause to desert such ship, and that the ship is liable for the balance of his wages. I do not think this contention sound. The libelant says that he left the *Lady Furness* because of the extra work he had to do. He does not allege or claim cruelty, or bad treatment, or deviation, or that the voyage was at an end, but simply that he had to do the watches of two other seamen who were sick; that for one of these seamen he had two hours for each of two days, and for the other seaman he had two hours for each of five days, making fourteen hours in all. If he left the steamship because of extra watches, why did he not leave promptly when the ship arrived at the port of New York? Why did he work and wait 23 days, and leave her the very day she was going to sea, and but a few hours before? During one year of service the libelant had to perform 14 hours of extra watches for two sick seamen. He made no complaint to the British consul on arriving at the port of New York. He made no complaint to the captain of the steamship, or first mate. If he did, they both deny the same. The libelant knew, or ought to have known, when he signed the shipping articles, that he might be called upon to do the work of sick associates. This is not unreasonable or unusual. The contract may have been harsh, and the time thereof may have been long; but the libelant was aware of this, or ought to have been, when he signed the contract. There were six firemen on this steamship during this voyage, and none of them left of his own accord, excepting this libelant, and four of them continued on the ship's voyage from New York to the Cape ports. That the ship was about to sail into a hot climate, and the libelant's fear that he might have to perform more extra watches, do not warrant or justify him in quitting the ship, and thereby put her captain to additional expense and inconvenience in procuring another fireman. Actions of this character should not be encouraged. Shipowners have rights, as well as sailors, and the rights of each should be respected and upheld by the courts. The contract was signed and entered into by the libelant, and I fail to see any good or sufficient reason for his breaking the same and deserting the ship.

It is urged, however, that the court should not entertain jurisdiction of this case. Even the British consul at the port of New York has requested this court "not to exercise jurisdiction." It will not be disputed, I apprehend, that the matter of jurisdiction, in a case like the one at bar, is very much in the discretion of the court. This

case has been tried, and it seems to me that time and expense, and perhaps further litigation, will be saved by this court taking jurisdiction of this case, which it does, notwithstanding the courteous letter of the British consul to the contrary. The libel is therefore dismissed, with costs. Let a decree be entered accordingly.

THE RABBONI.

THE NELLIE E. RUMBALL.

(Circuit Court of Appeals, First Circuit. February 1, 1898.)

Nos. 113-116.

COSTS IN ADMIRALTY APPEALS—DOCKET FEES.

In cross appeals heard together on the same evidence only one docket fee is taxable.

This was an appeal from the clerk's taxation of costs. For report of the opinion on the merits, see 26 C. C. A. 379, 81 Fed. 239.

Edward S. Dodge, for the Nellie E. Rumball.

Eugene P. Carver, for the Rabboni.

Before COLT, Circuit Judge, and ALDRICH, District Judge.

PER CURIAM. This is an appeal from the clerk's taxation, in which four docket or attorney fees were allowed the prevailing party. In the controversy to which this taxation relates there were two appeals and two cross appeals. The appeals and cross appeals were entered separately upon the docket, but heard together upon the same evidence, and there was a decree that "costs in this court are adjudged to the owners of Nellie E. Rumball." Such decree means only that costs are to be taxed in accordance with the statutes, the rules, and the ordinary practice. The practice in the supreme court is to tax one fee only in case of an appeal and a cross appeal. Uniformity in matters of this kind is desirable, and for this reason we adopt the practice of the supreme court, although for a considerable period a different practice has obtained in this circuit. The taxation should be modified according to these views, and it is therefore ordered that the taxation shall include two docket fees only. It is also ordered that a mandate issue at once.

BRIGGS v. TAYLOR.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1898.)

No. 237.

ADMIRALTY PROCEDURE—PARTIES—APPEARANCE.

When a stranger to an original libel in rem, claiming to be the owner, gives a release bond conditioned to restore the vessel as the court shall direct, pay damages for its use and detention, and "perform any other judgment which the court may render," etc., he thereby becomes a party to the cause, and is bound by a default decree thereafter entered in accordance with stipulations of the bond.

Appeal from the District Court of the United States for the Eastern District of Virginia.

Edward R. Baird, for appellant.

Hughes & Hughes, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and PURNELL, District Judge.

PURNELL, District Judge. On the 12th day of April, 1897, appellee filed in the district court for the Eastern district of Virginia a libel in due form against the steam launch Sylph, her engines, tackle, etc., and "against all persons intervening for their interest therein." The libel alleges sole ownership, and that the launch had been navigated under authority of libellant by one Raper, as master, until the morning when the libel was filed, when Raper was removed, and another appointed master; that Raper refused to give up possession; that the vessel was in the district; that the premises were true, and within the admiralty jurisdiction of the court. Stipulations were filed, attachment issued, and was served on Raper. On the same day a bond was filed with George S. Briggs, appellant, as principal, and two sureties, for the release of the vessel, reciting that whereas, George S. Briggs, the "appellant," claims to be the owner of a certain steam launch called the "Sylph," and desires to take the said steam launch into possession, etc., and providing for the return of the said steam launch, and the payment of damages and costs, in the usual form. On the 3d day of May a decree was entered (the time allowed by law and by the rules of the court for making defense having elapsed, and no defense having been interposed) adjudging the said G. S. Briggs and steam launch in contumacy and default, and the libel taken for confessed. The court then proceeded to hear the cause ex parte, and, upon satisfactory proofs, adjudged appellee the owner of the launch, "and no one else is such owner," the possession of G. S. Briggs wrongful, and ordered the marshal to put appellee in possession. The cause was then referred to a commissioner to ascertain and report to what extent the launch had been damaged since the filing of the libel, together with what was a reasonable sum per diem for her use. On the 8th of May the commissioner filed his report, and on the 11th of May, no exceptions being filed, a decree was entered confirming the report, ordering restoration of the vessel, and judgment against the appellant and sureties on the bond. Six days thereafter appellant filed a petition reciting the proceedings, claiming he was not a party thereto, that no process had been issued against or served on him, and that he was interested in the vessel by a title merely equitable. This petition closes with the statement: "Appearing, therefore, solely for the purpose of moving to set these proceedings aside, he respectfully shows that the same are coram non judice and void as to him," etc. Appellee filed an answer to this petition, and against his protest the case was again referred and the damages reduced. Appellant appeared, and introduced testimony before the commissioner, and filed exceptions to the report, all of which are to items of damage, and not of law,

which exceptions were overruled, and a decree entered for appellee, from which Briggs appealed.

The grounds of appeal are not tenable. There are two well-known ways by which a party can get into court,—one passive, one active; the latter being even more effective than the former. There may be defects in process or in service, but, when a party comes into court of his own motion, there can be neither. And this is as true in courts of admiralty and maritime, as in courts of law and equity, jurisdiction. Briggs was not a party to the original libel proceedings,—he was not known to the court,—but for some reason he gave bond, claiming to be the owner of the launch, which claim he never, as far as the record shows, attempted to prove; but he took possession of the vessel, and presumably used it, for it is alleged in the bond that it was necessary to him in his business. The condition of the bond was for the restoration of the property as the court should direct, together with damages for the use and detention, “and to perform any other judgment which the court may render in said cause, and pay all costs and damages which may be awarded against him by said court,” etc. Briggs thus made himself a party to the proceeding as effectually as if process had been regularly issued against and served on him. He voluntarily took Raper’s place, and ignored Raper in all subsequent proceedings. The libel was properly against the vessel in rem, and in personam against the person in possession. U. S. Admiralty Rule 20; *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949; *The S. C. Ives*, Newb. 205, Fed. Cas. No. 7,958. Raper has never answered. The time expired for answering under the rules, and Briggs, in possession using the launch, ignoring alike Raper and the court, offered no defense or proof of ownership. The return day passed, and no defense was offered. Under the circumstances, it was not only in accordance with the rules in admiralty, but the duty of the judge to pronounce him in contumacy and default, and adjudge the libel to be taken pro confesso, and to proceed to hear the cause ex parte. Under such circumstances, a default has the same effect as a default at common law. Rule 29; *Miller v. U. S.*, 11 Wall. 268.

The proceedings being regular, it was too late, six days after a decree, to enter a “special appearance,” and, subsequent proceedings being all at the instance of the appellant, he waived any supposed irregularity. The relief granted by the decree was only such as was stipulated for in the bond. The proceedings after May 11th were at the instance of appellant, and the exceptions involve no question of law, but are to findings of fact. “And other plain errors,” as assigned in the record, is not a compliance with the rules of this court. Errors not assigned according to the rules will be disregarded, but the court, at its option, may notice a plain error not assigned. Rule 11, 21 C. C. A. cxii., 78 Fed. cxii. We see no reason to exercise this option.

The original bond having been adjudged sufficient for the retention of the launch, and appellant having paid the cost in the district court, the judgment here is that the decree appealed from be affirmed,

and that appellee recover his costs in this court expended. This cause is remanded to the court below, with instructions that a decree be entered against appellant, and the sureties on his bond, for such damages as may be proper on account of the detention of the said vessel by said George S. Briggs. Affirmed.

THE TILLIE A.

THE ELLEN J.

CORNELL STEAMBOAT CO. v. THE TILLIE A.

SAME v. THE ELLEN J.

(District Court, S. D. New York. October 30, 1897.)

TOWAGE—CHARTERED SCOW—IMPLIED NOTICE—NO LIEN.

The C. Steamboat Co. was in the habit of towing boats belonging to S. & S. on the North river, and rendering to them in New York monthly accounts for towages for payment. S. & S. chartered the above-named two scows to one Van Buren, and, according to the testimony, gave notice of the charter by telephone to the steamboat company, and that S. & S. would not be responsible for any bills. The company's testimony denied such notice, and alleged that the telephone message was to tow the scows to Fishkill and send bills to Van Buren. Others in the company's office testified that inquiries were made as to the standing of Van Buren. The bills for these towages were rendered at Fishkill, and not to S. & S. until several months afterwards. *Held*, that the libelant company was at least sufficiently put upon inquiry as to the facts, and that the towages were no lien upon the scows.

These were two libels in rem to recover towage.

Edwin J. Davis, for libelant.

Macklin, Cushman & Adams, for claimants.

BROWN, District Judge. The above libels were filed to recover for the towage of the scows Tillie A. and Ellen J. from New York to Fishkill and back, in July and August, 1896. The scows, owned by Sheridan & Shea, had been chartered by them to one Van Buren at Fishkill. Sheridan & Shea had been in the habit of having various boats belonging to them towed by the Cornell Steamboat Company, for which towage bills were rendered to them from month to month in the usual course of business. At the time these two scows were chartered to Van Buren, a clerk in the office of Sheridan & Shea, according to his testimony, gave notice by telephone to the office of the Cornell Steamboat Company that the two scows were chartered, and that they would not be responsible for any bills on the scows' account, and that the steamboat company must look to Van Buren for their pay. The employes of the steamboat company testify that the message received was: "Tow scow Ellen J. to Fishkill and send bill to Van Buren." They deny that any notice of the charter was given, or that Sheridan & Shea would not be responsible for the bills. One of the employes, however, states that inquiry was made if they knew the standing of Van Buren; which the respondents' clerk says was an inquiry made of them in reference to

agreeing to the proposed charter. Two witnesses for the claimants confirm their version of the conversation by telephone; and the subsequent conduct of the libelant is in accord with this, inasmuch as the bills for towing were sent to Fishkill, and were not sent to Sheridan & Shea with their usual monthly bills until some months after, when it was found that the bills could not be collected at Fishkill. The bookkeeper of the libelant further states that it was not usual to direct bills to be sent to another party for collection; and as no bills were rendered for these towages in the ordinary monthly accounts against Sheridan & Shea as for other towages, the natural inference is strong that the bills for the towages in question were understood not to be chargeable to Sheridan & Shea. The evidence further shows also, that the towages were not ordered by Sheridan & Shea or by the care-taker of these scows, the only man who is kept on such boats.

Under the above circumstances, I think neither Sheridan & Shea nor the scows were liable for these towages; but that the libelant received by telephone if not express notice of the charter, at least abundant notice to put it on guard and upon inquiry, such as would prevent the acquisition of a lien for towages that were neither ordered by the owners, nor by anybody having authority to bind them or their boats. For towage services rendered in the exigencies of navigation there is at least a presumptive lien upon the boat (*The Erastina*, 50 Fed. 126); but in the ordinary course of such business as the towage of the scows in this case, when it appears either that the boat or the owner was not to be charged for the service, or that the circumstances or dealings were such as to apprise the tower of that fact, the presumptive lien cannot be upheld any more than in the cases of ordinary supplies under similar circumstances. *The Sarah Cullen*, 45 Fed. 511; *Id.*, 1 C. C. A. 218, 49 Fed. 166. The evidence shows that Van Buren in person procured the first scow to be taken to the libelant's stake-boat for towage. There is no evidence how the other scow came to be towed. The libelant in performing the service after the notice given it by Sheridan & Shea without further inquiry, and so far as it appears without any order from any one, took the risk of what such inquiries would have made known to it, namely that it had no right to charge Sheridan & Shea or the scows for the towage services. *The Kate*, 164 U. S. 458, 465, 470, 17 Sup. Ct. 135; *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323. This case is substantially the same as the cases last cited.

The libels are dismissed, with costs.

LOWRY et al. v. UNITED STATES SHIPPING CO.

(District Court, S. D. New York. January 10, 1898.)

CHARTER PARTY—CHARTERERS' STEVEDORE—REBATE RECOVERABLE—WHARF-AGE NOT.

A charter of the steamship *Monkseaton* gave the charterers the right to appoint a stevedore at the usual rates for loading, and provided that the steamer should pay \$20 a day wharfage. The charterers sent the steamer to a railroad wharf where, in consideration of loading the railroad com-

pany's goods, no wharfage was charged. The stevedore appointed by the charterers was accustomed to make and did make a rebate to them upon the bills rendered for loading. *Held* that, in the accounts between the ship and the charterers, the latter were entitled to charge against the ship the stipulated wharfage, but must give credit for the rebate, since the appointment of a stevedore was a fiduciary act upon which they could make no profit, and because the usual rate for loading was, in fact, the amount charged less the rebate.

This was a libel in personam by E. Lowry and others against the United States Shipping Company to recover money alleged to be due from respondents as charterers of a steamship.

Convers & Kirlin, for libelants.

Cowen, Wing, Putnam & Burlingham, for respondents.

BROWN, District Judge. The above libel was filed to recover from the respondents two items, one of \$181.19, a rebate from a stevedore's bill, and the other an item of \$240 for wharfage, both of which were charged by the respondents as charterers of the steamship *Monkseaton*, against the libelants, as owners of the steamer, in the settlement of accounts under the charter made with the master at Hampton Roads, prior to the sailing of the vessel in June, 1896. These items appear distinctly upon a statement rendered by the respondents to the libelants subsequently to the settlement. The libel avers that neither item was a payment made, or an expense incurred by the charterers, and that they, therefore, had no right to charge either against the vessel.

These charges against the vessel were based upon the following provisions in the charter:

"Charterers to have the option of appointing the tally clerks, also the stevedore to load and stow & discharge the cargo—under the master's supervision—steamer paying expense of same at usual rates for first class work, and charterers to be in no way liable for improper stowage. * * *

"Steamer to haul to loading berth or berths as ordered by charterers, but if hauled more than once any necessary towage to be paid by charterers. Wharfage under this charter \$20 per day, to be paid by the steamer."

The charter was executed at New York. It was a charter of affreightment only. It provided for loading at a usual safe wharf or dock in the port of Newport News ^{and} or Norfolk in any rotation, as ordered by charterers, a full and complete cargo of lawful merchandise; and that the ship should proceed to Rotterdam and there "deliver the cargo agreeably to bills of lading on being paid freight in full of all port charges, pilotages, freight brokerages, and other charges customarily paid by steamers."

Under a charter of affreightment, the ship must bear all the ordinary expenses of the voyage, and the expense of loading, except as otherwise provided in the charter. In this case it was provided that extra expense for night work should be borne by the charterers. The master or the owners' agents would also have the right to employ or designate their own stevedore for loading. Here the option to appoint tally clerks and the stevedore was given to the charterers, with the stipulation, however, that the loading should be under the master's supervision, the steamer paying expense of same at usual rates for

first class work. Whatever may have been the precise business reasons for giving this option to the charterers—and several legitimate reasons are conceivable—it is not a legitimate reason and cannot be held a part of the contract, that it was to enable the charterers to make a profit out of the loading, by means of a rebate to the charterers on prices exacted from the ship. The appointment of the stevedore, if the charterers claimed and exercised the option given by the charter, was in my judgment a fiduciary act, which disables them from making any profit out of it. *The Kendal*, 56 Fed. 239.

Aside from this consideration, however, the qualification annexed to the option given to the charterers, viz.—“steamer paying expense of same [i. e. loading] at usual rates for first class work”—forbids the charterers to retain this rebate for their own benefit, because this qualification shows clearly that the ship was to pay only the “expense” of loading, that is, the actual expense; and second, that this expense could not exceed the usual rates for first class work. Here the rebate paid to the charterers by the stevedore shows that the full sum charged to the ship was not the real expense of loading, but was in excess of the actual expense; and the further fact, which was conceded upon the argument, that the rebate made by the stevedore to the charterers was in pursuance of the usual practice between him and the charterers, shows also that the rate charged to the ship was not their usual rate, but only a nominal rate, from which a rebate was customarily made. The defendants should, therefore, respond for this item.

2. Wharfage. The claim as to wharfage stands upon a different basis. The stipulation of the charter in this regard is absolute; viz. “wharfage under this charter \$20 per day to be paid by the steamer.” There is nothing in the context, and there are no other stipulations in reference to the same matter, which serve to modify or restrict the stipulation to pay \$20 wharfage. The immediate context provides that the charterers shall pay for any necessary towage of the steamer, if hauled more than once in loading; and the agreement that the steamer shall pay \$20 per day for wharfage, seems to me a stipulation with the charterers fixing that sum, which binds the ship to pay that amount, and by implication binds the charterers to pay any sum in excess of \$20 per day that might be incurred. The charterers in taking this burden, took also the benefit of a less expense. Upon the facts stated in the argument, it appears that the reason why no separate expense was incurred for wharfage in this case was, that the wharf was owned by a railroad company and used exclusively in its business; and that as an inducement to deal with the company, and to take merchandise from the railroad company at its wharf, no wharfage was charged. The charterers had the right to take such lawful merchandise as they pleased, and at any usual wharf within the ports named. As it was the charterers, therefore, who exercised this option, both as to the merchandise to be carried, and the place at which it should be loaded, any benefit as respects wharfage offered by the railroad company for taking its goods was practically an inducement offered to the charterers of which they are entitled to the benefit.

The ship has no right to complain, because wharfage is a usual expense, which the ship is bound to pay; and the sum charged against her in this case is only what her owners expected and agreed to pay when the charter was signed. It is quite probable that when the charter was drawn up, the charterers intended to take the railroad company's goods, with the attendant exemption from wharfage charges; and that this was the reason for the unqualified provision that the ship should pay the amount named in the charter for wharfage, which the charterers would receive as one of the considerations for loading the railroad company's goods. The fact that the amount of \$20 per day was agreed upon by the owners, whether they understood the precise reason of it or not, is sufficient evidence that it was a reasonable and customary charge, which the ship would ordinarily be bound to pay. The ship has no equity, therefore, to claim the benefit of the exemption from wharfage, contrary to her stipulation, since the considerations for the exemption of the ship from the usual charge of wharfage, moved wholly between the charterers and the railroad company. It was in effect, wharfage supplied by the charterers by reason of their own voluntary dealing with the railroad company upon terms to which they agreed. The charterers I find, therefore, are entitled to retain the wharfage charge.

The case, having been heard upon exceptions to the libel with a view to avoid unnecessary delay and expense in the taking of testimony, has been determined not alone upon the strict letter of the pleadings and exceptions, but upon the facts as well, which were in substance stated and agreed upon at the argument.

WOOD et al. v. KEYSER et al.

(District Court, N. D. Florida. July 3, 1897.)

1. DEMURRAGE—EXCEPTIONS IN CHARTER PARTY—STRIKES.

The term "strike," contained among the exceptions as to the running of lay days stipulated for in a charter party, should be accepted in its ordinary sense, as meaning that the charterers should be excused for any delay occasioned by a refusal of all the available workmen to work except charterers should pay an advance in wages made or demanded in the midst of the loading of a vessel, after the contract of the charterers and owners had been made upon the basis of wages formerly paid.

2. SAME—LAY DAYS.

Days lost in putting up the gear of a vessel, preparatory to taking her cargo, being, under the terms of the charter party, a part of the duty of the merchant, should be included in the running of the lay days.

3. SAME—WORKING DAYS.

Where, by the custom of a port, baymen stop work upon the day of the funeral of one of their deceased members, and also where they stop work on days which are not legal holidays, but which they desire to commemorate thereby, no allowance should be made therefor out of the days stipulated as lay days, as the term "working days" includes all days except Sundays and legal holidays; and, as these days cannot be excepted under any other provision of the charter party, they should be computed in the running of lay days.

This was a libel in admiralty to recover demurrage, alleged to be due under a charter party. On final hearing on libel, answer, and stipulation of facts.

Convers & Kirlin, Liddon & Eagan, and B. C. Tunison, for libelants.
John C. Avery, for respondents.

SWAYNE, District Judge. This is an action by the owners of the British steamship Daybreak against the charterers to recover demurrage for the detention of the said vessel at Pensacola, the loading port, for 13 days in excess of the 14 working days allowed in the charter party for the furnishing of the cargo. The libel alleges the ownership of the steamship by the libelants, the making of the charter party, and that the vessel proceeded to Pensacola, and on the 31st day of March, 1896, gave notice of readiness to receive cargo, but shipment was not completed within the time fixed, but was delayed for a period of 14 days, for which libelants claim the stipulated demurrage, with interest thereon from April 20, 1896, to the date of the payment thereof. Respondents filed an answer, in which they admitted making the said charter party, but set up conditions which they alleged to amount to a strike among the baymen who were engaged in the loading of vessels in the port of Pensacola, preventing the loading of the vessel within the days allowed by charter party. The parties, by their proctors, filed stipulations to take the place of testimony. On said libel, answer, and testimony, the cause was submitted for final hearing. The charter party was for a full cargo of sawn timber, deals or boards, at merchants' option, for a port in Europe. From the record it is shown that a mixed cargo from charterers was placed as cargo. Among the conditions of the said charter party was the following:

"The act of God, * * * floods, droughts, * * * riots, strikes, or stoppage of labor, collisions, stranding, * * * or any other extraordinary occurrence beyond the control of either party," were always mutually excepted.

It further provided that lay days should commence the day after the vessel was ready to receive cargo, and notice given thereof, but that days for discharging should be according to the custom of the port of discharge, and continued:

"In the computation of the days allowed for delivering and receiving the cargo shall be excluded any time lost by reason of fire, droughts, floods, storms, strikes, lockouts, combinations of workmen, or any extraordinary occurrence beyond the control of the charterers or the receivers of the cargo."

The cargo was to be delivered to the vessel alongside, "and within the reach of ship's tackle," and up to that time to "be at merchants' risk and expense," and to be received by the master, and secured by the ship's dogs and chains, when so delivered, and then to be at ship's risk. It also provided, "Charterers or their agents to appoint and pay a stevedore to do the loading and stowing of the cargo under the supervision of the master," to supply dogs and chains, and to pay all port charges, at \$2 per load of 50 cubic feet on cargo loaded; owner having a lien on cargo for freight, dead freight, and demurrage. The cessor

clause in the charter party was expressly waived before the vessel sailed, and it was agreed that the matters in dispute in this cause might be decided in an action in admiralty or at law. Respondents admit the delay, but set up as an excuse that certain days were stormy, and that on other days the workmen would not work, on account of a funeral of one of their number. But the principal cause of delay, and the main question of contention in this and the other cases submitted herewith, is the allegation that there was a strike among the workmen who were expected to load the cargo; and therefore the charterers claim exemption from damages for delay, under the clause of the charter party which provides that:

"In the computation of the days allowed for delivering and receiving the cargo shall be excluded any time lost by reason of fire, droughts, floods, storms, strikes, lockouts, combinations of workmen, or any extraordinary occurrence beyond the control of the charterers."

It is vigorously contended in this case, on the part of the charterers, that the strike which existed at the time the loading was taking place was such a strike as was intended by the parties to the contract to cover at the time it was signed, and therefore the charterers should not be liable for delay caused thereby. Upon the other hand, the libelants maintain that the expression in clause 9, "beyond the control of the charterers," means that if it were possible for the charterers to yield to the demand of the strikers, by an increase of wages, and they could have, under these circumstances, loaded the vessel, then the strike was not "beyond the control" of the charterers, and they are not entitled to exemption for demurrage. The libelants further contend that where the time for loading a vessel is fixed definitely in the charter party, so that it can be calculated beforehand, the charterer thereby agrees absolutely to load her within the prescribed time; and he takes the risk of all unforeseen circumstances; and the principal case they cite to maintain this contention is that of *Brown v. Certain Tons of Coal*, in 34 Fed. 913, in which Severens, J., speaking of the subject of strikes, and the effect upon the delay of a vessel, says:

"He refused to pay—whether justly or unjustly, I do not know—the price that was charged by the laborers in that vicinity for unloading a vessel. He higgled over a little difference of 10 cents an hour to those employés, and permitted the vessel to lie there until he could coerce the employés to accept 40 cents instead of 50 cents an hour; thereby attempting to save to himself a pittance, while subjecting the other parties to serious loss and damage. It is therefore held in this case, as a matter of fact, that the consignee did not use reasonable care and diligence."

Sanborn, Circuit Judge, in *Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co.*, 23 C. C. A. 564, 77 Fed. 919, referring to the same difference in wages between employer and employés in the matter of strikes, says:

"The suggestion that the Reading Company might have resumed operations earlier by hiring men who had discharged themselves at the rate of 50 cents instead of 40 cents an hour, and by agreeing not to prefer other workmen as employés, is not entitled to extended consideration. The market rate of wages for men of this class was 40 cents an hour. That was the rate at which the strikers worked without complaint until they abandoned their employment.

That was the rate at which the new employes were paid. To exercise all reasonable diligence does not require an employer to hire, at wages 25 per cent. above the market rate, a set of men who have abandoned its employment without warning, at a critical time in the conduct of its operations, and banded themselves together to prevent, by intimidation and violence, other workmen from carrying on its legitimate business. Nor does it require such employer to agree not to prefer, or not to prefer in fact, faithful and willing laborers at going wages, as its employes, to those who have acted in this way, at wages 25 per cent. higher." And then the learned judge adds: "There is nothing in *Brown v. Certain Tons of Coal*, 34 Fed. 913, in conflict with these views."

This decision by Sanborn, Circuit Judge, is not only one of the very latest (having been delivered in August, 1896), but is one of the best-considered, cases cited, and contains many valuable references. There is much in it to sustain the proposition in libelants' brief, that if the charterers could, by any reasonable effort, have avoided the strike, or secured other laborers with which to load the vessel, then they would be liable. On page 7 of the brief of *Convers & Kirlin*, they say that the charterers must secure workmen if it were possible to get them at reasonable terms, and if those whose services they had, or expected to have, refused to work for them on reasonable terms, they must secure others, if possible. The court apprehends that this is the proper construction that should be put upon the clause in question in this case. In the case above referred to, Sanborn, Circuit Judge, on page 568, 23 C. C. A., and page 923, 77 Fed., speaking of the question of customary time, or usual time, as compared with reasonable time, in that case, says:

"We have failed to find any decision among the cases cited by counsel for appellants to the effect that a custom of a port excludes other facts and circumstances from consideration in determining the reasonableness of the time of the boat's discharge, or of the diligence of the charterer. The decisions and opinions to which he referred amount to nothing more than this: That when a ship is to be unloaded, under ordinary circumstances, the customary method and the customary time in its port of delivery prove the reasonable method and the reasonable time, and measure the liability for detention, in the absence of countervailing evidence. But suppose that the circumstances are extraordinary; suppose that the threats of reckless men and the violence of mobs suspend the operation of every custom of a port, and hold willing laborers and anxious dock owners alike in enforced idleness and utter helplessness for days; is the customary time for the discharge of a vessel under ordinary circumstances the reasonable time under such circumstances? Shall the reasonableness of the time within which a charterer is required to unload a vessel under such circumstances be measured by a consideration of ordinary circumstances only, or by a consideration of all the actual facts and circumstances at the time he was required to unload her?" He adds: "It is not a new question. It has been carefully and exhaustively considered in the English and American courts,"—and cites a number of cases thereon.

All the American decisions show that, whether the custom of a port is proved or not, all the facts and circumstances, ordinary and extraordinary, which exist at the time of the unloading, have been uniformly considered in determining the reasonableness of the time of discharge. The American cases apply the same rules of law to these contracts, where the customary time of discharge is proven, that they do when no custom is established; and the test of the lia-

bility of the charterer for the delay is the reasonableness of the time occupied in unloading, in view of all the facts and circumstances at that time. Any other rule would contradict and destroy itself. It is settled that the obligation of the charterer is to load the ship in a reasonable time. Our reason teaches that that time is reasonable under ordinary circumstances (that is, customary), but is unreasonable under extraordinary circumstances. If extraordinary circumstances can never be considered to determine the reasonableness of the time, then the charterer must always unload all vessels that arrive under unusual circumstances in an unreasonable time. It is admitted by the stipulations filed in this case that the charterers were unable to obtain other labor than that of the strikers with which to load the vessel; and the court holds in this case that the demand that they should be compelled to pay an advance in wages, made in the midst of loading, after the contract between the charterers and the owners had been made upon the basis of the wages formerly paid, and a refusal to work unless the demand was acceded to immediately, was, in the estimate of the court, an unreasonable demand, and one which the charterers were not required to comply with, in carrying out the spirit and the intention of the parties to the contract at the time it was made. To say that the charterers could avoid the effect of the strike by granting the demands of the strikers and paying the additional wages, and thus save the vessel from damage and the charterers from liability, is to virtually nullify the purpose for which the clause was inserted in the charter party. If such were the law, and the charterers should promptly comply in every instance with the demand of the strikers, then there would never be a strike. If the clause does not mean protection to the charterers, under the circumstances in this case, then it has no meaning, and no reasonable interpretation can be put upon it. The court does not feel bound, and is not in any way inclined, to lend its power to aid a set of men to squeeze their employers into an unconscionable and unreasonable contract, made at a time of great necessity, and under the fear upon the part of the charterers that they will be mulcted in damages, as contended for by the libelants here, if they do not yield to their demands.

As to the other causes of delay, to wit, the funeral of the baymen, the day occupied in putting up the tackle for loading the vessel, and for cessation of work on Good Friday, it appears that these days do not fall within the exceptions of the charter party, as, properly speaking, they are "working days," which term includes all days except Sundays and legal holidays; and I am of the opinion that the custom of baymen to cease labor on these days, as set forth in the answer, is not such a stoppage of labor as was contemplated by the charter party. The day lost in putting up the gear of the ship should count in lay days, as it may reasonably be included in the work of stowing the vessel; it not being contended that it is part of the duty of the vessel to so fit herself, in order to fall within the terms of the charter party, "Lay days to commence on the day after

the vessel is ready to receive cargo, and written notice of same given to charterers." It appears from the record that these matters were the custom of the port, of which the charterer, at the time of the making of the charter party, had full knowledge; and for the delay occasioned by such custom he was entitled to provide, and knew that they might be liable to occur. For the loss of days occurring from the last-mentioned causes, the charterers can plead neither ignorance nor surprise, and the court thinks that they should be held liable for damages for any time over lay days lost for these reasons.

HAWKHURST S. S. CO. v. KEYSER et al.

(District Court, N. D. Florida. July 3, 1897.)

1. CHARTER PARTY—DEMURRAGE—STRIKES.

Where the lay days of a vessel being loaded by respondent merchants are fixed, but exceptions from the running thereof include the term "strikes," merchants should not be held liable for demurrage, even though the alleged strike was brought about by the demands of the merchants that the laborers engaged in loading the vessel should conform to certain rules and regulations which are perfectly reasonable in themselves.

2. SAME.

Notwithstanding the fact that the charterers acquiesced in certain customs of baymen while loading their ships for some time previous to a strike, this is not a waiver of their right to insist upon their abandonment of such customs if the same are unreasonable, nor is it evidence of their justness.

This was a libel in personam to recover demurrage under a charter party.

Convers & Kirlin, Liddon & Eagan, and B. C. Tunison, for libellant.
John C. Avery, for respondents.

SWAYNE, District Judge. This is an action in personam, on the admiralty side of this court, to enforce the payment of demurrage, and arose out of almost the same circumstances as, and the allegations in libel and answer are similar to, those in the case of Wood v. Keyser (decided at this term of court) 84 Fed. 688. However, this case presents some additional facts, and an additional phase of the strike question to that decided in that case. The answer, among other allegations, sets forth certain methods insisted upon by the labor organizations, which had, as members, all the available timber workers in Pensacola Bay, where the ship was being loaded. The allegations in the answer, which, from the record, I must take as fairly representing the facts, so far as this matter is concerned, set up the following:

"The said labor organizations had for years arbitrarily dictated to the timber merchants at Pensacola not only the matter of wages, but also as to the manner of loading vessels at said port with timber, by means of rules and regulations and practices insisted upon, the effect of which was to require the members to work only in a certain way, which deprived their employers

of the full and reasonable work which they could and would perform but for such rules and regulations. That such rules and regulations prohibited what is called 'skull dragging,' which is pushing sticks of timber, over rollers or skulls, into position by hand, after being placed in the port of a vessel; such prohibition causing a loss of time, and the employment of extra men to move the timber, by attaching a dog and chain, and drawing it into place by means of winches and winchmen. That such rules and regulations required that a steamship should be loaded as two ships; the compartments forward of the smokestack being taken as one ship, and the compartments aft of the smokestack being taken as another, and not permitting men to be changed from one to the other, so that in many instances the cost of stowing a small quantity of timber would be greater than its value. That the said rules and regulations of the said associations also required that no matter how small a quantity of timber remained to be placed in the ship after the usual hours completing the last full day's work, as permitted by the associations, the ship should wait until the following day to finish loading, and then that a half gang of men should be employed, and paid for a full day, though but one hour's time might be required for the work. That the said rules and regulations also forbade the use of steam in any manner, and under any circumstances, in the loading of the ship, although steamships were provided with all the facilities for such purposes, and could thereby be loaded more expeditiously, and notwithstanding that the master and owners of the said ships were ready and anxious to supply ships with such facilities without charge, as is customary at all ports except Pensacola. That the practice of the said associations was to stop all work of loading ships in the bay whenever a member of one of the associations died. That the said merchants, including respondents, with but one or two exceptions, decided and notified the said associations that they would not submit longer to the unjust rules and regulations and practices aforesaid of the said associations in regard to the loading of timber of ships," etc.

Under these circumstances the charterers undertook to supply what may be called reasonable terms of employment, under which timber stowers were to be employed in vessels chartered by respondents. Among these terms insisted upon were: (1) That the death and funeral of a member of the associations should not cause a cessation of the work upon the vessels; (2) that skull dragging, or the placing of timber in position in the hold of a vessel by pushing same by hand over skulls or wooden rollers, should be regarded as proper to be insisted upon by said merchants; (3) that gangs of men might be required to work in any part of the ship, either in fore or aft hatches, interchangeably; (4) that charterers should have privilege to employ members to work overtime at one dollar per hour, in order to complete loading, when only small quantity left over on last day; (5) merchants to have privilege of using steam power of vessel, paying wages of same number of men, whether actually employed in loading or not. The record nowhere discloses any allegation or inference that these conditions were unreasonable or unjust to the workmen, but, on the contrary, from their terms, they appear just and reasonable towards all concerned; and, although the respondents may have acquiesced for some time in these usages, yet this is not evidence of their justness, or a waiver of their right to insist upon their abandonment. If the customs in controversy are unreasonable, the demands of the merchants at that time for their abandonment would, in my opinion, be exactly analogous to a demand on the part of the baymen or stowers of timber that the said customs, supposing the

same had not theretofore existed, should be observed in the future, and the merchants, deeming them unreasonable, refused to comply with said demands. A strike, occurring under these circumstances, being a refusal of a combination of all available workmen to work upon terms which must be viewed by this court as reasonable, seems to fall within the meaning of the strike clause or exception as clearly as where it results from a demand of an advance of wages. If the merchants must submit to the unjust rules and regulations of the labor associations to-day, when, and in the loading of what ships, will it be right for them to take a stand? Beach on the Modern Law of Contracts, at section 238, vol. 1, says:

"Where a 'strike clause' is inserted in a contract, excepting liability in case of failure to perform, occasioned by a strike, the contractor is not thereby prohibited from conducting his business upon the same general principles which would have governed him had the clause not been inserted; nor is he required to resort to extraordinary or unusual means to prevent strikes, but he has the right to adopt such rules and regulations and pay such wages as are reasonable under the circumstances."

In speaking of the strike clause in the contract before it, the court of appeals of New York (*Railway Co. v. Bowns*, 58 N. Y. 574) says that the additional agreement, that "every effort will be made by the company for the fulfillment of the contract," will not be interpreted as requiring the performance at all events, if within the power of the company; and then, passing to the "strike clause" proper, that court says:

"The strike was immediately preceded, and proximately caused, by a reduction of the wages by the employer; and the contention of the defendant is that as the strike resulted from the voluntary act of the plaintiff, and would not have occurred but for that act, the plaintiff cannot have the benefit of that exception and exemption from liability. But parties may agree in advance under what circumstances and upon what contingencies the contract shall terminate, or either party be absolved from its obligations; and if the circumstances occur or the contingency happens, even by the voluntary act of the party claiming the exemption and the benefit of the stipulation, it will be available to him in the absence of fraud or mala fides." Again, that court says, "Provision was intended to be made against the result of the strikes, but not against their occurrence," and then goes on to define a "strike," within the meaning of the excepted clause: "A strike is a combination among laborers—those employed by others—to compel an increase in wages, a change in the hours of labor, some change in the mode and manner of conducting business, to enforce some particular policy in the character or number of men employed, or the like." "They can always be prevented or arrested, whatever be their origin, by a yielding on the part of the employers to the demands of the combination; and if such were the duty of the plaintiff, under the stipulation to make every effort that the contract with the defendant might be performed, the clause providing for an indemnity from the consequences of a strike was nugatory, and had no meaning. There could be no strike for which the plaintiff would not be responsible, in a way to deprive it of the benefit of the exemption from liability." Again: "The plaintiff acted in good faith in fixing wages of its employes, and upon just and reasonable business principles, and it is in no respect liable to the defendant for the result."

These principles apply with equal force to the case under consideration. The respondents, in insisting upon the change in custom,

did so from what apparently seems to be sound business principles, in good faith, and with a view to place their business and that of the port upon an equal footing with that of other ports; and the refusal of the association and combination to yield cannot be attributable to them, and clearly falls within the meaning and intent of the exception on account of strikes. Other days for which exemption is claimed are classed with those for which a decree was directed to be entered in the case of *Wood v. Keyser*, heretofore decided; and for days lost, over the stipulated lay days, for these reasons, a decree may be entered in this cause.

THE CRAMP.

O'BRIEN v. THE CRAMP.

(District Court, E. D. Pennsylvania. January 3, 1898.)

No. 54.

SEAMEN'S WAGES—REFUSAL TO HANDLE CARGO—SHIPPING ARTICLES.

There is no custom exempting the crew from the duty of handling cargo when it consists of ice, in the absence of an express stipulation in the shipping articles.

This was a libel in rem by O'Brien and others against the Cramp to recover seamen's wages.

Jos. Hill Brinton, for libellant.

Horace L. Cheyney, for respondent.

BUTLER, District Judge. It is to be regretted that the libelants did not accept the money paid into court on their account. It seems to be all they are justly entitled to. Had they been suing at their own expense it is probable they would have accepted it. Unnecessary litigation at the public expense, which not unfrequently occurs, should be discouraged. The libelants, according to the libel and answer, were discharged from service because they refused to "handle cargo." It is the duty of the crew, generally, to perform this service. The articles signed, which are the evidence of the contract, are in the usual terms, and silent respecting the service in question. Without more, it is clear that the libelants were subject to the service. They testify, however, that it was distinctly agreed before they signed or when they signed that they were not to "handle cargo." They support each other in this statement. The statement, however, is not consistent with their conduct afterwards, or with the statements of the libel. They did not pretend to a recollection of such an agreement until called to testify, but thought the articles did not specify this service, and were uncertain about that. To justify a qualification of the articles respecting the subject the testimony should be clear. The written evidence of the contract should prevail except when fraud or mistake is shown. The evidence does not satisfy me that by custom the crew is exempt

from the duty to "handle cargo" where it consists of ice, unless such duty is expressly mentioned in the articles.

I need not decide whether the respondent's offer, or tender, before the commissioner, was sufficient to relieve him of subsequent costs. What he paid into court, the libelants were entitled to take out; it could only be paid in for them, and it is only because of such an unconditional tender that he is relieved as respects future costs. The libel is sustained to the extent of the money paid into court, and to this extent only.

A decree may be prepared accordingly.

THE ILLINOIS.

BALANO v. THE ILLINOIS.

(District Court, E. D. Pennsylvania. January 3, 1898.)

COLLISION—DAMAGES—INTEREST.

In determining the amount of the damage award, the value of the injury done to the vessel is to be ascertained, and then an amount equal to interest thereon to the time of the trial may be added, not strictly as interest, but as part of the damage compensation.

This was a libel in rem by the owners of the schooner Mabel Jordan against the steamship Illinois to recover damages for a collision. The owners of the Illinois also brought in the tug Gladisfen as a co-respondent. In the district court it was held that the Illinois alone was in fault (65 Fed. 123), and the cause was referred to a commissioner to report the amount of damages. The commissioner having now filed his report, the hearing is upon exceptions thereto.

John F. Lewis, for libelants.

N. Dubois Miller, for respondent.

BUTLER, District Judge. After careful reading of the commissioner's report and the briefs of counsel in support of their exceptions, I am satisfied that the exceptions should be dismissed. The commissioner's findings relate to matters determinable by the evidence, and in my judgment they do the parties substantial justice. The evidence respecting the numerous disputed items is conflicting, and the commissioner's duty was a difficult one. A different conclusion than that reached by him, respecting some of them, might possibly be sustained by the evidence as reported, but the commissioner, who saw and heard the witnesses, is best qualified to estimate the value of their testimony, and I have found nothing that would justify me in differing from him.

As respects the allowance for demurrage, I think the evidence of the vessel's actual earning capacity is sufficient to answer the claim based on the charter; and in this respect the case resembles that of *The Redruth* (recently decided here) [26 C. C. A. 338, 81 Fed. 227]. As

respects the allowance for permanent injury to the vessel, the commissioner appears to have examined the subject with great care and intelligence, and has reached a conclusion fully justified by the evidence. To sustain such a claim the evidence of such injury should be fully proved: and in this instance, in my judgment, it is. The sum called interest added to the \$5,000 was necessary to make full compensation at this time. It is not strictly interest—which is due only for the withholding of a debt—but the compensation for the permanent injury to the vessel was due as of the time when it was inflicted, and the addition of what is called interest is justly added for withholding it. If the respondent's position in this respect were sound no compensation on this account would be due until such time as the vessel might be sold. It is not sound, however; \$5,000 of the value of the vessel, as the commissioner has found, was destroyed by the collision and the libelant was thus deprived of this amount of his property. He was justly entitled to be paid for it when deprived of it, and such payment being withheld, the usual compensation for the withholding of a debt is the common method of compensating for the withholding of damages due for a tort. It has been held in one or more instances that where a jury renders a verdict for the amount of damages resulting from an injury and adds interest from the date of its infliction, the verdict should be set aside; but it is quite well settled that in ascertaining the amount of compensation to be paid, it is justifiable to find the extent of the injury valued in money, and add a sum equal to interest to make compensation at the time of such finding. It is but charging the wrongdoer with what he may justly be supposed to have made out of the money which belonged to the party injured.

The exceptions must be dismissed and the report confirmed.

THE HAROLD.

THE DAVID CROCKETT.

MANSON et al. v. THE HAROLD et al.

NEALL v. MANSON et al.

(District Court, S. D. New York. January 11, 1898.)

COLLISION—SAIL VESSEL—TUG AND TOW 2,600 FEET LONG AT SEA—FOG.

The tug Harold was proceeding southward past Cape Charles with two barges in tow, each over 200 feet long, and each upon a separate hawser about 1,100 feet long behind the tug. The H., hearing the fog horn of the schooner M. bound north nearly ahead, starboarded her wheel, and passed some 300 or 400 feet to the eastward of the schooner, but the schooner collided with the Crockett, the first barge, about 1,100 feet behind the H. Lights could be seen only a few hundred feet distant. No signal was given by the tug, indicating her change of course to the schooner, nor any signals to the tow to co-operate with the tug by starboarding, nor was any signal given from the barges to indicate their positions. There was no lookout

forward on the Crockett to observe the change in the lead of the tug's hawser to port, and in consequence of this, the Crockett, when the schooner's lights were first seen, erroneously put her wheel to port, in order to go to the westward of the schooner, though she very quickly changed her wheel to starboard. The schooner was going under nearly all sail at about six miles an hour. *Held*, that the navigation of each of the vessels was blamable; that navigation in fog with such long tows without previous arrangement for signals to indicate the position of the tow, or to secure co-operation by the tow with the tug in keeping out of the way, is dangerous, and at the risk of the tug, whose legal duty it is to keep the whole fleet out of the way under the rules of navigation; since without such previous provisions, it is impossible for the tug to keep the fleet out of the way of sailing vessels, or to give the latter sufficient opportunity to keep away themselves. *Held* also that the Crockett was here liable for negligence in her own part of the navigation, and that the schooner was also liable for immoderate speed.

Libel and cross libel for damages caused by collision.

Carter & Ledyard and Edmund L. Baylies, for Manson and others.
Robinson, Biddle & Ward, for the David Crockett.
Carpenter & Park, for the Harold.

BROWN, District Judge. The above libel and cross libel grow out of a collision, which took place a little after 10 p. m. on April 8, 1897, in a dense fog, about 15 miles to the northeast of Cape Charles, between the three-masted schooner Agnes E. Manson, bound north, and the barge David Crockett, in tow of the tug Harold, bound south, by which both vessels sustained some damage.

The tug Harold had two barges in tow; the David Crockett on a hawser about 1,100 feet behind the tug, and the barge Marion behind the Crockett on a hawser of about the same length. The Harold was a powerful tug, about 130 feet long with two masts and sails; and each barge was 218 feet long or over. The David Crockett was an old clipper ship turned into a barge, with three masts and fore and aft sails. Both barges were light. The schooner was 174 feet long and was loaded with 1,360 tons of coal. She was making a course N. E. by N. on the starboard tack, with a good wind from about S. S. E., nearly three points aft of abeam. She had all sails set except two topsails, which were taken in when the fog came on about an hour and a half before the collision. At collision she was making about six knots an hour. The fog was so thick that lights could not be seen more than a few hundred feet. The tug was headed S. W. by S. The fog horn of the schooner was heard, as the pilot says, $1\frac{1}{2}$ points on his starboard bow; this estimate was incorrect. The result shows that the schooner must have been very nearly directly ahead. On hearing her fog signals, the pilot of the tug starboarded his wheel so as to head 2 points more to the southward, and steadied at S. by W. under one bell, making probably about $3\frac{1}{2}$ knots speed. He heard one or two additional fog signals from the schooner, and then made her green light on his starboard bow, and passed to the eastward of her, at a distance estimated at about 300 to 400 feet. When abeam and faintly seeing her sails,

he twice hailed the schooner, shouting that he had barges astern and that the schooner should keep off. Those on the schooner heard several fog signals of the tug, at first apparently a little on their starboard bow, and afterwards saw the tug's vertical white lights indicating a tow, and soon after her green light in the same direction. The lookout of the schooner testifies that he heard from the tug when abeam, the hail to keep off. The master and mate testify that they heard some shouting, but did not hear what the hail from the tug was, nor the report of it by the lookout. The mate at about the same time told the wheelsman to keep his course. A few moments afterwards the green light of the barge David Crockett was made a little on the schooner's port bow, whereupon the schooner's wheel was put hard a-starboard, and the schooner paid off two points, enough to bring the barge a little on the schooner's starboard bow, when the collision took place, the stem of the barge striking the anchor stock on the schooner's starboard side and badly scraping her side. The barge's stem was knocked to port, and some leaking caused.

There is much less conflict than usual in the testimony concerning the facts of this case. The accounts given by the different witnesses do not much differ. The master of the schooner, indeed, contends that the tug did not change two points to the southward, as the latter's evidence shows that she did; but that she continued on a course about parallel to his own. There is no sufficient reason, however, to discredit the tug's witnesses in this respect; and it agrees better with the other facts of the collision, since it is not probable that the Crockett, except through the tug's starboarding, would have been as much as three or four hundred feet to the westward of the position of the tug, having reference to the line of the schooner's course and of the tug's course shortly before. What is specially noticeable in the case is, the entire disregard by each of the three vessels of some of the well-known rules of navigation.

(1) The schooner had nearly all sails set in a fresh wind, and was going at a speed of six knots; this plainly was not the moderate or reduced speed required in fog by article 13. *The City of New York*, 15 Fed. 628; *The Martello*, 34 Fed. 75; *The Rhode Island*, 17 Fed. 555, 558; *The Wyanoke*, 40 Fed. 704; *The Zadok*, 9 Prob. Div. 114.

(2) The Crockett, though having her sails set and being 1,100 feet behind her tug, had no lookout forward, and paid little attention to what was ahead of her. There were but two men on deck, both of whom were in the pilot house, which was far aft near the mizzen mast, and no attention was paid to the lead of the hawser which should govern the steering of the tow. Consequently when the red light of the schooner was first seen and seen later than it should have been seen, a few hundred feet away and nearly ahead, the barge not knowing on which side of the schooner her hawser led, wrongly put her wheel hard a-port, so that if the schooner had not by starboarding fortunately headed her off, she would have raked and probably sunk the schooner by her hawser.

(3) The tug, though making the fog horn of the schooner nearly

ahead, did not stop her engines, as required, until the position of the schooner could be certainly ascertained. The *Martello*, 153 U. S. 64, 14 Sup. Ct. 723. Had she done even this, it is probable that the collision would have been avoided, through the slower movement of the *Crockett* and the greater time for the schooner to have got away under her starboard wheel. By the tug's stopping and slackening the hawser, moreover, in such situations the privileged vessel might often escape harm by crossing the hawser, when she would otherwise be damaged or sunk. The tug again though she herself starboarded, which the result shows was necessary, in order to clear the schooner, gave no signal to the barges to starboard also, though immediate starboarding was equally necessary to enable them to avoid collision, and was the only means by which the tug could keep so long a tow out of the way of the schooner.

There is no doubt that the fresh wind on the port side of the barges, which were light and high out of water, caused them to sag somewhat to the westward. This made it more dangerous to the schooner for the tug to go on the windward side of her, as the barges were thus the more likely to be encountered by the schooner.

From this sagging of the tow to leeward, there was special reason why the tug should have ordered the barges, by such notice as was practicable, to follow the tug, and to starboard immediately when the tug found that starboarding was necessary to avoid the schooner. The pilot of the tug testifies that they had a code of signals, by the use of the steam whistle, for giving to the barges various directions, such as casting or weighing anchor, to set or take in sail, etc.; but he had no signal arranged for directing the barges to port or to starboard the wheel. He states, however, that it was understood that several short blasts in succession was a signal that the barges should give special attention to follow the tug's hawser. Had that signal been given, it would have been better than none at all, and might have been sufficient for this occasion had the barge been provided with any lookout forward, as was her duty, to see how the hawser was leading. The captain of the *Crockett* testifies that some other tugs by which he has been towed, have signals for an order to the barge to port or to starboard the wheel. The barges were also provided with steam whistles; but they are not in the habit of using the whistle to indicate their position in a fog, and did not do so at this time.

Had this barge indicated her position by any sound upon her whistle, there is no doubt that the collision would have been avoided. The schooner, though knowing that the tug which she had just passed had a tow, did not know and had no suspicion that the tow was tailing considerably to the westward of the line of the tug, so as to bring the tow upon the schooner's port bow. Any whistle from the barge would have made this fact known to the schooner much earlier than the time when the barge's port light was seen, and in time to enable the schooner by starboarding to avoid collision.

In the case of *The Whitney and Shamokin*, 77 Fed. 1001, a similar difficulty was experienced by the steamship *Whitney* in approach-

ing Pollock Rip Lightship going south, while a tow, similar to this, was rounding that point and going north. It was there considered that the tug and tow were bound to provide for indicating the tow's situation by some signal or else previously to have come to anchor. The cases of *The Raleigh*, 44 Fed. 781, and *The City of New York*, 1 C. C. A. 483, 49 Fed. 956, were referred to, and the ruling in the former case requiring such signal was regarded as most properly applicable to the case; and the same rule should, I think, be applied here.

Without some signal indicating the position of the tow in fleets made up like this, it is impossible for a crossing vessel in fog to know which way the tow is tailing, or where its boats are located, and impossible, therefore, to make use seasonably and intelligently of such measures as are practicable to the sailing vessel and necessary to save life and property. The dangers of such navigation in fog with tows on such long hawsers and without any such precautions, seem to me too great to be justifiable, in the absence of any statutory recognition. The mere recognition of towage at sea is no recognition of the lawfulness of towage on such long hawsers in fog; and the practice is too recent to have acquired validity as a customary usage of the sea. The new 15th article permits a signal from the tow, and with such long tows and hawsers in fog signalling seems to me a plain requirement of ordinary prudence.

But if such navigation by tug and tow be deemed justifiable, it is, at least, subject to the established rules of navigation. The *Maverick*, 84 Fed. 906. Nothing in the rules releases the tug from the obligation of the thirteenth rule to keep herself and her tow, as one vessel, out of the way of sail vessels. *The Civilta*, 103 U. S. 699. It is urged that this is impossible in cases like the present. But if a tug and tow voluntarily enter upon towage in such form and manner as to make it impossible for them to keep out of the way and at the same time impossible for the privileged vessel when meeting them, through lack of timely knowledge of the tow's position, to keep away by any care of her own, must not such navigation be at the risk of those who engage in it? It is at least incumbent upon them, as it seems to me, to take reasonable precautions by the use of such signals as are permissible and as the evidence shows are perfectly practicable, to indicate their position and to secure concert of action in steering so as to perform the statutory duty of keeping out of the way, as well as to aid the privileged vessel to do seasonably what she can to avoid collision.

In the towage cases before the supreme court it has been adjudged (*The Civilta*, *supra*; *The Virginia Ehrman*, 97 U. S. 309) that notwithstanding the general responsibility of the tug, the tow also is bound to be vigilant in the use of all proper means at her command to avoid collision. In those cases the hawser was but from 200 to 300 feet long, about one-fourth the length of the hawser in the present case. In the case of *The Virginia Ehrman*, where the tow was on a hawser of but 50 fathoms, both the tug and the tow were held in fault for running into a dredge at anchor in a channel way; the tug, for not giving the dredge a wider berth, and the ship, because

she "had no lookout, and her helm was put to port when it should have been put to starboard." That is precisely the case with the barge in this instance. She had no lookout, and at first ported when she ought to have starboarded, through failure to keep watch of her own hawser.

In the case of *The Civiltà*, 103 U. S. 699, a ship was in tow of a tug on a hawser 270 feet long, less than one-fourth of the hawser in this case. The pilot who had the lawful control of the navigation, was on board the ship, and did not interfere with the navigation of the pilot of the tug. The ship ran into a schooner, which it was held had not changed her course. Both the ship and the tug were held in fault for not properly observing the schooner, and not keeping away in time. The tug was held responsible for the general navigation, and because the pilot, who was on the ship, and "who was in charge of both ship and tug, *neglected to give the necessary directions to the tug*, when he saw or ought to have seen, that no precautions were taken by the tug to avoid the approaching danger."

These cases fully recognize and establish the duty of both the tug and the tow to keep a proper lookout, to be vigilant in doing what is in the power of each to avoid collision, as well as the duty of the pilot in charge of the whole, to communicate such orders as may be necessary between tug and tow.

In like manner it was the duty, as it seems to me, of the pilot on board the tug, who in this case was in charge of both tug and tow, to give notice to the tow, as a part of his duty to keep the whole fleet out of the way, that she should starboard her wheel, as above intimated, at the same time that the tug starboarded her wheel; inasmuch as in no other way could the tow, a half mile long, help tailing across the line of the schooner's course, with collision as the almost inevitable result. Provision could as easily have been made for such necessary communication between the tug and tow as to steering, as was made in regard to sails and anchors.

The tug, moreover, did not give to the schooner the signal of two blasts, as she might have done, to show that she was turning to port, which would further have put the schooner on her guard as to the position of the tow behind. This was specially commented on by the court of appeal in *The Martello*, 39 Fed. 509.

I think the tug is, therefore, liable for not keeping the tow out of the way, as she was required to do by the thirteenth article, and for not making use of any of the means above stated in the endeavor to do so.

The tow is liable for neglect to keep any lookout forward, or any watch upon the lead of the tow line to guide her own steering. The tug's lights could not be seen from the barge and the only guide of the barge in steering was the direction in which the hawser led and the sound of the tug's whistles, the latter a most uncertain reliance. Through lack of any lookout forward and consequent want of knowledge, at the moment the schooner's light was seen, in which direction the hawser led, the *Crockett* wrongly ported when she ought to

have starboarded. A proper lookout forward would not only have reported the schooner earlier, but would have previously noticed the lead of the hawser to port and directed a corresponding starboarding of the barge's helm,—both important factors in avoiding collision.

I do not feel warranted in exempting the schooner from blame on her contention that her excessive speed did not contribute to the collision. Even if it be assumed that the schooner, if going three or four knots only, instead of six, would not have been able to turn any more to the westward under her starboard wheel, it is certain that the barge would have had longer time in which to correct her error in first porting, and therefore more time to draw away to the southward both by her own subsequent starboard wheel, and by the longer duration of the pull of the tug to the southward; and had collision still have taken place, it must have been comparatively slight, and the damage little or none. A very little change of the barge's head to the southward would have avoided collision. Probably 10 seconds more time would have been sufficient. More than this difference would have been made had the schooner been going at a speed of only from three to four knots. It is probable that the barge's light was seen at least 500 feet distant, as the schooner after seeing it was able by starboarding to change her heading two points to the westward. As she was a large schooner 174 feet long and deeply loaded and pays off much more slowly than she luffs, the time necessary to change two points under a starboard wheel must have been over half a minute, which would give at least 500 feet for the approach of the vessels during the interval. This would indicate that the barge's green light was seen when the schooner was about midway of the tug's hawser, or about a half minute after she passed the tug. I am not altogether satisfied as to the reasonable care of the schooner in proceeding for half a minute without change of helm after hearing the shouts from the tug, even though the hail was not precisely understood. For the schooner knew from the tug's lights that there was a tow behind, which in the fresh wind would naturally swing to the westward of the tug's course, and the only reasonable inference from the hail was that the tug meant to give at least some caution to the schooner, which would naturally import a suggestion to her to keep off to the westward.

The damages and costs should be divided equally among the three vessels, the faults of each being independent of the others.

THE SAGINAW.

THE PERSIA.

HAMBURG AMERICAN LINE v. THE SAGINAW.

CLYDE S. S. CO. v. THE PERSIA.

(District Court, S. D. New York. January 14, 1898.)

COLLISION—THWARTING MANEUVERS—ROUNDING BUOY—MISUNDERSTANDING OF SIGNALS—BAD LOOKOUT—FAILURE TO STOP—INSPECTORS' RULE 3.

The steamship S., outward bound, soon after rounding the Bay Ridge buoy, and about 40 minutes after sunset, came in collision with the steamship P., inward bound, striking the latter at an angle of about three points on the starboard side. When first seen, the vessels were nearly head and head, the S.'s red light before she had rounded being seen a very little on the P.'s starboard bow. The P. ported and very soon saw the S.'s two colored lights, and then her green light only on the P.'s port bow, whereupon the P. starboarded hard. The S. first noticed the P.'s red light on her starboard bow after rounding the buoy, and ported, resulting in collision as above stated. The P. on first porting gave a signal of one blast, and on afterwards starboarding, a signal of two blasts, both of which, it was alleged, were answered by the S. with similar whistles. They were neither heard nor answered by the S. There was great confusion and contradiction in the testimony as to bearings and the time of slowing and stopping. *Held*, that the maneuvers of each were thwarted by the other; that they were less than one-half a mile apart when first observed, very much nearer than claimed, through lack of a proper lookout on each; that neither was justified in starboarding, and the P. was bound under inspectors' rule 3 to reduce her speed more quickly than she did, upon an evident misunderstanding between the ships; and that the S. was further to blame for inattention to the P.'s signals.

These were cross libels for damages resulting from a collision.

Wheeler & Cortis, for the Persia.

Robinson, Biddle & Ward, for the Saginaw.

BROWN, District Judge. The above cross libels were filed to recover the damages to the steamships Persia and Saginaw, arising out of a collision between them, which occurred about 40 minutes after sunset on November 13, 1896, off Stapleton or a little to the northward of it, Staten Island, and probably a little to the westward of mid-channel. The Persia, a large steamer, 445 feet long by 51 feet beam, was coming in from sea and had left Quarantine Station, about a quarter of a mile above Ft. Tompkins, some 11 minutes before the collision, and stood up on a course about north, crossing to the eastward by one point the usual course of N. by W. in that part of the bay. The Saginaw, a much smaller steamer, 260 feet long, was outward bound, and shortly before the collision rounded to the westward of Bay Ridge buoy in about mid-channel, and in so doing by the usual course she would naturally change from S. by W. above the buoy, to S. $\frac{1}{2}$ E. or S. by E. below it. The night was clear and calm; other vessels were about, but none to interfere with the movements of either of these steamers. Neither was observed by

the other as early as she should have been observed; both, after some previous changes of course, turned to the westward, and the Saginaw, with the bluff of her starboard bow, struck the starboard side of the Persia aft of midships at an angle of about three points or less, with a glancing blow, which damaged both vessels and injured two children on the Persia, in whose behalf libels have also been filed against both steamers.

The contention for the Persia is that while she was heading north and making nine to ten knots against an ebb tide of two or three knots, the Saginaw's red light was seen nearly ahead and a mile or more away; that the Persia at once ported and gave a signal of one whistle, which was answered by one whistle from the Saginaw; that soon afterwards the Saginaw's two side lights were seen, and shortly her green light alone; that on seeing her two side lights the Persia's engines were stopped, her wheel starboarded, and a signal of two blasts given, which was answered by two blasts from the Saginaw; that afterwards the Saginaw swinging to the westward, showed again her red light and that the Persia then gave three blasts of her whistle and reversed either then or previously; and that when the vessels were about 300 feet apart she swung her stern about one point to port to ease the blow. She charges the whole fault upon the Saginaw, (1) for swinging to port in rounding the Bay Ridge buoy so as to change her show of lights after the Persia's signal of one whistle, and (2) for turning again to starboard too late and when too near to the Persia, after her previous change to port.

For the Saginaw it is claimed that the Persia was not seen, nor any signal given to her until after the Saginaw had turned the buoy; and that no signal of one blast was heard from the Persia at any time; that after the Saginaw had turned the buoy and was on a course of about S. by E. the Persia's red light was seen half a point off the Saginaw starboard bow; that the Saginaw at once ported and gave her a signal of one whistle, and soon after repeated the signal, to neither of which was any answer received; that under the Saginaw's port wheel her head swung to starboard until the Persia was one point on the Saginaw's port bow; that soon after, when the Persia was about two points on the Saginaw's port bow, the Persia's green light came into view and her red light was shut in, being then about 1,000 feet off; that the Saginaw then gave a signal of one blast, to which the Persia replied with two blasts, whereupon the Saginaw starboarded and at once stopped and reversed at half speed and so continued until collision. She reversed at half speed only in order to avoid too rapid a swing of her head to starboard. She charges the whole fault upon the Persia for starboarding her wheel and crossing the Saginaw's bows when both were in a situation of perfect safety, after the two vessels had been showing red to red for a considerable time.

The case is an interesting and a peculiar one, because I am satisfied that each vessel when first seen by the other was seen nearly ahead, and each vessel in then porting her helm, observed the requirements of the rules of navigation, and adopted the maneuver

which seemed the proper one to avoid collision; and yet each vessel in turn thwarted the maneuver of the other, either of which maneuvers, if not thus thwarted, would have avoided collision. Both mistakes arose from the evident fact that each vessel misunderstood the intentions of the other. The object of the rules as to signals is to prevent such misunderstandings. That object was here frustrated because the Persia attributed to the Saginaw answering signals of assent which the Saginaw never gave; and because the Persia did not hear or answer the timely signals of one whistle which the witnesses from the Saginaw testify were given by her, and also because the signals given by the Persia were not heard or noticed on the Saginaw. A further question is also suggested, viz. why in a clear evening and in mild weather and only 40 minutes after sunset such vessels should not have avoided each other, even without the help of signals, if the approach of either had been reasonably attended to. This involves the question of the actual navigation of each vessel, their distances apart at their various maneuvers, and how the collision occurred. On these questions there is considerable conflict, not merely between the witnesses for each vessel against the other, but also between the witnesses on the same ship.

In endeavoring to understand how the collision occurred, I have been much embarrassed by these contradictions in the testimony. There is evident inconsistency, confusion and mistake in the Persia's testimony as regards the bearing of the lights seen at different times; and little reliance can be placed upon the estimates of distances on either side. I have spent much time in endeavoring to trace the navigation of the two vessels, according to the testimony as to what they actually did. The result is to a considerable extent in accord with the Persia's diagram; but the distance traversed between the Persia's sighting the Saginaw and starboarding her wheel is, I think, greatly exaggerated in the Persia's diagram, and the positions of the vessels when near collision seem to me forced.

From the testimony of the Saginaw's pilot, that after rounding the Bay Ridge buoy in about mid-channel the Ft. Lafayette light bore considerably more off his port bow than the Ft. Wadsworth light bore off his starboard bow, I think the Saginaw did not turn more to the eastward than S. $\frac{1}{2}$ E. The Persia, handled as a single screw propeller, i. e. her two screws not put in contrary directions, could turn only about a point in three-fourths of a length, so that had she at first gone more than a point to starboard, she would have been so much to the eastward of the Saginaw that she could not afterwards have got under the Saginaw's bows by starboarding; since the Saginaw, a much smaller vessel, would turn much more rapidly on porting, and hence go off much faster to the westward, than the Persia.

When the Saginaw's two colored lights were first seen, the two vessels must have been less than a half mile apart, as a drawing of their courses based upon the testimony as to what each subsequently did will show. Reversing continued not over $1\frac{1}{2}$ to 2 minutes before collision; and the master and mate say that it was but a very

short time after the two lights were seen, "a few seconds only," that the Saginaw's red light was seen a second time, whereupon the Persia reversed. I think the interval was probably half a minute, during which the Persia swung to port one or two points. But it was not probably over a third of a minute after the Persia first saw the Saginaw's red light that the latter's two lights were seen. The interval was so short that the mate thought the Persia had not answered her port helm at all; he so entered in the log, and the original libel repeats that entry. The Persia probably first turned about a point to starboard in about a third of a minute in going about 400 feet. She then starboarded, but before she broke her sheer and turned westward enough to show her green light, the Saginaw saw her red light a little on the starboard bow, ported a point in probably 20 seconds in going about 250 feet, so as to bring the Persia's red light on the Saginaw's port bow, and thus show her own red light again to the Persia, while the latter in the meantime was swinging to the westward, so as to show soon her own green again to the Saginaw's red, whereupon both reversed. Unless the Persia had first turned to the eastward about a point, she could not have exhibited her port light to the Saginaw long enough to enable the Saginaw by porting to change the bearing of the red light from her starboard bow to her port bow, as four of her witnesses testify, and at the same time have been able to get to the westward of the Saginaw, and cross her bows, before collision.

The vessels were making about the same speed over the land, viz. about 10 knots, and they were probably but little over a half mile apart when the Saginaw's lights were first seen. Probably a half minute later the Saginaw saw the Persia's red light, over her starboard bow, and ported. This was probably as soon as she had straightened upon her course of S. $\frac{1}{2}$ E., and the attention of her officers was no longer occupied with turning the buoy, which they could not see. The pilot then first noticed the Persia's hull, and the vessels were then probably but little more than a third of a mile apart. The Persia's testimony that the Saginaw's red light appeared the second time from two to four points off the Persia's starboard bow, and the Saginaw's counter statement, that the Persia's green light came in sight two or three points on the Saginaw's port bow, are irreconcilable, both estimates of the bearing are equally improbable, and I have no doubt that each light became visible when not over half a point off the other vessel's bow, as a drawing of the navigation indicates.

For the Saginaw it is contended that the first change in her show of lights to the Persia, viz. from red to green, took place after the Saginaw had rounded the buoy and was straightened down on a course of S. $\frac{1}{2}$ E. or S. by E., and that that change of lights was caused by the Persia's crossing the bows of the Saginaw to the westward under a starboard helm. But this theory is incompatible with the most important parts of the testimony on both sides, as any attempt to sketch the navigation of the vessels will show. The Saginaw at some time after having straightened down ported her helm,

according to her own testimony, because she saw the Persia's red light off her starboard bow. There is no other reason or justification for the Saginaw's porting. But if when the Saginaw ported her helm the Persia was showing her red light, the Persia must have been then heading somewhat to the eastward of the Saginaw, and therefore could not possibly have made her supposed turn to the westward and across the Saginaw's bows before the latter ported; if she had done so, she must have shown her green light, and the Saginaw would not have ported at all. On the other hand, the first change in the Saginaw's lights could not have been caused by the Persia's crossing the Saginaw's course to the westward after the Saginaw ported her helm, because on that hypothesis this crossing could only have occurred a few moments before collision, and the Persia could have had the Saginaw's two side lights in view only once, instead of twice, as the testimony is, and the Saginaw's red light could not have come into view a second time after her green light was seen and the red was once shut out; this theory would also impute to the Persia either mistake in putting her helm to starboard when it was ordered put to port, or else the idiotic maneuver of starboarding and running into the Saginaw, at a time when the vessels were safely showing red to red. I have no doubt, therefore, that the change in the Saginaw's lights from red to green arose from her own swing to the eastward in rounding the buoy. As the buoy was not seen, she was probably some distance below it before her course got S. $\frac{1}{2}$ E.

Upon this view of the manner in which the collision happened, both vessels should, I think, be held to blame. Neither vessel was noticed by the other in adequate time for a complete watch and observation of course and intention, nor for a clear and intelligible interchange of signals, such as was necessary to prevent misunderstandings. Each gave the proper signal, but no answers were given or received by either until too late. The confusion and mistakes in the testimony are attributable perhaps to the suddenness of the danger when first apprehended. The lookout on the Saginaw was certainly very remiss in not seeing and reporting the Persia when she was more than a half mile away, and much sooner than the pilot saw her hull, when it was much nearer than that. Had she been seen and reported while the Saginaw still showed her red light only to the Persia, when certainly but little if any over a half mile distant, the Saginaw would have kept to the westward and avoided collision, instead of starboarding and turning as she did, to the eastward, so much as to shut out her red light before she ported.

The Persia's pilot heard no answer to his signal of one whistle, or of two whistles, but the mate told the pilot that he heard an answer of one whistle to the first signal of one blast. No such answer, however, had been given; and when, after that, the pilot of the Persia saw the Saginaw's two lights, and then the green light alone, he knew that the Saginaw was proceeding contrary to her supposed answer, that the Saginaw had probably neither seen nor heard the Persia, and that the supposed understanding was a misunderstanding.

ing, and that he was therefore bound under inspectors' rule 3 to reduce his speed to bare steerage way with a signal of three blasts, until a common understanding was had, or else to rely on the Saginaw to keep out of the way under the starboard hand rule, while the Persia kept her course, as would be required if the situation were to be treated as an original one at that time. Had the Persia observed either of these rules, collision would have been avoided.

The Persia, on first seeing the Saginaw's red light a trifle on her starboard bow, was bound to port as she did. The Persia's pilot had no right to suppose that after a signal of one whistle, which he had given and understood to be answered with one, the Saginaw would attempt to go ahead of him without a signal of two whistles. He heard no such signal at all; and the two blasts, which the other officers swear to hearing, was after the Saginaw had swung to the eastward so as to show her green light only, and after the Persia had starboarded. This was no justification, therefore, of the Persia's starboarding at that time. Considering the previous signal of one whistle by the Persia, and the supposed assenting answer reported to the pilot by the mate and the evident contrary navigation by the Saginaw, the situation was in my judgment, from the Persia's point of view, precisely the one provided for by inspectors' rule 3, as above stated. Instead of observing that rule, the pilot assumed that the Saginaw would continue her course down the bay without change, and he therefore starboarded, giving at the same time a signal of two whistles. The pilot, as I have said, heard no answer. The Persia's other witnesses say this signal was answered by a signal of two whistles from the Saginaw. This was a mistake. The Persia had not then been noticed by the Saginaw, and the situation from the Persia's point of view was evidently, as I have said, either one of uncertainty under inspectors' rule 3, or else one of the starboard hand rule, as an original situation. The Persia in violating both rules took the risk of any further misunderstanding of signals.

The Persia's master and mate say that the Persia's engines were stopped at the time the two lights were seen, though not reversed until after the Persia swung two or more points to port and the Saginaw's red light was again disclosed. Even if the engines were stopped when the Persia starboarded, that would not have been a compliance with inspectors' rule 3; and a sketch of the navigation, as well as the log entries, compel me to believe that the engines were not stopped until the Saginaw's two lights were seen the second time. The Persia's master and mate have, I think, made the same error in their testimony as to the occasion of stopping that they manifestly made as to the bearing of the two colored lights on their starboard bow when first seen, viz. that both those occurrences were when those lights were seen the second time, and not when first seen. If the engines were stopped when the two colored lights were first seen, I cannot bring the Persia ahead of the Saginaw. The engineer's log and the pilot's testimony do not agree with any such separation of the orders to stop and to reverse as the interval sufficient for the Persia to change two points to port would require.

The log has the entry of the order to stop and reverse as a single order at 5:35; the scrap-log has the collision entered as at 5:35; the third officer says the engine was not stopped any length of time; and the engineer twice says the order to reverse followed instantly the order to stop, as the log itself indicates.

The situation when the Persia starboarded was too far from the collision to be deemed a situation in extremis. It could not have been so regarded by the Persia's officers; for, if so, they would naturally not only have reversed at once, but would have worked her two propellers in contrary directions, so as to turn her head very rapidly to port. Had that been done, she would certainly have avoided the Saginaw. This, however, does not absolve the Saginaw from blame in not observing the Persia at a reasonable distance, and therefore avoiding the change in her own lights by her swing to the eastward, and the subsequent embarrassment to the Persia's navigation.

It is remarkable that none of the signals given by either vessel, when about a half or a third of a mile apart, were heard by the other; that no answer was in fact obtained by either; and that neither observed the requirements of inspectors' rule 3. I do not feel justified in ascribing the double failure to hear each other's signals to abnormal atmospheric conditions in apparently clear weather, when the vessels were so near to each other; and no other explanation of this failure is apparent except a lack of sufficient attention to the signals given by each. If the latter is the explanation, it equally affects both vessels with fault. But aside from this consideration, I think both should be held to blame for the other reasons stated; and decrees may be entered accordingly.

THE NYMPHAEA.

THE MAY.

GRAHL v. THE NYMPHAEA.

STAG LINE, Limited, v. THE MAY.

(District Court, S. D. New York. October 6, 1897.)

COLLISION—FOG—LOWER BAY—REVERSAL DELAYED—NAVIGATION UNEXPLAINED—DAMAGES DIVIDED.

The steamship May, going out, and the Nymphæa, coming in from sea, came into collision a little to the northward of the swash channel in the Lower Bay in dense fog. The fog signals of each were heard by the other nearly ahead. The course ascribed by each vessel to the other was contradicted, and the navigation of each presented great difficulties, not satisfactorily explained. *Held*, that the cause of collision was the failure of each to check her speed sufficiently, or to reverse in time, and the damages were divided.

Libel and cross libel to recover damages caused by a collision between the steamships May and Nymphæa in the Lower Bay, New York Harbor.

Convers & Kirlin, for the Nymphaea.

Butler, Notman, Joline & Mynderse, for the May.

BROWN, District Judge. The above libels were filed in behalf of the owners of the steamships May and Nymphaea, to recover their respective damages growing out of a collision between those vessels, which occurred in a dense fog about 10 minutes after 10 a. m., of September 27, 1896, in the Lower Bay, not far from black buoy No. 9, a little above the junction of the swash and main channels.

The Nymphaea had been previously at anchor in the swash channel, near its northerly terminus, on account of the fog. At 9:30 a. m., the fog having lifted, with the appearance of clearing weather, she hove up anchor and proceeded up the swash channel on the usual course. When she had nearly reached the red bell buoy at the northerly end of that channel, and on its eastern edge, the fog again shut down thick; and that place not being a suitable place to anchor, she continued on, intending to anchor in proper anchorage ground to the northeastward. She made the red bell buoy, passing from 50 to 100 feet to the westward of it, at a few minutes before 10 a. m., and then rounded on a course of N. $\frac{1}{2}$ E. A few minutes later, on meeting a white vessel outward bound, about 100 or 200 feet to the westward, she changed her course to N. by E., and, as her witnesses state, stopped her engines. Soon after clearing the white vessel, the May's fog whistle was heard, a little on the starboard bow, before the Nymphaea's engines were started ahead, and her engines, it is said, remained stopped for four minutes; and her course was continued N. by E. Shortly after two fog signals had been exchanged, the May came into view, some 300 or 400 feet distant, a little on the Nymphaea's starboard bow; whereupon the engines were reversed full speed, but the stem of the Nymphaea struck the May's port bow about 12 feet from the stem. The blow carried away the stem of the Nymphaea from starboard to port, leaving a piece of the stem in the May's plates; and it also broke the anchor stock on the Nymphaea's port bow and scraped her side for about 16 feet. The upper plates of the May along the flare were ripped up for about 40 feet from the first point of contact. The angle of collision was differently estimated from one-half a point to three or four points.

The May had left her dock above the bridge in the East river at 7:30 a. m. with the aid of two tugs, and got straightened on her course, as the mate says, at about 8 a. m. The weather was changeable, with fog. The vessel went a part of the time at full speed; at other times at half speed, slow, or dead slow. Her full speed was about $8\frac{1}{2}$ knots, that of the Nymphaea a little less. The tide at the time of collision was the last quarter of the flood, and did not much, if any, exceed a knot an hour; an hour earlier it was running somewhat faster. Her witnesses testify that during the dense fog prior to collision, the May was going at "dead slow," i. e. about three knots through the water; that she passed within 200 feet of the black bell buoy at the tail of the west bank, on the west side of the channel, and that from that point she took a course of S. by W. $\frac{1}{4}$

W., magnetic, with the design of making black buoy No. 9, a mile below, on the west side of the channel, and of going a little to the westward of that buoy; that she kept that course (S. by W. $\frac{1}{4}$ W., magnetic) for about five or ten minutes after passing the black bell buoy, when the strong fog whistle of the Nymphaea was heard a little on the port bow twice; that very soon after the second fog whistle was heard from her, the Nymphaea appeared in view, about three points on the May's port bow, whereupon her engine was reversed full speed; but collision occurred as above stated. Each vessel gave an alarm of three blasts and reversed as soon as the other was sighted, but not until then. The May's engines were not previously stopped; the Nymphaea claims that her engines were stopped for four minutes before reversal, as above stated. For each vessel it is claimed that her way through the water was fully stopped at the time of collision.

The channel way in the region of the collision is about 1,000 feet wide. The May claims that the collision was on the westerly side of the channel, and not over one-third of a mile south of the black bell buoy, i. e. about two-thirds of a mile north of the black buoy No. 9, and that the fault is wholly chargeable to the Nymphaea for being on the wrong side of the channel way, for heading some three points across the channel, and for not promptly reversing. The Nymphaea contends that the collision was close upon the easterly side of the channel, about a quarter of a mile above the red bell buoy, and as much to the southward of black bell buoy No. 9, or nearly a mile below the place of collision assigned by the May; and that the May was in fault for being on the easterly side of the channel, for immoderate speed, and for failure to stop and reverse in time.

I am unable to determine the probable place of collision with any exactness from the direct testimony. This testimony on both sides involves estimates of time and speed, which cannot be expected to be accurate. For the Nymphaea it is urged that the short interval of a little over two hours during which the May ran the distance from her pier to the place of collision, against the tide, equivalent to a little over 14 knots, proves that she must have been going much faster than her witnesses state. This interval is not compatible with the considerable time some of her witnesses say that she was running "dead slow." But these computations are close, and would not prove that she may not have been running at slow speed for the few minutes before collision. And so as against the Nymphaea, the contention that the place of collision is so clearly proved to be much more to the northward and westward than the place assigned by her, that her testimony in that regard is to be taken as evidence of fabrication, sufficient to discredit her whole testimony, does not seem to me at all warranted considering the counter testimony.

I am quite baffled by the alleged course of the May (S. by W. $\frac{1}{4}$, magnetic), testified to by her witnesses, after leaving the black bell buoy. Black buoy No. 9 is S. $\frac{3}{4}$ W., magnetic, and about one knot distant from the black bell buoy. The May, according to this, was

heading one-half a point westerly of that bearing; and as the flood tide ran due north at the rate of one knot, if the May was going only at the rate of three knots through the water, as her witnesses say, the real course of the May over the ground must have been about S. S. W., as computation will show; so that when the May got abreast of black buoy No. 9, she would have gone 1,400 feet to the westward of it, or 1,200 feet if when she made the black bell buoy she was 200 feet to the eastward of it; and if the place of collision was from one-third to one-half the distance from the black bell buoy to black buoy No. 9, as the master and pilot of the May estimate, the collision would have happened 300 or 400 feet west of the westerly side of the channel way, which is plainly untrue. I cannot find any error in this computation. So far as I can perceive, therefore, either the May was not on the course alleged by her, or her speed was so much greater than she admits as greatly to diminish the net effect of the tide, and of her course in carrying her to the westward; or else she had previously to the collision found herself on the easterly side of the channel, where the Nymphaea contends she had been, and was taking a proper course to correct her position. Whichever of these explanations may be adopted, I do not see how any superior credibility can be claimed for her story; nor any dependence placed on the supposed place of collision based on her direct evidence.

On the other hand, the evidence of certain disinterested witnesses, the pilots of the Simon Dumois, the Caribee and the Sandy Hook, makes it most probable that the collision was somewhat to the northward of black buoy No. 9. The two former vessels in coming up the main channel through the fog, overtook the Nymphaea a few moments after the collision, and while she was yet backing, though the May had gone out of sight to the westward. The Simon Dumois came near collision with the Nymphaea, and the Caribee was but little astern of her. The pilots of both of these vessels say that they overtook the Nymphaea somewhat above black buoy No. 9. Not long afterwards the steamer Sandy Hook, coming down, and a little before reaching black buoy No. 9, saw the Nymphaea to the eastward, estimated 1,000 feet off. It is suggested that the pilots of the Dumois and Caribee may have mistaken black buoy No. 9 for black buoy No. 7, a mile below. While such mistakes might possibly be made with regard to any of the buoys, as none of them are numbered, except on the map, such a mistake by these pilots does not seem probable in this instance, from the fact that they recognized the "perch and square" black buoy, which is on the westerly side of the swash channel and considerably to the north of black buoy No. 7. The testimony of these pilots also indicates, that they passed near black buoy No. 9; so that if credit can be given to the estimates of their position, the Nymphaea must have been at least as far to the westward as midchannel at the time of collision. This is a position to which the tide would in fact inevitably have brought the Nymphaea from a position a little to the westward of the red bell buoy, unless it were sufficiently counteracted by a port helm, and

it is not certain from her testimony that it was thus counteracted. When approaching that buoy she was heading N. N. W. This was at least two points to the westward of what the pilot calls the true course of the channel. When abreast of the bell buoy, the pilot says that he hauled the vessel around to N. $\frac{1}{2}$ E. He immediately adds that "in the center of the (main) channel, the course is north by east a quarter east"; so that after he had hauled the ship to N. $\frac{1}{2}$ E., he must still have been heading three-fourths of a point to the westward of the main channel course. His course N. $\frac{1}{2}$ E., therefore, would take him three-fourths of a point across the main channel, while the tide also was operating about a point and one-fourth to carry him to the westward.

While unable, therefore, to determine precisely the place of collision, I think it probable that the collision occurred somewhat above black buoy No. 9, and not far from the middle of the channel. The place of the collision is not in itself very important, except as it may affect the confidence to be given to the precise accounts of the navigation testified to by the two vessels. If the collision was above the black buoy No. 9, it must have been about 3,000 feet above the red bell buoy; so that the interval of time after passing the latter buoy must have been greater, or her speed greater, than is to be gathered from the Nymphaea's testimony. I have in truth no doubt that the speed of both vessels was greater than either admit, both from the circumstances above stated, and from the fact that they could not stop by reversing after they were sighted by each other without a contact of considerable violence. This is shown by the wound in the May's upper works, though the angle of collision was small, and from the fact that the Nymphaea's stem was broken and carried away from starboard to port.

The one fault which it seems to me caused this collision was that the vessels did not reverse earlier, and before they came in sight of each other, when the whistles of each must have shown that they were very near. In the case of *The Umbria*, 166 U. S. 404, 417, 17 Sup. Ct. 610, referring to circumstances of very dense fog like the present, it is said: "Under such circumstances it might well be held to be the duty of each steamer to stop and reverse her engines and feel her way until the course of the other had been definitely ascertained." The rule frequently stated, that a vessel in dense fog should not proceed except at a rate of speed that would permit her to come to a dead stop after the other vessel is sighted, provided the latter is going at the moderate speed required by law, is there approved. See *The Batavier*, 9 Moore, P. C. 286; *The Colorado*, 91 U. S. 703; *The Nacoochee*, 137 U. S. 339, 11 Sup. Ct. 122; *Steamship Co. v. Fabre*, 1 U. S. App. 614, 654, 3 C. C. A. 534, and 53 Fed. 288; *The North Star*, 22 U. S. App. 252, 10 C. C. A. 262, and 62 Fed. 71; *The Martello*, 153 U. S. 71, 14 Sup. Ct. 723; *The Britannic*, 39 Fed. 399, and other cases there cited.

In the present case if it were clearly established that either vessel in fact came to a stop in the water before collision, she should be exonerated, and the whole blame fall upon the other. I have care-

fully considered this point upon the evidence, and I am not satisfied that such is the fact as regards either vessel. Upon this ground, therefore, each must be held to blame and the damages and costs divided.

THE ONEIDA.

SUMMERS v. THE ONEIDA.

(District Court, D. West Virginia. January 3, 1898.)

1. COLLISION—STEAMBOATS RACING—MUTUAL FAULT.

The steamer C. C. Martin and the steamer Oneida were racing in the Little Kanawha river, running side by side, the steamer C. C. Martin being near the shore, and while so running the Martin ran against the river bank, and was wrecked. *Held*, that the officers of both boats were guilty of negligence, and the owner of the wrecked vessel is entitled to recover one-half of the damages and one-half of the costs of the proceedings.

2. SAME—DAMAGE.

The owner of the C. C. Martin in good faith expended \$968.35 in endeavoring to ascertain the extent of the injury to the steamer C. C. Martin. *Held*, that he was entitled to recover, upon the grounds of mutual fault, one-half of the amount so expended.

This was a libel in rem by John S. Summers, owner of the steamer C. C. Martin, against the steamer Oneida, to recover damages alleged to have been caused by a collision between the two boats in the Little Kanawha river. On June 25, 1897, the cause was heard upon its merits, and the court delivered an oral opinion finding that the collision grew out of racing, and occurred while the boats were running side by side; and that the Martin, being nearer the bank, was driven against it by the collision, and sunk. The court found that both boats were in fault, and decreed that the libellant recover one-half the damages sustained by the Martin, together with one-half the costs. The cause was then referred to a master to ascertain and report the total damages sustained by the libellant by reason of the collision. The master having filed his report, the cause is now heard on exceptions thereto.

V. B. Archer, for libellant.

Van Winkle & Ambler and John J. Davis, for claimant.

JACKSON, District Judge. This cause was heard before me upon its merits on the 25th day of June, 1897, at which time a decree was entered holding that the officers in charge of the steamer Martin and of the steamer Oneida were mutually at fault, and that the costs of the suit, and the damages arising out of the injury complained of in the libel, should be equally divided between the libellant and claimant. At the same time the court directed a reference to a master commissioner to ascertain and report to the court the total damages sustained by the libellant by reason of the collision, as well as whether there was total loss of the steamer Martin, and, if so, its value. The master having filed his report in response to the decree

entered on the 25th day of June, 1897, the cause now is heard upon the exceptions to the master's report.

The exceptions as to the value of the *Martin*, found by the master, will be overruled. Whatever might have been the impression of this court as to the value of that vessel as an original question, still, the court having made an order of reference to the master, who has examined a large amount of evidence in the cause, and filed his conclusions as to its value, is not disposed to disturb that report, unless it is clearly in conflict with the weight of the evidence in the case.

There is a wide margin of difference between the witnesses who testified as to the value of the vessel, the highest fixing its value at the sum of \$6,000, and some as low as \$1,000. The commissioner basis his estimate upon the fact that there had been a bona fide offer of \$3,100 made for the vessel a short time previous to the collision, and that subsequent to that offer there was considerable money expended upon the boat to keep her in repair. It appears from the evidence that the boat was actually sold at public auction, in 1894, for \$2,410, and that subsequent to that date about \$1,700 of permanent improvements were placed upon her by her owners. Discarding what appear to be the extreme and extravagant opinions as to the value of the boat, the commissioner finds that the boat was a total loss, and that it was worth about \$3,100 basing his conclusions upon the evidence of those who were best acquainted with the boat and its market value at the time of the collision. I am of the opinion that the weight of evidence sustains the commissioner in his conclusions that the boat was a total loss, and that its value was \$3,100. I am not, therefore, disposed to disturb the conclusions reached by him.

The fifth and sixth exceptions to the master's report refer to the allowance by the master of \$968.35 as the amount expended by the owners of the *Martin* in attempting to raise her, with the view of ascertaining what might be saved from the wreck. The *Martin* was not insured, and it was clearly the duty of the owners of the vessel either to make an effort to save the boat and its machinery, or to notify the owners of the *Oneida* that they had abandoned the *Martin* as a total wreck, and that its owners held the owners of the *Oneida* responsible, in order that they might take charge of the sunken vessel with the view to ascertaining the liability of the *Oneida* arising out of the collision. It is apparent from the pleadings and the evidence that the *Oneida* claimed that she was in no wise at fault, and therefore no responsibility attached to her for the collision. It therefore became incumbent upon the owners of the *Martin* to make an effort to save, if possible, something from the wreck of the sunken vessel. This they did, and incurred an expense of \$968.35.

The supreme court in the case of *The Baltimore*, 8 Wall. 386, in an opinion delivered by Justice Clifford, who was an admiralty judge of great experience, held that "restitution or compensation is the rule in all cases where repairs are practicable, but, if the vessel of

the libelant is a total loss, the rule of damage is the market value of the vessel." It could not be determined, without an effort to raise the vessel, whether it was a total loss. The effort to raise her was for the mutual interest of both parties, as the court had held in this case that there was a mutual fault and a divided responsibility. In the case of *The Venus*, 17 Fed. 926, Judge Brown held that "the ordinary rule would not admit of a recovery beyond the amount of a total loss; that is, the full value of the vessel at the time it was sunk. To this," he says, however, "may plainly be added the cost of raising the boat, when that is necessary, in order to ascertain whether she should be abandoned as a total loss or repaired."

The extent of the liability of the owners of the *Oneida* could not be determined until there was an effort made to reclaim the boat. It is apparent that this effort was made in good faith, and the commissioner so finds. The only question in my mind is whether I should refuse to allow the libelants, the owners of the *Martin*, the full amount expended in an effort to raise and reclaim the boat, and its engines, tackle, etc. I have held that this is a mutual fault and a divided responsibility. I have also decided that it was the duty of the owners of the *Martin* to make an effort to raise the boat, and to reclaim anything that could be saved from the wreck. They elected to this, and in this respect strictly complied with what was clearly their duty under the circumstances. Taking this view of the case, I am of the opinion that the respondents, the owners of the *Oneida*, are justly chargeable with one half of the expense of the effort to raise this boat, and that the owners of the *Martin* are chargeable with the other half. For the reasons assigned I overrule the fifth and sixth exceptions to the master's report, so far as it charges the *Oneida* with the whole amount of the cost and expense of the attempt to raise the *Martin*, and make them only liable for one-half of it.

A decree in this case will be drawn fixing the value of the boat at the time of her loss at \$3,100, dividing that amount equally between the owners of the *Martin* and the owners of the *Oneida*; and also fixing the amount expended by the owners of the *Martin* to raise and reclaim the boat at the sum of \$968.35, which is also to be divided equally between the owners of the two boats; and that the costs will be taxed and equally divided between the parties, either party getting credit for any portion of the costs that they have already paid, pending this litigation, which the clerk of the court will credit the party with upon producing proper vouchers for the same.

The exceptions taken by the libelant's counsel as to the allowance to be made to the watchman is sustained, and, in lieu of an allowance of \$2 a day, the court allows \$1.50 a day.

THE MARY E. CUFF.

FENNO et al. v. THE MARY E. CUFF.

(District Court, E. D. New York. November 30, 1897.)

COLLISION—NEGLIGENT ANCHORAGE.

A master who, on a dark evening, in spite of high wind and an approaching storm, anchors his schooner in the usual way, with only one anchor out, when he might have used two, and leaves no one on board to watch during the night, is guilty of negligence; and his vessel is liable for damages caused by dragging her anchor in the storm, and colliding with another vessel, anchored in a proper place. It is no excuse that others cared for their vessels, on the same occasion, in the same way.

This was a libel in rem to recover damages caused by collision.

Wilcox, Adams & Green, for libelants.

Thomas J. Ritch, for claimant.

TENNEY, District Judge. This is an action brought by Lawrence C. Fenno, executor, and Laura W. Lowndes, executrix, of the last will and testament of Walter C. Tuckerman, deceased, against the schooner Mary E. Cuff, her tackle, etc., to recover damages in a cause of collision, wherein the sloop yacht Liris was injured and sunk in the Port Jefferson Bay, on the night of November 5, 1894. It is admitted that the yacht Liris was sunk in Port Jefferson harbor, on the night of November 5, 1894, and the question here to be decided is which schooner, the Mary E. Cuff or the Observer, caused such sinking and injury to the yacht Liris. The libelants claim that it was the schooner Mary E. Cuff, while the claimant contends that it was the schooner Observer. November 5, 1894, was a wet and stormy day, with the wind, at Port Jefferson, in a northeasterly direction. In the evening of that day the storm increased, and the wind changed, and was blowing hard from the northwest. It appears that when last seen on the night of the collision the Mary E. Cuff was lying at anchor in the neighborhood of 1,000 feet to the northwest of the yacht Liris, while the Observer was lying at anchor from 300 to 500 feet to the north or northeast of the yacht Liris. The captain of the schooner Cuff testifies that, if a straight line was drawn from the Cuff to the Liris, the Observer would be to the eastward of such line some 300 feet, and the owner says some 200 feet. On the morning of November 6th, the Cuff was found near to the Liris, with her anchor over or across the anchor chain of the Liris, while the Observer had drifted in a southerly direction some 400 or 500 feet beyond the Liris. No one saw the collision. We have, therefore, in deciding which schooner collided with the Liris, to depend in a great measure upon the direction of the wind, and upon the location of the two schooners, the Cuff and the Observer, on the night of November 5th and the morning of November 6th. In addition to this, however, there are certain marks and scratches upon the Cuff, and splinters from the Liris found upon her deck, which aid

somewhat in coming to a proper conclusion in this case. I am clearly of the opinion that the Mary E. Cuff drifted down and collided with the yacht Liris, and caused her to sink, and sustain the damages she did. It is impossible for me, considering all the circumstances in this case, to arrive at any other conclusion.

It is contended by claimant, however, that if it be found that the schooner Cuff did collide with the yacht Liris, yet there is no liability, for the reason that the Cuff was properly anchored, and left in the condition that any prudent man would have left her, and that the accident was inevitable, and beyond human forethought and skill to prevent. This contention is not sound. There is no claim that the Liris was anchored in an improper place. No such defense is set up in the answer, nor does the evidence warrant any such suggestion. The fact is, the schooner Cuff dragged her anchor some 1,000 feet, and drifted upon and collided with the yacht Liris, as hereinbefore stated. Moreover, the day preceding the accident was cloudy and windy, and had been peculiarly threatening. In the evening the wind had changed to the northwest, and was blowing hard. The night was dark, and a storm was at hand. The owner and master of the schooner Cuff had timely warning of this increasing and approaching storm, and should have put their schooner in order. This they signally failed to do, and must be held responsible for their neglect. They anchored their boat in a place of convenience. They left it in the usual way. They cast but one anchor, when they had two at hand. They left no one on board to guard and watch the vessel during this stormy night. This was negligence. Had they taken the precaution which prudence and care demanded, there might have been no collision. The fact that others cared for their vessels, on this night, in the same way, does not excuse or acquit the claimant of his neglect. There must be a decree for the libelants, with an order of reference to ascertain the amount of damages.

SMITH v. McINTYRE et al.

(Circuit Court, N. D. Ohio, W. D. November 20, 1897.)

No. 1,257.

1. COURTS—FINAL RECORD—FOLLOWING STATE PRACTICE—RULES.

In an action at law, brought in a United States circuit court, in Ohio, against some 40 defendants, plaintiff moved for an order dispensing with or remodeling certain records, and modifying the requirements as to papers on writ of error. *Held*, that what constitutes the final record in the circuit court is a matter regulated by the statutes of Ohio, which the court cannot change, and by the rules of the circuit court heretofore established.

2. APPEAL AND ERROR—TRANSCRIPT—RULES—FINAL RECORD.

What shall constitute the transcript upon which a case may be carried to the circuit court of appeals is a matter regulated by the acts of congress and the rules and regulations of that court, which the court below has no power to change, and it cannot overhaul the record, after final determination, and, without consent of both parties, remodel it, for the convenience of the plaintiff in error, or to save him expense.

This was an action at law by A. Lee Smith against John H. McIntyre and numerous others to recover possession of certain lands.

Hurd, Brumback & Thatcher, for complainant.

Potter & Emery and Swayne, Hayes & Tyler, for defendants.

HAMMOND, J. This is a motion by the plaintiff asking an order to dispense with recording upon the journal and record all the answers filed herein, except one, to be selected by the defendants; also that the clerk be directed to send the original bill of exceptions to the circuit court of appeals, instead of a copy, and, alternatively, that he be directed to send the original answers filed in the case, without transcription into the certified copy of the record which is to be sent to the circuit court of appeals. This seems to us a somewhat anomalous procedure. It does not yet appear that there has been any writ of error sued to the circuit court of appeals, or that any writ of error has been perfected in the ordinary course of such procedure. The plaintiff files, along with his motion, the correspondence between his attorneys and the presiding judge of the circuit court of appeals, in which that learned judge points out to the plaintiff the impossibility of securing, by order of that court, any relief by the abbreviation of the record in the matters referred to; and also to efforts that have been made to secure, by legislation, an amelioration of the heavy costs of appellate proceedings under the law and rules and regulations as they now exist, and in which is also suggested that a part of the relief asked for might be secured by some order of this court for the abbreviation of the record. Upon a careful consideration of this subject, we are constrained to hold that legislation is the only proper remedy, even in its application to the making up of the records of this court. The parties make the record in all courts, and not the court. The parties are responsible for any enormities in respect of the length of the record, and not the court. Neither are the officers of the court, who must perform the duties required of them by the parties, in any sense responsible

for the enormities of practice that have grown up in respect of records. It is the duty of the parties to consider the question of the kind of record they will make, and the probable cost of their litigation, when they commence the suits, and as they progress through them. The rules of practice provide ample remedies for excluding from the record any irrelevant matter, if attention is given to it at the time when it is introduced into the proceedings. For example, oftentimes the testimony of one or two witnesses would be ample to sustain a fact, and yet the parties will go to the enormous expense of sometimes introducing from 20 to 25 or more witnesses, or perhaps a lesser number, and no attention is paid at the time to the cost of such a proceeding. And so it is, with a reckless disregard of all questions of costs, papers and documents that might just as well be left out are filed, and made part of the record, and it is not until the costs come to be paid, or have to be provided for, and after the work is done, that any attention is paid to the question of lessening the costs of litigation. Take this case for example: Here were 80 acres of land, upon which a village had been built, claimed by the plaintiff in this case to be his. His right to it very clearly depended upon the construction of a will, which is written upon probably one page of a sheet of paper. By bringing one suit against one of the tenants, the construction of the will might have been settled, and the other suits deferred until that had been settled; or, if brought separately because of statute of limitations or other reason, have a test case made, and let the others lie over. If it were decided against the plaintiff ultimately and finally, he need not have brought or proceeded further with the suits against the other tenants of the property, and this would seem to have been a wise way to have conducted such a litigation. But, instead of this, the plaintiff inconsiderately brought one suit against all the tenants, called them all in with process, and required them to answer; and, without any effort to abbreviate the ordinary progress of such a proceeding, waits until the transcript comes to be made up for the court of appeals to go back over the proceeding, and asks to have the record abbreviated and reconstructed for his benefit. It does not seem to us that any party to the litigation has a right to demand much consideration from a court under such circumstances. More than this, the court of original cognizance does not technically, and is not required technically, to proceed with any reference whatever to any appeals or writs of error that may be taken from its judgments in the matter of making up its record. The record in this case is the record of this court, and is made with reference to the rights of the parties in respect of this court, and not in respect of any other court, or any other proceedings.

Now, the purpose of all the law, both common and statutory, in regard to the enrollment of the final record, proceeds upon the rights of the parties to perpetuate the testimony of that which was done; and it has no other foundation or reason for existence than that. In olden times it was required to be enrolled and kept upon parchment, as the most imperishable method of preserving the evidences of the litigation. What shall constitute the final record in

this case, to be kept here for the preservation of the testimony so far as it relates to the evidences of the title of the parties interested in this ejectment suit, is a matter regulated by law, and, as we understand it, by statute in Ohio, to which we conform in the practice of this court. That which belongs to the record, and is required to be enrolled as such, is regulated by statute, and we do not see that we have any power to alter or change it. The parties may, by their consent and agreement, possibly do this; but in this case the defendants decline to make any agreement to accommodate this matter. The answers in this case are numerous, but they are numerous because the plaintiff called in numerous parties to litigate with him. He proposes, possibly, to take a writ of error against each and every one of these defendants, and he asks us now to compel these defendants, in the appellate tribunal, to have their rights decided upon somebody else's answer, which we are asked to require them to adopt. We do not feel that we have the power to do this. What shall constitute the record of the appellate tribunal is a matter wholly within the control of the appellate tribunal itself, and not of this court, as has been well pointed out to the plaintiff by the presiding judge of that court. We cannot now, as we understand it, overhaul this record, and discard so much of it as the plaintiff may think immaterial and irrelevant, and compel the defendant to accept the plaintiff's judgment as to what is material and relevant to go into the record. We do not see that we have any more power than the appellate tribunal has to compel the clerk to send up the original papers in the case in lieu of a transcript thereof.

We have suggested to the defendant's counsel that he might very well agree to copy into the transcript to be sent to the appellate tribunal only one of these answers, with a following memorandum, showing any distinctive differences that there might be in the other forty; but he declines to agree to any such order and reconstruction of the record for the benefit of the plaintiff, and to facilitate his writ of error. We do not see how the original papers can be sent to the court of appeals, without consent of parties, by any order that we can make. If that court chooses to direct that it shall receive the original papers instead of the certified copies, possibly it might be accomplished in that way; but, as we understand from the language of the presiding judge, that court does not feel authorized to so change the statutes and the rules of practice without legislation. Certainly we have no more power to send up the original papers than that court has. It therefore comes to this:

First. That which constitutes the final record in this court is a matter regulated by the statutes of Ohio, which we cannot change, and by the rules of this court heretofore established.

Second. What shall constitute the transcript upon which the case may be taken to the appellate tribunal is a matter regulated by the acts of congress and the rules and regulations of that court, which we have no power to change.

Third. We cannot overhaul the record that has already been made by the parties, after the case has been finally determined, and, without the consent of both of them, remodel that record for the purpose

of abbreviating it for the convenience of, and lessening the expense to, him who desires to take the case to another tribunal.

I am authorized by Judge RICKS, who sat with me, and heard this motion, to say that he concurs in the conclusions that have been reached. The motion is therefore denied.

COIT & CO. v. SULLIVAN-KELLY CO. et al.

(Circuit Court, N. D. California. December 31, 1897.)

No. 12,510.

COURTS—PRACTICE—UNITING LEGAL AND EQUITABLE ACTIONS.

Seeking recovery under one complaint against a corporation for goods sold and delivered to it, and against an individual alleged to have an interest in its business, and the full control, management, and disposition of its property and assets, is an improper joinder of legal and equitable causes of action, and will not be permitted in the federal courts, though allowable in the courts of the state where the action was brought.

L. T. Hatfield, for plaintiff.

Robert T. Devlin, for defendants.

HAWLEY, District Judge (orally). This action is brought to recover the sum of \$3,682.58, alleged to be a balance due and owing from the defendant the Sullivan-Kelly Company for goods, wares, merchandise, and paint supplies sold and delivered by the plaintiff to said corporation. The defendants have separately appeared, and moved to dismiss the action, and have also separately interposed a demurrer to the amended complaint. One ground of the demurrer, and the only one that need be noticed, is "that there is a misjoinder of parties defendant, in this: that Robert T. Devlin, alleged to be a trustee, is made a party with the defendant the Sullivan-Kelly Company, alleged to be a debtor." The cause of action against the defendant Devlin is stated in the following averment:

"That under an arrangement between defendants, the Sullivan-Kelly Company and Robert T. Devlin, the details of which are unknown to plaintiff, defendant Robert T. Devlin has become a party in interest in the ownership, control, and management of the business and property of the Sullivan-Kelly Company, to the extent of having the sole control of the disposition of the assets of the Sullivan-Kelly Company, the collection of the money arising therefrom, and the disbursement thereof, for distribution among all the owners of such property and business, and for the payment of all indebtedness of the Sullivan-Kelly Company, including the indebtedness to plaintiff; and he is now, and for more than five months prior to the commencement of this action has been, so in control of such business and property of the Sullivan-Kelly Company, and the disposition of the money arising therefrom, and is now, and at all times within said period of five months has been, beneficially interested therein."

The plaintiff "prays judgment against defendants for the sum of three thousand six hundred and eighty-two and ⁵⁸/₁₀₀ dollars, with interest, * * * and for such other and further relief as plaintiff may be entitled to in law, and under the practice of this court."

The character of this complaint cannot be classified either as an

action at law or a suit in equity. The plaintiff really seeks to amalgamate the two causes in one complaint. The defendants ought, under the rules and practice of this court, to have made a motion to compel plaintiff to elect whether it would proceed at law or in equity, which motion would have been granted. The motion to dismiss will, however, be denied.

If the complaint is to be treated as an action at law to recover from both defendants the amount of money alleged to be due, it is wholly insufficient, because there are no allegations which aver any contractual relations between the plaintiff and the defendant Devlin, or any averment of any character to show that defendant Devlin, in any way or manner, or by any transaction, had become obligated to pay plaintiff any sum or amount of money whatever. As a bill in equity, it is defective in several respects,—among others, that it does not show that the plaintiff has no clear, speedy, or adequate remedy at law. Moreover, the law is well settled that, before a plaintiff can maintain a suit in equity to subject property in the possession of one party to the payment of a debt due from another party, he must first bring his action at law against the debtor to establish and enforce his claim. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Tube-Works Co. v. Ballou*, 146 U. S. 517, 523, 13 Sup. Ct. 165; *Hollins v. Iron Co.*, 150 U. S. 371, 379, 14 Sup. Ct. 127. It is, however, unnecessary to discuss the merits or demerits of the averments in the complaint. It is enough to say that the real objection to the complaint is that the plaintiff has attempted to unite an action at law with a suit in equity, as under the state practice in the state courts he is permitted to do, but that practice does not prevail in this court. The plaintiff may bring his action at law against the Sullivan-Kelly Company to recover the sum of money alleged to be due, and it may also bring a suit against the defendant corporation and Devlin to subject the assets in the possession of Devlin to the payment of any judgment that may be recovered against the corporation; but it cannot unite a suit in equity with an action at law, in the same complaint. The distinction between law and equity must be observed in all actions or suits brought in the United States courts. The equity jurisdiction of the courts of the United States is derived from the constitution and laws of the United States. The practice is regulated by the various courts and by the rules established by the supreme court, unaffected by any state legislation. In the United States courts, the union of equitable and legal causes of action are not allowed. These general principles are too well settled to require an extended discussion. *Bennett v. Butterworth*, 11 How. 669; *Fenn v. Holme*, 21 How. 481, 484; *Thompson v. Railroad Co.*, 6 Wall. 134, 137; *Payne v. Hook*, 7 Wall. 425, 430; *Hurst v. Hollingsworth*, 100 U. S. 100, 103; *Railroad Co. v. Paine*, 119 U. S. 561, 7 Sup. Ct. 323; *Ridings v. Johnson*, 128 U. S. 212, 217, 9 Sup. Ct. 72; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Scott v. Armstrong*, 146 U. S. 499, 513, 13 Sup. Ct. 149. The demurrers are sustained, and plaintiff given 20 days in which to amend his complaint.

McCAIN et al. v. CITY OF DES MOINES et al.
(Circuit Court, S. D. Iowa, C. D. January 11, 1898.)

No. 2,355.

1. FEDERAL COURTS—JURISDICTION—FEDERAL QUESTIONS.

A suit by property owners to enjoin city officials from exercising any jurisdiction over annexed territory, on the ground that the statute extending the corporate limits is void under the state constitution, cannot be maintained in a federal court, on the theory that the assessment of taxes, etc., by the city, being without warrant of any valid law, will be a taking of property without due process of law, and a denial of the equal protection of the laws. The real issue in such case is whether the statute enlarging the corporate limits is invalid under the state constitution, and no federal question is involved.

2. CONSTITUTIONAL LAW—FEDERAL JURISDICTION—DECISIONS OF STATE BINDING UPON FEDERAL COURTS.

The determination of a question involving the construction of a state constitution by the highest court of a state is absolutely binding upon the courts of the United States, where no question affecting the constitution of the United States is involved. *State v. City of Des Moines* (Iowa) 65 N. W. 818, approved.

This was a suit in equity by Walter M. McCain and others against the city of Des Moines and its officials to enjoin them from exercising any jurisdiction over certain territory included in the recently extended limits of the city. The cause was heard on motion for a preliminary injunction and demurrer to the amended bill.

Wishard & Clark, for complainants.

N. T. Guernsey, for defendants.

SHIRAS, District Judge. In the year 1890 the general assembly of the state of Iowa passed an act entitled "An act to extend the limits of cities and for other purposes incident thereto" (*Laws* 1890, p. 3), which by its terms was limited to cities which by the census of 1885 were shown to have a population of 30,000 or more. Acting under the provision of this act, the city of Des Moines exercised corporate jurisdiction over the territory which had formerly been included within the limits of the incorporated town of Greenwood Park; and the board of public works of the city entered into contracts with third parties for the paving of streets extending through the town of Greenwood, and the city also refunded its public debt by the issuance of bonds under the provisions of an act of the state legislature approved March 25, 1890. In March, 1894, there was brought in the district court of Polk county, Iowa, a proceeding by quo warranto, in the name of the state of Iowa, ex rel. A. G. West, against the city of Des Moines, in which it was claimed that the act of the general assembly extending the city limits was in its nature special legislation, and therefore void under the provisions of the state constitution, which forbid the enactment of special laws for the incorporation of towns and cities, and a judgment of ouster was prayed against the city of Des Moines for the purpose of preventing it from further exercising governmental authority over the territory added to the city under the act of March,

1890. The case was carried to the supreme court of the state, wherein it was held that the legislative act was clearly unconstitutional, because its terms were such that it could only apply to the city of Des Moines; and it was therefore, in effect, the same as though that city had been named in the act as the corporation intended to be affected thereby, and hence the act was special in its nature, and therefore within the constitutional inhibition. The court further held, however, that the delay in instituting proceedings, coupled with the fact that many and large interests had become involved and would be affected by a judgment of ouster, constituted ground for estopping the attack upon the legality of the extension of the city limits, and the decree of ouster was refused. *State v. City of Des Moines (Iowa)* 65 N. W. 818.

In October, 1897, the present proceedings were commenced by the complainants, who are residents and property owners within the territory formerly constituting the town of Greenwood, and now within the limits of the city of Des Moines, as defined in the act of the legislature; the defendants named in the bill being the city of Des Moines, the members of the board of public works of the city, the Des Moines Brick Manufacturing Company, and the incorporated town of Greenwood Park. The bill recites the facts upon which it is claimed that the legislative act is unconstitutional; avers that the former authorities of the town of Greenwood Park have ceased to act; that the city of Des Moines is exercising jurisdiction over the territory of Greenwood Park, and, through its board of public works, has contracted for a large amount of paving to be done in the streets extending through the added territory; that, for the cost thereof, the city will assess and levy heavy taxes upon the property of complainants; that the city will continue to exercise municipal authority over such territory, and will subject the property and the property owners therein to heavy taxes to pay the refunded city debt; that thereby the property of complainants will be taken without due process of law, and in violation of the provisions of the federal constitution, wherefore it is prayed that this court will perpetually enjoin the city of Des Moines and its board of public works from exercising over the territory of Greenwood Park any function of municipal government, or authority or jurisdiction for the purpose of taxation, or for the work of internal improvement therein, or from levying any taxes, special or general, upon the property within said town, or from interfering with the officers of said incorporated town of Greenwood Park in the administration of its municipal affairs; that the incorporated town of Greenwood Park be authorized and enjoined to exercise, for its own future benefit, all functions of municipal government, taxation, and the carrying on of works of internal improvement included, and said town be authorized to prosecute its ancillary bill against the city of Des Moines for settlement of the matters averred in the bill.

The bill on its face shows that the several parties named as complainants and defendants are all citizens of Iowa or corporations created under the laws of that state, and hence jurisdiction in this

court cannot be assumed on the ground of diverse citizenship. In support of the federal jurisdiction it is averred in the bill that the controversy is one arising under the laws and constitution of the United States; that the acts of the city are such that they deprive complainants of their property without due process of law, and deny them the equal protection of law, and take the property of complainants without due compensation, all of which is alleged to be in contravention of the federal constitution. The averments to the effect that the controversy is one arising under the federal constitution or laws, or that the parties are denied due process of law, and the like, are merely conclusions of law; and the court must look to the facts averred in the bill to see whether they support the conclusions sought to be based thereon; for, unless the facts averred show a ground of jurisdiction, it will not be inferred from mere averments of legal conclusions.

Do the facts averred show that the controversy between the parties is based upon any provision of the federal constitution or laws, so that it can be said that the case is one arising under the same? The real gist of the controversy is the question whether the corporate limits of the city of Des Moines have been in fact extended over the territory formerly constituting the town of Greenwood Park, so that the city, through the proper authorities, can lawfully control the extension and paving of the streets in that territory, and impose taxes on the property therein for that and other municipal purposes. If the city of Des Moines has acquired the right to exercise municipal control for the purposes named over the territory in question, then it is clear that the complainants are not entitled to a decree forbidding the city of Des Moines from continuing to exercise this control over such territory; nor are they entitled to a mandatory injunction compelling the former corporation of Greenwood Park to reassume the exercise of corporate power over such territory; nor do they show themselves entitled to a decree forbidding the city of Des Moines from levying taxes on their property to meet corporate expenses. The pivotal point, therefore, in the controversy, is this question whether the city of Des Moines can lawfully exercise its municipal authority over the territory of Greenwood Park, as being part of the city of Des Moines. There is no provision of the federal constitution or laws which will be involved in the solution of this question. The determination thereof depends wholly upon the construction of the state constitution and laws, and it is a question upon which the decision of the supreme court of the state is absolutely binding upon this court. The powers that may be lawfully exercised by the city, and the extent of the territory over which such powers may be exercised, are questions depending upon the laws of the state of Iowa, under which the corporation was originally created, and which authorize the extension of the city limits as need therefor may arise; and thus it appears that the case is not based upon any right created or immunity guarantied by the federal constitution or laws.

Thus, in *Starin v. City of New York*, 115 U. S. 248, 6 Sup. Ct. 28, it is said:

"The character of a case is determined by the questions involved. *Osborn v. Bank*, 9 Wheat. 738, 824. If, from the questions, it appears that some title, right, privilege, or immunity on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not."

The question involved in that case was whether the city of New York had, under its charter, the exclusive right to establish ferries between Manhattan Island and the shores of Staten Island. The supreme court held that this question depended upon the construction of the city charter, and that it did not involve a federal question, and hence the United States circuit court could not take jurisdiction thereof.

In *Shreveport v. Cole*, 129 U. S. 36, 9 Sup. Ct. 210, it was held that:

"Unless this suit was one arising under the constitution or laws of the United States, the circuit court had no jurisdiction; and if it did not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or some law, upon the determination of which the recovery depended, then it was not a suit so arising."

Applying this test to the present case, what is the result? There can be no question that the complainants herein could have brought the suit in the state court had they chosen that forum. Can there be any question that they could have presented every ground they rely upon as a foundation for the claim that the asserted extension of the corporate limits and corporate powers of the city of Des Moines over their property is illegal, and therefore invalid, without quoting any section or clause of the federal constitution or laws? Is it not clear that whatever court undertakes to pass upon the rights sought to be enforced in this case must solve the problems by a construction of the state constitution and laws, and that, in determining the pivotal question whether the property formerly included within the town of Greenwood Park is now within the limits and subject to the control of the city of Des Moines, no clause or provision of the federal constitution or laws will be referred to or be brought up for consideration? It must, then, be held that this case is not one wherein the right of the complainants to ask a decree restraining the city of Des Moines from continuing to exercise corporate authority over the territory in question is based upon any provision of the federal constitution or laws, and, as the right of recovery or to the relief sought would not be affirmed by one construction or denied by another construction of the federal laws, it cannot be rightfully said that the controversy is one arising under the federal constitution or laws, and jurisdiction in this court cannot be maintained on that ground.

Equally unavailing are the general averments that, unless restrained, the city of Des Moines will continue to exercise its corporate authority over the property of complainants, will continue the work of improving the streets in the territory of Greenwood Park, and will levy taxes on the property therein for the payment of street improvements and of the city debt, and that thereby the

property of complainants will be subjected to burdens without due process of law, and be taken without compensation. It is open to complainants to attack the validity of the asserted extension of the city limits in the state courts, unless that question is settled by the decision of the supreme court of Iowa in the case already cited. There is no provision in the laws of Iowa which preclude the complainants from obtaining a hearing upon all the questions which are presented by the bill filed in this suit. Of a case brought for that purpose the state court would have jurisdiction. If, in the progress thereof, the complainants should seek to rely upon any right or immunity granted by the federal constitution or laws, the state court could give them the full benefit thereof; or, if such benefit was refused, the parties could carry the question before the supreme court of the United States, and obtain protection therefrom.

Thus, in *City of New Orleans v. Benjamin*, 153 U. S. 411, 14 Sup. Ct. 905 (a case which in some of its features is similar to the one now under consideration), it was held that the circuit court had not jurisdiction, it being therein said that:

"Ordinarily, the question of the repugnancy of a state statute to the impairment clause of the constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the constitution and laws of the United States require (*Chicago & A. R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 1 Sup. Ct. 614, 617); and, if there be ground for complaint of their decision, the remedy is by writ of error, under section 709 of the Revised Statutes."

It is not claimed or averred in this bill, nor could it be so claimed rightfully, that, under the constitution and laws of Iowa, a party can be deprived of his property without giving him his day in court, or that property can be taken for a public use without due compensation, or that provision is not made enabling every one whose property is assessed and taxed to question the validity of the tax. When traced to its real foundation, the claim asserted by complainants, that, without due process of law, their property is being burdened with assessments, is not based upon the theory that the laws of Iowa do not afford them ample means for testing the validity of the assessments made, but it is based upon the claim that their property is not within the limits of the city of Des Moines; is not therefore subject to the control of the city authorities, and cannot be lawfully assessed or taxed by them. It is manifest, however, that the legality or illegality of the action of the city is dependent upon the question whether the territory of Greenwood Park now forms part of the city of Des Moines, and the existence of this disputed question does not show that the complainants are in any proper sense denied due process of law for the protection of their rights, or that they are denied the equal protection of the laws, within the meaning of the federal constitution.

As the lack of jurisdiction in this court is thus apparent on the face of the bill, it follows that the motion for an injunction must be denied, the restraining order heretofore granted must be dissolved, and the bill itself must be dismissed; and it is so ordered.

DUFFY et al. v. JARVIS.

(Circuit Court, E. D. Tennessee, S. D. February 2, 1898.)

No. 587.

1. **FEE-TAIL—RULE IN SHELLEY'S CASE—STATUTES.**

The two statutes which have been generally enacted in the several states (as illustrated in Code Tenn. §§ 2007, 2008), respectively converting fees tail into fees simple, and abolishing the rule in Shelley's Case, are not inconsistent. The former applies where, by the terms of the instrument conferring the estate, it goes to the person mentioned, and the heirs of his body, while the latter applies where the terms of the instrument purport to create a life estate in the first taker, with remainder to his heirs, or to the heirs of his body.

2. **SAME—CONSTRUCTION OF GRANT.**

Inasmuch as it is the very terms of the instrument of which these statutes seize hold, in order to determine the consequence of the use of such terms, no room is left for any implication that a grant to A. and the heirs of his body creates a life estate, with remainder over to the heirs; for the terms thus used are the very ones which, by the statute relating to fees tail, confer a fee simple upon A.

This was a suit in equity by Daniel L. Duffy and others against Samuel M. Jarvis, trustee, to remove a cloud upon title. The defendant demurred to the bill.

Dodson & Dodson, for complainants.

Brown & Spurlock, for defendant.

SEVERENS, District Judge. The bill in this case was filed by certain heirs of Isadore M. Duffy to remove a cloud from their title created by the execution and recording of a certain trust deed by the above-named Isadore M. Duffy and her husband to Samuel M. Jarvis, trustee, as security for a loan of money, on the 13th day of August, 1873, on certain land, to which the complainants claim title. Mrs. Duffy at the time of the making of said trust deed was in possession under a claim of title derived through a deed from D. J. Duffy, her husband. The granting part of this last-mentioned deed was as follows:

"I hereby give, grant, bargain, sell, transfer, and convey unto the said Isadore M. Duffy and the heirs of her body, free from my control, or the control of any future husband, for their sole use, forever, the following described piece of land."

And the habendum was as follows:

"To have and to hold the above-granted premises to the said Isadore M. Duffy and the heirs of her body, free from my control, or the control of any future husband, for their sole and separate use and behoof, forever."

Mrs. Duffy died before the filing of this bill. Her heirs now claim title to the land in themselves, as of the remainder attendant on a life estate in their mother, upon the terms of the above-mentioned conveyance to the mother. The defendants, on the other hand, claim that the deed to Isadore M. Duffy and the heirs of her body vested in her a fee simple (there being heirs of her body), which she had the power and right to convey by the trust deed to Jarvis above mentioned. The whole case turns upon the construction to be given

to the deed to Isadore M. Duffy on the 13th of August, 1873. If that granted an estate in remainder to the complainants upon the termination of a life estate in Mrs. Duffy, the complainants are entitled to maintain this bill. If it did not, and the construction contended for by the defendants is the proper one, the suit of the complainants must fail. The issue presents an interesting question, which has its foundation in the ancient doctrines of the law respecting real property.

At an early period of the English law of real property, a gift or grant to a man and the heirs of his body constituted a conditional fee in the donee; that is, a fee conditional upon his having heirs of his body. If he did, then he was regarded as having an estate in fee simple, to such an extent that he could alien the lands and give a complete title. If he did not have such heirs, or if he did and they died in his lifetime, and no alienation had been made by the donee, the estate reverted upon his death to the donor. This power of alienation in case the donee of such an estate should have heirs of his body was the result of judicial theorizing prompted by the desire to promote a supposed public policy in the free alienation of lands; but in many instances it disappointed the expectations of the heirs, and defeated the intention of the donor. The landed nobility of the country, intent on holding their great estates in their own families, were dissatisfied with the result of this judicial construction of devises and grants, and procured the enactment of the statute (13 Edw. I.) *de donis conditionalibus* (that is, concerning conditional estates), which declared that thereafter such construction should not be given to the gift or grant, but that such conveyances should be construed (as their form is, and according to the intention of the donor) to convey an estate which would, upon the death of the donee, pass to the heirs of his body; and it deprived the donee of the power to alien the land upon his having heirs of his body, as he could previously have done. Under this statute, the donee had what was called an "estate tail" (that is, cut out of the fee); upon the termination of which the heirs of his body came into the estate according to the form of the gift. The estate tail which the first donee took was an estate tail general or special,—general when the gift over was to the heirs of his body, without other description; and special where it was to some special kind of such heirs, as heirs male or heirs female. This was the character of such estate as impressed by the statute *de donis*, and this law prevailed for several hundred years, until the effect of it, in tying up the lands of the country, became so intolerable that by another scheme of judicial devises the tenant in tail was allowed to cut off the entailment, and convert the estate into a fee simple, by having a proceeding instituted in a court by the intended purchaser, and then making concord with him,—a final agreement, sanctioned by the court, whereby the plaintiff took the land, or the tenant vouched in a pretended warrantor, then suffered a default, and the plaintiff took judgment against him, and he, in turn, against the vouchee, for lands of equal value; but, as the vouchee was always a good for nothing person, nothing was expected from the recovery over against him. But these methods of fines

and recoveries were formal contrivances, and in some of their features merely farcical. However, they served the purpose of providing a means of cutting off entails.

The rule of construction embodied in the statute *de donis* became inwrought as a rule of the common law of England, and in that form was brought by the colonists into this country. The practice of defeating its operation by fines or recoveries has not here prevailed to any extent, but quite generally the rule itself has been annulled by statutory enactment. If the statute of Tennessee had not annulled it, the rule of the statute *de donis* would have been precisely applicable to the deed under consideration. Under it, Isadore M. Duffy would have taken an estate in tail general, and her children, the heirs of her body, would have taken the inheritance upon the expiration of her life estate, and her conveyance of the property could not have defeated the heirs; but the statute of North Carolina of 1784, brought into Tennessee while yet a colony, adopted as a statute when the state was organized, and still retained as section 2007 of the Code, abolished the rule, and converted all estates in tail, general or special, into fees simple. This section of the Code reads as follows:

"Any person seized or possessed of an estate in general or special tail, whether by purchase or descent, shall be held and deemed to be seized and possessed of the same in fee simple, fully and absolutely, without any condition or limitation whatsoever, to him, his heirs and assigns forever; and shall have power and authority to sell or devise the same as he thinks proper; and such estate shall descend under the same rules as other estates in fee simple."

Of equal antiquity with this rule, whose history I have just traced, is, or was, a doctrine of the common law which has been called in England and this country the "Rule in Shelley's Case." The rule did not originate with that case, but is a still more ancient dogma. That, also, was a rule of construction, and it was this: Where one takes an estate by grant or devise, and the deed or gift by its terms gives him a life estate only, with remainder, immediately thereafter, or after the expiration of an intermediate estate, to his heirs, or the heirs of his body, then, if there should be such heirs, the tenant for life would become seised of an estate in fee simple, and those in remainder would take as heirs, and not as purchasers. The word "heirs," or "heirs of the body," in the deed, in defining who should take the remainder, were regarded as words of limitation of the estate, and not as words of purchase. And this rule was so stubborn that, if such were the words of the grant, it was therefrom conclusively inferred, as matter of law, that the intent and purpose of the grant was to create an estate of inheritance, which would descend to those nominated by the general description of "heirs," notwithstanding the grantor should declare his intention to be otherwise. But, to become subject to this rule, there must be, by the terms of the grant, a life estate in the first taker, with remainder to heirs, or the class of heirs, named in the deed. The result of this was that the first taker, immediately on the birth of heirs such as were mentioned in the grant, would take the remainder also, and thereupon have the whole estate. This he could alienate, and thereby disappoint the heirs, who would then be cut out of their estate in remainder.

The severity of this construction was modified somewhat in the interpretation of wills, where, if the other language made a different conclusion necessary in order to give effect to the evident intention of the testator, the rule was made to yield. The purpose of this rule is not certainly known, but it has remained as part of the common law of real property for centuries. And this rule, too, came to this country with the colonists, and has remained operative, except where annulled by statute, hoary and steadfast. At various dates, nearly all the states have, by legislative acts, abolished the rule in Shelley's Case. In Tennessee it continued to be a part of the law of real property until the act of 1852, whereby it was abolished. The following is the language of the act:

"Where a remainder shall be limited to the heirs or heirs of the body of a person to whom a life estate in the same premises shall be given the persons who, on the termination of the life estate, shall be heirs, or heirs of the body of such tenant, shall be entitled to take as purchasers by virtue of the remainder so limited to them." Laws 1851-52, p. 113.

This act was carried into the Code, and constitutes section 2008. These sections (2007, converting fees tail into fees simple, and 2008, abolishing the rule in Shelley's Case) are not, as supposed by counsel for complainants, inconsistent with each other. They both have reference to the form of the grant or devise, as the case may be. The first (2007) applies to the case where, by the terms of the instrument conferring the estate, it goes to the person mentioned, and the heirs of his body. The second (2008) applies to such instruments as by their terms purport to create a life estate in the first taker, and the remainder in the persons who answer the description of heirs, or heirs of the body, of such first taker. With this distinction in mind, the cases decided by the supreme court of Tennessee are readily reconciled. The error of counsel for complainants consists in supposing that by the language of this deed there is, by implication, a life estate, with remainder over to the heirs; but the difficulty is, there can be no implication where the law, seizing hold of the very terms of the grant, declares what shall be the consequence of the use of such terms. There is no room left for implication. This matter has been so many times before the supreme court of Tennessee, and counsel have so often fallen into misapprehension from failing to note that the distinction is one which pertains to the terms of the instrument conferring the estate, that it seems singular it should never have been remarked upon, though it is evident that it has at all times been manifest to the court. There is no inconsistency, as counsel seems to suppose, in the decisions of the supreme court of the state upon this subject. Thus, in *Williams v. Williams*, 3 Baxt. 55, the deed, in terms, granted an estate for life in the first taker, with remainder over to the heirs of the body. This, under the rule in Shelley's Case, would have constituted an estate in fee simple; but, that rule having been abolished by the act of 1852, the first taker was limited to a life estate, and the heirs of the body were entitled to the estate in remainder, and the court so held. On the other hand, there are a number of cases, arising since the act of 1852 was passed, in which, by the terms of the grant, the estate was con-

veyed to the grantee and the heirs of his body. In such cases the statute abolishing entails (Code, § 2007) has been steadily applied. *Middleton v. Smith*, 1 Cold. 144; *Kirk v. Furgerson*, 6 Cold. 479; *Skillin v. Loyd*, Id. 563; *Wynne v. Wynne*, 9 Heisk. 309; *Boyd v. Robinson*, 93 Tenn. 34, 23 S. W. 72; *Brown v. Brown* (Tenn. Ch. App.; Sept. 18, 1897) 43 S. W. 126. There are occasional instances where the court has referred to the relaxation of the stringent legal construction in the interpretation of wills, but it is not necessary to follow out that subject. The frequency of the cases which have arisen and have been controlled by section 2007 of the Code, is probably due to the use of old forms of conveyances, and it is likewise probable that in this way the real intention of the grantor has in many instances failed. But the law upon this subject is well settled, and the result is that the demurrer must be sustained.

CARTER et al. v. COUCH.

(Circuit Court of Appeals, Fifth Circuit. May 25, 1897.)

No. 549.

1. RES JUDICATA—COLLATERAL ATTACK.

A money judgment recovered in a case in which the defendant sets up a discharge in bankruptcy is conclusive, in a collateral proceeding, both of the fact of indebtedness, and that the discharge did not discharge the particular demand sued on.

2. DEEDS—DURESS.

A deed made to discharge an actual indebtedness, though given under duress, is not absolutely void, but, at most, voidable.

3. LACHES—DEED GIVEN UNDER DURESS.

A delay of 10 years in bringing proceedings to avoid a deed which the grantor claims was procured from him by duress is laches which will estop him and his heirs from disturbing a title based thereon, for which value was paid.

Appeal from the Circuit Court of the United States for the Western District of Texas.

This suit was commenced September 22, 1892, by S. E. Couch against Theodore H. Wood, in the district court of Crockett county, Tex., in the ordinary form of trespass to try title, under the Texas statutes, to recover 15 sections of land in Crockett county, with an additional count to remove a cloud alleged to be cast upon the title by the assertion of some claim of title by the defendant. The case was removed to the circuit court for the Western district of Texas by the defendant, who filed therein an answer, amended answer, and cross bill. He died pending the suit, and the cause was revived in the name of his daughter and sole heir at law, Clara A. Carter, joined by her husband, S. D. Carter. Thereafter the plaintiff, by way of repleader, filed an original bill of complaint in equity. Various other pleadings were filed in the progress of the cause, and after a trial on the merits a decree was rendered on April 1, 1896, in favor of the plaintiff, for the lands in controversy, quieting his title, and affording other relief. From the pleadings and the evidence the following facts appear:

From 1868 to 1872 the defendant Theodore H. Wood was agent and treasurer of the Peterborough Railroad Company, in New Hampshire, and as such gave bond in the sum of \$15,000, with Josiah G. Graves and William W. Bailey as sureties. For his services he presented a bill to the company for \$4,200.

which was approved by the president and other officers; and he thereupon, with their consent, paid that amount to himself. On April 15, 1879, Wood procured a discharge in bankruptcy, in the district court of the United States for the district of New Hampshire. Thereafter, and in 1882, the Peterborough Railroad Company brought a suit on Wood's bond in the supreme court of New Hampshire for the county of Hillsboro; and, although his discharge in bankruptcy was set up as a defense, a judgment was recovered against him and his sureties for \$5,000. It was paid by his bondsmen, Graves and Bailey, who subsequently caused him to be indicted in New Hampshire for embezzling the \$4,200 which he had paid to himself as treasurer of the railroad company. They caused him to be arrested in Massachusetts, carried on a warrant of extradition to New Hampshire, and there incarcerated. On June 19, 1882, while still in custody, on the request of his bondsmen he executed to one Frank A. McKean, as trustee, a deed to the Texas lands in controversy, whereupon he was released, and no further proceedings were had against him under the indictment.

At that time Crockett county, Tex., in which the lands were situated, was unorganized, and the deed was filed June 30, 1882, for record, in Tom Green county, to which, complainant claims, Crockett county was then attached for registration purposes. Subsequently Crockett county seems to have been attached for registration purposes to Val Verde county, and on May 7, 1889, McKean caused his deed to be there filed for record. Soon after Wood's release from imprisonment under the indictment, he brought a suit in Suffolk county, Mass., against his bondsmen, Graves and Bailey, and also against Charles H. Burns, the county solicitor of Hillsboro, county, N. H., where the indictment was found, for false imprisonment, which suit ultimately resulted in a verdict and judgment for the defendants. In March, 1885, Wood filed in the clerk's office of Kinney county, Tex., to which county, defendants claim, Crockett county was then attached for recording and judicial purposes, a caveat concerning the lands in question, duly signed and acknowledged by him, and warning all persons against negotiating therefor or meddling therewith, and stating that the deed of trust from himself to McKean had been improperly and unlawfully obtained.

On May 27, 1891, McKean conveyed the lands to the plaintiff, S. E. Couch, for a consideration partly in cash, and partly in deferred purchase-money notes. The complainant relies upon the title thus acquired, and contends that the deed from Wood to McKean, trustee, was a legal and valid conveyance, and that in any event he was an innocent purchaser for value, without any notice or knowledge of the claims of the defendants, or of the caveat filed by Wood in Kinney county. The defendants' position is that the judgment obtained against Wood and his bondsmen by the Peterborough Railroad Company was fraudulently obtained, and void; that the indictment against him was procured for the purpose of forcing him to make a settlement with his bondsmen, and that the deed to McKean in trust for them was given under duress, and was consequently invalid; that the deed from McKean to the complainant was made without consideration, and in pursuance of a combination or conspiracy between complainant and McKean, Bailey, and Graves to perfect the title in complainant; and that the latter had full notice of all the frauds, injuries, and wrongs practiced upon Wood, so that the title in his hands was void as against the defendants.

B. D. Owen, for appellants.

S. R. Fisher, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PARDEE, Circuit Judge. The case made by the amended bill of complaint appears to be one of slander of title, rather than to remove clouds from title, and was probably demurrable on the ground that the complainant had a complete and adequate remedy at law. Pom. Eq. Jur. § 1399; Nickerson v. Loud, 115 Mass. 94.

The judgment against Wood and his bondsmen, rendered in the case of Railroad Co. v. Wood, in the supreme court of the state of New Hampshire for the county of Hillsboro, conclusively settled the fact that Wood was indebted to the railroad company, and that Wood's previous discharge in bankruptcy did not discharge the indebtedness. As the judgment rendered in the case mentioned was satisfied by Graves and Bailey, Wood became, and was, indebted to Graves and Bailey for the amount thereof. As Wood was indebted to Graves and Bailey, the deed of Texas lands in part payment and settlement of such indebtedness, though given under duress of imprisonment, was not absolutely void, but, at most, voidable. The action thereafter instituted by Wood against Burns and Graves and Bailey in the superior court of Suffolk county, state of Massachusetts, for damages for false imprisonment, was certainly not a repudiation of the above-mentioned deed. It ought, rather, to be viewed as a ratification. This deed, executed June 19, 1882, outstanding, the failure of Wood to institute proceedings to avoid the same until the commencement of the present suit was laches, which, in a court of equity, should estop Wood and his heirs from disturbing any title based upon the deed in question, for which value was paid. On full consideration of the pleadings and all the facts and circumstances shown by the evidence, we conclude that the decree appealed from does substantial justice and equity between the parties, and ought not to be disturbed. Decree affirmed.

BLAIR v. SILVER PEAK MINES et al.

(Circuit Court, D. Nevada. January 28, 1898.)

No. 642.

MORTGAGE FORECLOSURES—PLEADING—DEMURRER—LIMITATION OF ACTIONS.

One who is made a defendant in foreclosure merely because he claims some interest in the mortgaged property, without any allegation in the bill that he owes any part of the debt, or is in possession of any part of the property, or has the legal title thereto, cannot, by demurrer, set up the defense of the statute of limitations.

This was a suit in equity by John I. Blair against the Silver Peak Mines, a corporation, and L. J. Hanchett, for the foreclosure of a mortgage. The cause was heard upon demurrer to the bill of complaint.

Rush Taggart and F. E. Murphy, for complainant.

Reddy, Campbell & Metson, for defendant L. J. Hanchett.

HAWLEY, District Judge (orally). This is a suit to foreclose a mortgage executed by the Silver Peak Mines, a corporation, defendant herein, in favor of complainant, Blair, to secure the payment of seven bonds, executed October 1, 1879, aggregating the sum of \$204,205.73. The Silver Peak Mines is a corporation organized and existing under and by virtue of the laws of the state of New York. The bonds and mortgage were executed in that state. The property mortgaged is situate in the state of Nevada. The Silver Peak Mines has appeared in this suit, and admits the indebtedness, and does not plead the statute

of limitations in bar of the suit. L. J. Hanchett is made a party defendant. The only averments in the complaint in relation to him are: (1) "That L. J. Hanchett is a citizen and resident of the city of Sacramento, county of Sacramento, state of California." (2) "That the defendant L. J. Hanchett has, or claims to have, some interest in, or claim upon, said premises, or some part thereof, which claim or interest is unknown to this complainant, and which interest or claim is subsequent to and subject to the lien of this complainant's mortgage." The object of the second averment is to compel Hanchett to answer, and set up his claim or interest in the premises, whatever it may be, in order that his rights, if any he has, as against the mortgage lien, may be heard and determined in this suit. *Poett v. Stearns*, 28 Cal. 226, 228; *Sichler v. Look*, 93 Cal. 600, 608, 29 Pac. 220, and authorities there cited; *San Francisco Breweries v. Schurtz*, 104 Cal. 420, 426, 38 Pac. 92. Hanchett, instead of answering, has appeared, and interposed a demurrer to the complaint upon the equitable ground that the complainant is not entitled to any relief by reason of laches and lapse of time, and specifically states that the cause of action is barred by the statute of limitations of the state of Nevada, where the property is situate, and of the state of New York, where the bonds and mortgage were executed. The bonds in question were made payable at different times. The latest bond became due in 1883. This suit was commenced in July, 1897. Can defendant Hanchett interpose, by demurrer, a plea of the statute of limitations? This question, to my mind, is susceptible of but one answer. He cannot. Why? Because it is not shown by any averments in the complaint that he owes the debt, or any part of it; that he is in possession of the mortgaged property, or any part of it; that he has the legal title to the property, or that he has any such interest in the property as would entitle him to interpose such a plea. The question whether Hanchett could raise the plea of limitations by answer is not directly involved, and will not be decided in advance, because the court does not know, and has no right to presume, what facts will be disclosed by the answer. But there are certain general principles of law bearing upon this question which it is deemed proper to refer to, as they have equal force in their application to the plea by demurrer as well as by answer. The rule is universal that the right to plead the statute of limitations is a personal privilege of which the debtor may or may not avail himself. He is not under any moral or legal obligation to plead the statute. If he refuses to plead it, he can not personally, either in law, equity, or good conscience, be compelled to do so. The law allows a debtor to be honest, and to pay an honest debt, however stale and ancient it may be. As a matter of fact, the Silver Peak Mines, being a foreign corporation, could not, under the laws of this state, plead the statute of limitations, even if it had attempted to do so. *Robinson v. Mining Co.*, 5 Nev. 44, 74; *State v. Central Pac. R. Co.*, 10 Nev. 47, 80; *Barstow v. Mining Co.*, Id. 386; *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 Nev. 121, 125, 7 Pac. 271. Conceding, for the purposes of this opinion, that Hanchett, having an interest in the mortgaged property subsequent to the execution of the mortgage, might plead the statute of limitations, he would, nevertheless, be compelled to show, in order to make his plea available, that the suit is

barred as between the Silver Peak Mines and the complainant, Blair. The Silver Peak Mines, the debtor herein, not having interposed the plea of the statute, it is certain that Hanchett cannot plead it for that corporation, notwithstanding the lapse of time beyond the statutory period of limitations.

In *Chafee v. Blatchford*, 6 Mackey, 459, 482, which was a bill in equity to restrain certain proceedings by attachment, where many questions were involved concerning trust deeds, judgments, etc., and, among other things, a debt of William Sprague to one Blatchford, the complainant, Chafee, claimed that Blatchford was not a creditor, because the debt due from Sprague to him was barred by the statute of limitations. The court, touching this point, said:

"Now, this position is only good upon the theory that the debt of Blatchford has ceased to be a debt by the mere lapse of time; and that is entirely at war with the settled rules of law relating to the statute of limitations. I think it is sufficient to state it, to insure its rejection by counsel representing the complainant. The defense of limitations, as we all know, is one which it is the privilege of the debtor to make or not, as he pleases. The law does not make it for him, nor does the law pronounce any debt extinguished by virtue, merely, of the lapse of the statutory period. The debt continues the same, and may be collected or reduced to judgment, unless the defense of the statute of limitations be interposed. * * * So far as we know or can anticipate, the plaintiff in the lawsuit may obtain personal service on William Sprague, or Sprague himself may choose to appear, and allow judgment to go by default, or may forbear to plead the statute of limitations. Nobody can plead it for him. Chafee cannot appear in that suit, and plead. It is a controverted question whether he may appear in the attachment proceeding, and move to quash it, * * * but certainly he could not plead the statute of limitations to the action. Nobody could plead that, except Sprague himself, and we cannot assume any more that he will than that he will not."

In *Ewell v. Daggs*, 108 U. S. 143, 147, 2 Sup. Ct. 408, which was a case in some of its facts different from this, but, in so far as the essential principles of law are concerned, is identical with the case at bar, James B. Ewell and his wife gave a mortgage upon certain property to secure the payment of certain notes to one Daggs. Within three months thereafter J. B. Ewell and his wife conveyed the mortgaged premises to George W. Ewell. Upon foreclosure proceedings it was suggested by counsel that, although the plea of the statute of limitations would not avail J. B. Ewell, because judgment had been rendered against him before the bar took effect, it nevertheless was a protection to G. W. Ewell, because he was a stranger to the judgment and mortgage, and the suit now pending was not brought until after the time limited for an action to recover the debt. The court, replying, said there was no force to this objection, "for the present suit is not to recover the debt, nor is it a suit against Geo. W. Ewell. He is a party defendant because he has an interest by a subsequent conveyance in the lands sought to be sold under the mortgage. He has an equity of redemption, which entitles him to prevent a foreclosure and sale by payment of the mortgage debt; but the debt he has to pay is not his own, but that of Jas. B. Ewell. If he can show that that debt no longer exists, because it has been barred by the statute of limitations, he is entitled to do so; but he must do it by showing that it is barred as between the parties to it. If not, the land is still subject to the pledge, because the condition has not been performed. It is not to the purpose for the ap-

pellant to show that he owes the debt no longer, for in fact he never owed it at all; but his land is subject to its payment as long as it exists as a debt against the mortgagor, for that was its condition when his title accrued." See, also, *Sanger v. Nightingale*, 122 U. S. 176, 184, 7 Sup. Ct. 1109; *Allen v. Smith*, 129 U. S. 465, 470, 9 Sup. Ct. 338; 1 Wood, Lim. c. 1, § 7, pp. 24, 28; Id. c. 4, § 41, p. 96; *Stoutz v. Huger* (Ala.) 18 South. 126, 127; *Waterman v. Manufacturing Co.*, 14 R. I. 43, 45; *Kennedy v. Powell*, 34 Kan. 22, 26, 7 Pac. 606; *Bank v. Kimble*, 76 Ind. 195, 203. Demurrer overruled.

ELECTRICAL SUPPLY CO. v. PUT-IN-BAY WATERWORKS, LIGHT & RAILWAY CO. et al.

(Circuit Court, N. D. Ohio, W. D. January 31, 1898.)

No. 1,087

1. EQUITY—DISMISSAL OF BILL—RECEIVERS' CERTIFICATES.

When a circuit court of the United States takes and exercises jurisdiction upon a record apparently authorizing it, and orders the issuance of receiver's certificates, which are sold to bona fide purchasers, and it subsequently appears that by reason of collusion of the parties in bringing the suit the jurisdiction is defective, and the cause must therefore be dismissed, the court nevertheless has power, as a preliminary to dismissing it, to protect the receiver's certificates by directing a sale of so much of the property in the receiver's hands as may be necessary for that purpose.

2. SAME—INTERVENING PETITIONS.

A court of equity, in which intervening petitions are filed, asserting liens upon or interests in property which it has placed in the hands of a receiver in an original suit, may retain jurisdiction of such interventions, even though it subsequently appears that the original suit was collusively brought, and should have been dismissed at the outset, had the facts then been made to appear.

This was a suit in equity by the Electrical Supply Company against the Put-in-Bay Waterworks, Light & Railway Company and others.

T. J. Corkery, E. W. Tolerton, and M. G. Block, for plaintiff.

E. G. Love, for defendant company.

C. T. Lewis, for receiver.

L. K. Parks and J. K. Hamilton, for Arbuckle, Ryan & Co.

W. C. Cochran, for Walker P. Hall.

C. G. Wilson, for Treasurer Ottawa Co

SEVERENS, District Judge. The court, having passed certain orders in this case, confirming the masters' reports upon the reference to Irvin Belford, Esq., as special master, and upon the later reference to William H. Harris, as special master, and, having also adjudged certain receiver's certificates held by Walker P. Hall and another to be valid, and rightfully payable out of the funds and property in the hands of the court by its receiver, it thereupon appears that there is not a sufficient available fund in the hands of the receiver with which to satisfy the receiver's certificates and other necessary charges upon the fund. It therefore appears to be necessary to sell the railroad and the other real estate and fixtures belonging to the works of the Put-in-Bay Water-

works, Light & Railway Company, in order to raise a fund necessary to completely satisfy the charges. This brings the court to the necessity of determining certain other matters which have inhered in the case all along, but which it has not hitherto been found to be necessary to finally dispose of, the action of the court having been in the main concerned with a question as to how the court could so shape the proceedings as to enable it to dismiss the original bill as one collusively and fraudulently filed. The matters now particularly referred to as standing in the way of final disposition by sale of the property are the petitions of Arbuckle, Ryan & Co. and others having like claims for the enforcement of liens against the property in the hands of the receiver for materials and labor supplied to the Put-in-Bay Waterworks, Light & Railway Company, and certain petitions which have been filed in behalf of the county in which the property is situated for the taxes which have been levied upon it during the time it has been in the hands of the receiver. These parties are now pressing the court for recognition of their claims, and for an adjudication establishing their rights in the property now in the hands of the court. The original bill was filed September 9, 1892, and the property was soon after taken into custody by the appointment of a receiver. On the following 30th day of September, Arbuckle, Ryan & Co. filed what is called their cross bill, which is, in substance, an intervening petition setting up their contract with the Put-in-Bay Waterworks, Light & Railway Company, and the amount of labor and material which they had furnished in the execution of it, and their compliance with the statutory requirements of the state giving them a lien; and they prayed therein for the enforcement of their lien. Other cross bills of a like character were filed by other parties, and later on, and during the pendency of the suit, petitions for orders requiring the payment of taxes have been filed. Some three or four months after the filing of the original bill and the various cross bills, and after the receiver had been authorized to issue receiver's certificates, and had in fact issued and sold them, and after the receiver had been for some months in possession, it appeared, on a motion to dissolve the injunction theretofore ordered, heard in the late days of December, 1892, mainly through an affidavit submitted on that occasion, that the suit had been collusively brought; or, to be more exact, an affidavit was then filed upon which, in the court of appeals, a year later, it was held that the proceeding was collusive, and by plain inference that the court below should have dismissed it on the facts as they appeared upon the hearing had in the circuit court when the motion to dissolve the injunction was refused. It was for that reason that the circuit court of appeals reversed the order of this court refusing to dissolve the injunction. *Industrial & Mining Guaranty Co. v. Electrical Supply Co.*, 16 U. S. App. 196, 7 C. C. A. 471, and 58 Fed. 732. But this court, although fully recognizing what it has deemed its duty under the decision of the court of appeals, and although it has been endeavoring to bring the case into such a condition as that the cause could be dismissed for the reasons stated by the circuit court of appeals, has nevertheless retained the possession of the property in the hands of the receiver, and this against repeated motions of the Put-in-Bay Waterworks, Light & Railway Company to dismiss the bill. While

recognizing that the court had no jurisdiction to proceed and decree the relief prayed upon the original bill because of the collusion of the parties, it still had jurisdiction to remedy the mischief which had been wrought by taking and exercising jurisdiction, and to prevent persons who had acted in good faith upon the action of the court, while it was in possession of apparent jurisdiction, from suffering injury. Under orders of the court made for that purpose, the property has been yearly rented by the receiver, and the proceeds paid into court. In a collateral way these dependent petitions or cross bills have been mentioned to the court, and the court has intimated a strong impression that, having no power to proceed in the main case, and as the bill must be dismissed, it would follow that everything which was incident to it must go down also; in other words, that the jurisdiction of the court which it still retained was a jurisdiction supported by the necessity of providing relief to those who had acted upon the faith of the court's orders, and that the court's authority would be limited to that necessity. But upon more mature consideration I am satisfied that it is the duty of the court to take cognizance of the intervening petitions above referred to, and to determine the validity of the claims therein asserted, and, if found valid, to give them due effect by affording the petitioners appropriate relief. If no question had arisen in regard to the jurisdiction of the court over the principal case, there could be no doubt whatever of the right of the interveners to apply to this court, it having possession and control of the property upon which the liens and claims rest, for the relief to which they were entitled. The fact that there was a latent infirmity in the jurisdiction, arising from the unlawful conduct of the parties in instituting the suit, does not, in my opinion, change the result. The court did in fact entertain the bill and the cross bill of the original defendant, Tillotson, made an order for the appointment of a receiver, and seized the property into its possession. That possession it has ever since maintained, and still maintains, originally for the general purposes of the case, and more recently for the purpose of exercising the limited jurisdiction still asserted and exercised by the court for the special object already indicated. If this question be considered upon the grounds of the right of a third party to intervene for the protection of his own interest in a pending suit, it would seem to be immaterial whether the possession of the property which the court has taken into custody was rightful or not, or whether the maintenance of possession could be justified upon legal grounds. It is the fact of the actual possession which the court has taken, and that alone, which gives to the intervener his right to appear and be heard, and to have his rights in the property ascertained and awarded to him.

In the case of *Gumbel v. Pitkin*, 124 U. S. 131, 8 Sup. Ct. 379, the property taken into the possession of the court by its marshal was seized upon process which was void, and in a suit illegally commenced, the suit having been brought and the process issued on a Sunday, in violation of an express statute. The possession which the marshal afterwards retained under his writ, as the court afterwards held, was unlawful, and he was a trespasser. Nevertheless, it was held by the supreme court that the court below had the power, and it was its duty,

to entertain the petition of a third party to be let into that court and in that case to claim and obtain through its action the rights which he had acquired by a levy made subsequently to the first unlawful seizure, but prior to certain other levies which had been made. That case illustrates in a very forcible manner the fact that the question of the lawfulness or unlawfulness of the holding of possession by the court is wholly immaterial. And see, also, *Lewis v. Dillard*, 22 C. C. A. 488, 76 Fed. 688; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355.

In the case of *Compton v. Jesup*, 15 C. C. A. 397, 68 Fed. 263, a dependent bill was filed by Jesup and Knox to foreclose a mortgage which was prior to a mortgage which had been in process of foreclosure in the original case. The proceedings in the original case had been carried through to a final decree, and sales of the mortgaged property, and those sales had been confirmed, and deeds ordered to be executed; but the court retained possession for the sole purpose of protecting certain interests of the parties to the original litigation. It was at this state of the case that Jesup and Knox intervened. If their right to intervene had been determined upon the ground of citizenship, it could not have been allowed, and it was objected that, as the title to the property had already passed to the purchasers, and the object of the suit substantially accomplished, the petitioners had no right to intervene. The court held them entitled to intervene, and entertained their bill. One of the questions arising on the appeal in the circuit court of appeals was whether the right to intervene had been properly allowed. Judge Taft, in a very carefully prepared opinion, reviewed the authorities upon this subject, and by reference to that part of his opinion found at page 412 et seq., 15 C. C. A., and page 278, 68 Fed., it is quite clear that the determination of the question of the right to intervene depends not at all upon the validity of the original seizure or continued possession of the property by the court, but upon the fact of the actual holding in possession. The grounds upon which the doctrine seems to rest are: First, the necessity which the court is under to defend its possession, and hold the property subject to its order; and, second, the obligation it thereby assumes to itself undertake the affording of redress to those whom it prevents, by withholding the property, from obtaining relief elsewhere. It appears to me that the case of *Gumbel v. Pitkin* goes much further than the requirements of the present case, for here beyond doubt the appointment of the receiver, and taking the property into custody, was a perfectly lawful and justifiable act upon the facts as they then appeared in the record, and it is also clear, in my opinion, that the retention of possession, although for a limited purpose, is likewise lawful and proper. It can make no difference whatever to the parties who are prevented from seeking to enforce their claims upon property elsewhere with what intent or purpose this court continues its possession. For these reasons, I am persuaded that it is the duty of the court to accord a right to a hearing to the several parties who have intervened. Such orders as are necessary to expedite the proceedings may be entered.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. v. ROANOKE IRON CO.

(Circuit Court, W. D. Virginia. January 31, 1898.)

1. CORRECTION OF DECREE—CLERICAL MISTAKE.

Where a mortgage debt was ascertained and reported by the master as bearing interest from a certain date, and the report was approved by the court, but the decree, as entered, allowed interest from a different date, *held*, that this was a manifest clerical mistake, which the court would correct on petition.

2. FORECLOSURE SALE—RIGHTS OF PURCHASER—TAX LIENS.

An order entered January 23, 1897, directing a receiver to "at once pay the taxes that may be due upon the property," does not authorize him to pay taxes not due until February 1st following; and one purchasing the property under a decree of sale entered after that date takes it subject to the tax lien which then accrued, and, the sale having been confirmed without objection by him, he cannot thereafter insist that the lien shall be discharged out of the proceeds of the sale.

This was a suit in equity by the Fidelity Insurance, Trust & Safe-Deposit Company against the Roanoke Iron Company for the foreclosure of a mortgage. For prior proceedings, see 68 Fed. 623, and 81 Fed. 439. The cause is now heard on application for the distribution of a balance remaining in the receiver's hands.

Scott & Staples, for creditors, McClure & Amsler.

Watts, Robertson & Robertson, for purchaser, Robert E. Tod.

Griffin & Glasgow, for bondholders.

PAUL, District Judge. The report of the receiver in this cause shows that there is a balance in his hands, amounting to between \$800 and \$900, arising from the sale of the plant of the defendant company, and collections made, and he requests instructions as to what disposition he shall make of the same. Three separate claimants make application to the court to have this fund applied to their relief:

1. McClure, surviving partner of McClure & Amsler, states that in the decree entered in this cause on the 22d day of July, 1897, confirming the sale theretofore made of the property of the defendant company to Robert E. Tod, a clerical mistake was made, in allowing interest on the debt due said firm from the 14th day of December, 1894, instead of from the 14th of September, 1894. This debt had been previously ascertained and reported by the master as bearing interest from the 14th day of September, 1894, and the same was approved and allowed by the court in the decree of sale entered in this cause on the 27th day of February, 1897. The provision in the decree of July 22, 1897, which allowed interest on said claim from the 14th day of December, 1894, instead of from the 14th day of September, 1894, as had been reported by the master and approved by the court, was manifestly a clerical mistake. It is such a mistake as the court will correct on petition (Fost. Fed. Prac. § 350), and should be corrected to conform to the master's report as approved by the decree of the 27th of February, 1897.

2. Robert E. Tod, the purchaser of the property, asks that the money in the hands of the receiver be applied to the payment of the taxes

thereon for the year 1897. On the 23d day of January, 1897, the court entered a decree directing the receiver, "out of the funds in his hands, * * * to * * * at once pay the taxes that may be due upon the property of the Roanoke Iron Company." This order included the taxes due up to and including the taxes for the year 1896. The question as to what fund—whether to the real estate or the personal fund—the said taxes were to be charged was reserved for future adjudication. The taxes so paid amounted to \$4,607.68. On the 27th day of February, 1897, the court decreed a sale of the plant of the defendant company. In that decree the court ascertained that the taxes which the receiver had paid under the order of January 23, 1897, were a lien upon, and primarily chargeable upon, the real and personal property of said company, forming a part of the plant, and not upon the fund out of which they were paid, and that the fund out of which they were paid should be reimbursed to that extent out of the proceeds of the sale of the real and personal property of said company forming a part of its plant, and decreed accordingly. The property was sold on the 28th of June, 1897, and the sale was reported to the court by the special commissioners making it on the 30th of June, 1897. On the 8th of July, 1897, on motion of Robert E. Tod, the purchaser, the court entered a decree nisi confirming the sale, "unless good cause be shown why the same should not be confirmed on or before the 20th day of July, 1897." Exceptions to the report were filed by Jos. L. Buery and other creditors of the defendant company on the ground of inadequacy of price, and for other reasons. The exceptions were thoroughly discussed by counsel for Tod, the purchaser, who urged the confirmation of the sale, and by counsel for the objecting creditors; and on the 22d day of July, 1897, a decree was entered confirming the sale. The question as to the payment of the taxes for the year 1897 out of the purchase money to be paid for the property was not presented or suggested to the court prior to the confirmation of the sale. There is no provision in any of the decrees entered prior to the decree of confirmation of the sale requiring the receiver to pay the taxes for 1897. There is nothing in any of the said decrees showing that the failure to provide for the payment of the taxes for that year was a clerical error or mistake, as now contended by counsel for the purchaser. The decree of the 23d of January, 1897, directed the receiver "to proceed at once to pay the taxes that may be due upon said property of the Roanoke Iron Company." The taxes for the year 1897 were not then due, and could not have been paid by the receiver. The tax year of 1897 did not commence until the 1st day of February, 1897; and of course they were not, and could not have been, reported by the master as a lien upon the property at the time he filed his report. They constituted a lien upon the land when it was sold, but it was a lien accruing after the master's report had been filed, after the entry of the decree directing the receiver to pay the taxes due. The purchaser, by examining the report of the master and the decrees entered prior to the sale, could readily have ascertained what tax liens had been provided for, and would have seen that no provision had been made for the payment of taxes for the year 1897. The tax law of Virginia, making taxes a lien on real estate, was notice to him of the lien on the property he purchased for the taxes for the

year 1897. Code Va. 1887, § 456. He bought the property subject to this lien, and he raised no question as to how it should be satisfied before the confirmation of the sale. The doctrine that in a judicial sale the rule of caveat emptor applies is too well established to admit of discussion. It is the doctrine laid down by the decisions of both the federal and the state courts. The Monte Allegre, 9 Wheat. 616; Osterberg v. Trust Co., 93 U. S. 424; Waples v. U. S., 110 U. S. 630, 4 Sup. Ct. 225; 27 Myers' Fed. Dec. 780, 781. The doctrine is thus stated in Threlkelds v. Campbell, 2 Grat. 199 (syllabus):

"A purchaser at a judicial sale can only obtain relief for defect in the title, or incumbrances on the property, by resisting the confirmation of the sale by the court upon the return of the commissioner's report."

This rule has been followed by numerous decisions in Virginia,—among them, Long v. Weller's Ex'r, 29 Grat. 347; Redd v. Dyer, 83 Va. 331, 2 S. E. 283. In this case the court said:

"It is contended on behalf of the appellants that the Martin claim ought to have been passed upon and settled before the property was ordered to be re-sold, and that in failing to do so the circuit court erred. There is no merit, however, in this objection. It is based upon the idea that, if the claim be valid, the title to the property is defective, and that relief should be decreed the purchaser accordingly. This is not in accordance with the settled doctrine relating to judicial sales in this state. There is perhaps no principle in our jurisprudence more firmly established by repeated decisions of the court than that the maxim caveat emptor strictly applies to judicial sales."

The contention of counsel for Tod, the purchaser, that the failure to make provision for this tax lien in the decrees entered prior to that confirming the sale was a clerical error or mistake that the court will correct on petition, cannot be sustained. A careful examination of those decrees fails to show an intention on the part of the court to provide for the payment of the taxes for the year 1897 out of the proceeds of the sale of the plant, or out of any other fund in the hands of the receiver.

The other petitioners for the application of this fund to the payment of their claims are the mortgage bondholders. Subject to the correction that must be made as to the date from which the McClure & Amsler claim should bear interest, the bondholders are entitled to the balance of the fund in the hands of the receiver.

A decree will be entered correcting the mistake in the decree of July 22, 1897, whereby the claim of McClure & Amsler is made to bear interest from the 14th day of December, 1894, instead of from the 14th day of September, 1894, as fixed by the decree of February 27, 1897; denying the application of Robert E. Tod to have the fund in the hands of the receiver applied to the payment of the taxes for the year 1897 on the property purchased by said Tod; and applying the balance of the fund in the hands of the receiver to payments on the mortgage bonds, as provided in the nineteenth provision of the decree of the 27th of February, 1897.

ZIMMERMAN v. CARPENTER.

(Circuit Court, D. South Dakota, S. D. January 31, 1898.)

No. 275.

1. NATIONAL BANK—ASSESSMENT OF STOCK—FEDERAL JURISDICTION—ESTATE IN POSSESSION OF PROBATE COURT.

When an executor refuses to recognize, as a claim against decedent's estate, an assessment by the comptroller of the currency upon national bank stock belonging to the deceased, a federal court will assume jurisdiction of an action against the executor to determine the liability, although the estate is in the course of administration in the probate court.

2. SAME—LIABILITY OF ESTATES—LIMITATIONS OF ACTIONS.

The estate in the hands of an executrix at the date of the failure of a national bank is liable for the assessment on stock belonging to the estate in the same manner as if deceased was living (Rev. St. § 5152); and the fact that the time for filing claims against the estate has expired is no bar to an action to fix such liability.

3. SAME—TRANSFER OF STOCK—EQUITY JURISDICTION.

Where bank stock was transferred by an executrix to herself individually, and she admits, before suit is brought, and again in her answer, that the transfer was without consideration, and is void, such admission does not vacate the transfer, and a bill in equity will lie to determine the liability of the estate on an assessment of the face value of the stock.

4. EQUITY JURISDICTION—PLEADING AND PRACTICE.

Where, at the hearing, the defendant raises the point that the claimant has a plain, speedy, and adequate remedy at law, the court will not make a decree if there is a plain defect of jurisdiction, but the bill will be construed more liberally than if the point had been raised by demurrer.

This was a suit in equity by Charles F. Zimmerman, as receiver of the Dakota National Bank, against Frances G. Carpenter, as executrix of Charles C. Carpenter, deceased, to recover the amount of an assessment made by the comptroller of the currency upon shares of the bank's stock.

T. B. McMartin, for complainant.

Davis, Lyon & Gates, for defendant

CARLAND, District Judge. The complainant brings this action for the purpose of charging the estate of Charles C. Carpenter, deceased, with the sum of \$12,300, being the amount assessed by the comptroller of the currency upon 123 shares of stock in the Dakota National Bank, of which said Charles C. Carpenter was, in his lifetime, the owner. The cause has been submitted upon pleadings and proofs, from which the following facts appear: On the 16th day of May, 1895, Charles C. Carpenter, at Sioux Falls, S. D., died testate, and thereafter such proceedings were had in the county court of the county of Minnehaha, S. D., that on June 17, 1895, said defendant, Frances G. Carpenter, was, by said county court, duly appointed executrix of the estate of said Charles C. Carpenter, deceased; and, having duly qualified, has since that time acted as said executrix. That on said 17th day of June, 1895, said county court, by order duly made, fixed the time in which all persons having claims against the estate of said Charles C.

Carpenter, deceased, should present the same to the said executrix for allowance or rejection at six months from the date of the first publication of the notice to creditors, which date of first publication was June 28, 1895. That said notice to creditors was duly published, as required by law, and a decree entered by said county court to that effect. At the time of the death of said Charles C. Carpenter, he was the owner of 123 shares in the Dakota National Bank, then doing business in Sioux Falls, S. D., which shares came into the possession of the defendant as executrix of the estate of said Charles C. Carpenter, deceased. On November 23, 1896, said Dakota National Bank closed its doors, and thereupon the complainant was appointed receiver of the same by the comptroller of the currency, and, having duly qualified, has since been acting as such receiver. On February 4, 1897, the comptroller of the currency made an assessment upon all the shares of the capital stock of the said Dakota National Bank of 100 per cent. upon the par value of said stock, and ordered the holders of said stock to pay said assessment on or before March 4, 1897, and further ordered complainant to take all necessary proceedings to collect said assessment. On April 3, 1897, complainant caused to be presented to the defendant, as executrix of the estate of Charles C. Carpenter, deceased, a claim for the sum of \$12,300, duly verified by the oath of said complainant; the said claim being the amount of the assessment made by the comptroller of the currency upon the shares of stock hereinbefore mentioned. On April 10, 1897, said executrix rejected said claim, and refused to allow it as a claim against said estate. That prior to August 28, 1895, defendant, as executrix, without any order of the county court of Minnehaha county, and without consideration, and in violation of her trust as executrix, caused the 123 shares of stock held by her as executrix to be transferred and assigned to herself individually, for the purpose of making it possible for said Frances G. Carpenter to act as a director of said bank.

The general jurisdiction of this court over this action arises from the fact that it is a suit of a civil nature, arising under the laws of the United States, wherein the matter in dispute exceeds the sum of \$2,000, exclusive of interest and costs. *Thompson v. Insurance Co.*, 76 Fed. 892; Act Cong. March 3, 1887, as corrected August 13, 1888. At the hearing, counsel for defendant moved to dismiss the action, upon two grounds: First. That the property belonging to the estate of Charles C. Carpenter, deceased, is under the jurisdiction and in the possession of the county court in and for the county of Minnehaha, state of South Dakota, in the due course of the administration of said estate, and no other court has any authority or jurisdiction to interfere therewith. Second. Complainant has a plain, speedy, and adequate remedy at law.

The full force of the first proposition may be conceded, and still this action may be maintained. The object of this action is not in any way to interfere with the possession of the property belonging to the estate of Charles C. Carpenter, deceased, but simply to determine whether any liability has attached to said property by reason of the facts pleaded in the bill of complaint. When that question is determined, this proceeding is at an end. If determined favorably, then complain-

ant has an adjudicated claim against the estate of Charles C. Carpenter. *Wickham v. Hull*, 60 Fed. 326; *Parker v. Robinson*, 18 C. C. A. 36, 71 Fed. 257. It is claimed that to take jurisdiction for this purpose would be a mere idle ceremony, as the comptroller has determined the amount of the assessment, and that determination is beyond dispute. It is true that the assessment of the comptroller cannot be disputed, but in this case, upon demand, the executrix refuses to recognize the assessment as a claim against the estate of Charles C. Carpenter, deceased; therefore the complainant is compelled to go into a court of competent jurisdiction, and seek to establish the amount of the assessment as a charge against said estate.

The point involved in the second proposition was not brought to the attention of the court until the hearing. Where this is so, the court will not make a decree if there is a plain defect of jurisdiction, but the bill will be construed more liberally than if the point had been raised by demurrer. The cases of *Kennedy v. Gibson*, 8 Wall. 498, and *Casey v. Galli*, 94 U. S. 673, are cited to the effect that, where the action is to recover the full stock liability, the action must be at law. This undoubtedly is true, if there are no other facts existing, requiring the interposition of a court of equity. The same cases hold that, where the action is to enforce only a portion of the full stock liability, the remedy may be in equity. The court, in the cases cited, did not intend to hold that in every case where the full amount of stock liability was sued for the remedy was at law, for in the case of *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246, a bill in equity was sustained, which sought to enforce the full statutory liability of the stockholders. To hold that in every case where the full statutory liability is sought to be enforced the remedy must be at law, would allow any stockholder to fraudulently transfer his stock to a financially irresponsible person, for the purpose of exonerating himself from liability; and, if the assessment was for 100 per cent., there would be no remedy. In the absence of any showing to the contrary, the liability to pay the assessment attaches to the person in whose name the stock stands on the books of a bank. When this assessment was made, the stock formerly owned by Charles C. Carpenter, deceased, stood in the name of Frances G. Carpenter on the books of the bank. The complaint alleges that at that time the stock ought to have stood in the name of Frances G. Carpenter, executrix of the estate of Charles C. Carpenter, deceased, for the reason that Frances G. Carpenter, as executrix, had no right, power, or authority to transfer the stock to herself individually, and thus deprive the creditors of the bank of the right to charge the estate of Carpenter in the hands of the executrix, with the payment of their claims. It is also alleged that the transfer was without consideration, and part of the relief asked is to have the transfer of the stock declared void, and set aside, so that the liability to pay this assessment may be charged against the estate of Charles G. Carpenter, deceased, and not against Frances G. Carpenter individually. It is true, the executrix admitted, before this action was brought, and again in her answer, that the stock be-

longed to the estate of Carpenter. The admission before the action was brought was evidence in support of the allegations in the bill. The complainant had to state his case so as to meet any defense the defendant might set up, and, as it often happens, the allegations of this bill of complaint might all have been disproved, and complainant's case wholly destroyed, yet that fact would in no wise affect the jurisdiction of the court. *Cowley v. Railroad Co.*, 159 U. S. 581, 16 Sup. Ct. 127. The relief that the court must give in this case, if it gives any, is also not to be had at law. The receiver, representing the creditors of the bank, is endeavoring to reach assets which could not be reached if the transfer of the stock should stand. The fact that the defendant admits that the transfer was without consideration, and void, relieves the complainant from proving it, but in no wise sets aside or vacates the transfer; and we do not know what the defendant's answer would have been if the action had been brought on the law side. *Mississippi Mills v. Cohn*, 150 U. S. 207, 14 Sup. Ct. 75. And while we are considering this proposition we must not forget that, while the defendant admits that the stock upon which the assessment is made belongs to the estate of Charles C. Carpenter, deceased, still, before this suit was commenced, she rejected the claim of this assessment as a claim against said estate. The court is of the opinion that the bill states a case of equitable jurisdiction.

There is a plea of the statute of limitations contained in the answer, based upon the statute of the state of South Dakota regulating the time in which claims should be presented for allowance or rejection against the estate of decedents. By virtue of said statute and the order of the county court of the county of Minnehaha, the time within which a claim could be presented against the estate of Charles C. Carpenter, deceased, expired December 28, 1895. The bank failed November 23, 1896. The assessment was made February 4, 1897, and became due March 4, 1897, long after the expiration of the time limited for the presentation of claims against the estate of Charles C. Carpenter, deceased. While it is insisted that the claim is barred, it is as earnestly insisted that proper practice requires that the question whether the claim is barred or not should be left to the county court of Minnehaha county to determine; following the practice in *Wickham v. Hull*, 60 Fed. 326. If this court was of the opinion that the decision of this case required the court to construe a state statute, it would do so; but, it being of the opinion that it is not necessary so to do, it will proceed to dispose of the case upon the only grounds that to it seem tenable. Any theory upon which it is sought to maintain that the claim here attempted to be enforced is an ordinary claim against the estate of Charles C. Carpenter, deceased, to be presented and allowed in the manner required by the laws of the state of South Dakota, and, if not so presented and allowed, to be forever barred by the statute of nonclaim of said state, involves a total misconception of the object, meaning, and effect of sections 5151, 5152, Rev. St. U. S.

Section 5151 provides:

"The shareholders of every national banking association shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Section 5152 provides:

"Persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liabilities as stockholders, but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."

Now, it was not necessary for congress to provide by law that the estates of decedents should be liable for the debts of deceased persons. That result would follow irrespective of section 5152. But congress intended to, and did, provide that the estate of the testator or intestate, in the hands of an executor or administrator, should be liable in like manner, and to the same extent, as the testator or intestate would be if living, and competent to act, and hold the stock. By the language of the section last referred to, the death of the testator or intestate does not in any way affect the liability of the estate of the testator or intestate, except, if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged. On the 23d day of November, 1896, when the Dakota National Bank failed, Frances G. Carpenter, as the executrix of the estate of Charles C. Carpenter, deceased, under the laws of the United States and of South Dakota, was a shareholder therein. To the extent of 100 per cent. of the par value of the stock held by her, the estate of Charles C. Carpenter in her hands on that day was liable; not as if Carpenter was dead, but in the same manner, and to the same extent, as if he was living; the clear object of the statute being to make the estate liable for a debt arising after the death of a testator or intestate, as well as those arising before. On the 23d day of November, 1896, so much of the estate of Charles C. Carpenter, deceased, which was in the possession of defendant, as executrix of said Carpenter, on that day, stood not as the estate of a deceased person with reference to the liability on said stock, but in the place of Charles C. Carpenter himself, liable in like manner and to the same extent as he (Carpenter) would have been if alive. The cases of *Witters v. Sowles*, 32 Fed. 139, and *Parker v. Robinson*, 18 C. C. A. 36, 71 Fed. 256, it is believed, sustain the views here expressed. There is no evidence as to when the indebtedness arose to pay which this assessment was made, but, as it could not have arisen later than November 23, 1896, the complainant is entitled to a decree charging the estate of Charles C. Carpenter, in the hands of the defendant, as executrix, on that day, with the payment of the sum of \$12,300, with interest thereon from March 4, 1897; and it is so ordered.

FIDELITY INSURANCE, TRUST & SAFE DEPOSIT CO. v. ROANOKE IRON CO.

(Circuit Court, W. D. Virginia. July 22, 1897.)

1. JUDICIAL SALES—PENDENCY OF OTHER LITIGATION.

Where a large manufacturing plant is lying idle, and rapidly deteriorating, in the hands of a receiver, the mere fact that litigation is pending in another court, involving the title to the land on which the plant is situated, is not an insuperable objection to ordering a sale, if the court, in its best judgment, believes that the interest of the creditors will be best conserved thereby. Nor is it any ground of objection to confirmation of such a sale that the commissioners gave notice at the time of sale of the pendency of such suit, with the honest purpose of informing bidders as to the condition of the title.

2. SAME—PAYMENT OF PURCHASE MONEY.

The court will not refuse confirmation of a sale on the ground that the purchaser has not made the full cash payment required by the decree, where it appears that he has paid a substantial sum, and there is no reason to suppose that he will not pay the balance on confirmation. A resale will be ordered only when the court finds that the purchaser will not pay the balance due.

3. SAME—INADEQUACY OF PRICE.

A sale will not be set aside for inadequacy of price, unless it is such as to shock the conscience.

On a motion to confirm the sale of the defendant company's property.

Watts, Robertson & Robertson, for purchaser.

Griffin & Glasgow, for certain creditors of defendant company.

PAUL, District Judge. Acting under a decree of sale entered in this cause on the 27th day of February, 1897, and a supplemental decree of April 14, 1897, the special commissioners appointed to sell the property of the defendant company sold the same on the 28th day of June, 1897, and filed their report on the 30th of the same month. On the 8th day of July, 1897, on motion of Robert E. Tod, the purchaser, a decree nisi was entered on said report as follows:

"And now, this 8th day of July, 1897, at the city of Lynchburg, this cause came on to be heard upon the papers formerly read, upon the report of Special Commissioners David W. Flickwir and H. Peyton Gray, of the sale of the plant of the Roanoke Iron Company, as directed by the decree entered herein on the 27th day of February, 1897, which said report was filed on the 30th day of June, 1897, and on motion of Robert E. Tod, by counsel, the purchaser of said property, to confirm the said sale. Thereupon the court doth adjudge, order, and decree that the sale of said property, as set out in the aforesaid report of Special Commissioners David W. Flickwir and H. Peyton Gray, filed herein on the 30th day of June, 1897, be, and the same is hereby, confirmed, unless good cause be shown why the same should not be confirmed on or before the 20th day of July, 1897; and the court doth fix the 20th day of July, 1897, as the time, and the United States court room at Harrisonburg, Virginia, as the place, for the consideration of any objection that may be made to the confirmation of said sale, within the time above specified."

Exceptions were filed to the report of sale by Joseph L. Buery and others, creditors of said Roanoke Iron Company. The court will consider these objections to a confirmation of the sale in the order in which the exceptions are taken:

First. "Because the sale was made when a cloud rested upon the title to the property sold, created by a suit then pending in the supreme court of appeals of Virginia, in which a claim to the land on which said plant is located, adverse to said company, was made and undetermined." This objection to a sale of the property was raised before the decree of sale was entered, but the court did not think the objection would justify it in delaying a sale which was being actively urged by other creditors. This court had no control over the suit pending in a wholly different jurisdiction. It could take no step to hasten a decision of the questions involved in that case, and it might be years before they were settled; and, when settled, the court had no assurance that the conclusions would be favorable to the interests of the creditors in this cause. In the meantime the property was lying idle, deteriorating in value, and requiring constant expenditures to preserve it from damage and waste. The court, in the exercise of its best judgment in the premises, thought the interests of the creditors in this cause would be best conserved by a sale, and so decreed. If the court erred, its action is subject to appeal. But the court does not think this objection can be properly considered by it after the decree of sale has been carried into effect, and the only question before the court is the confirmation of the sale.

Second. "Because the offer for said property by Robert E. Tod, whose bid is reported to the court, is a grossly inadequate price for the same." In support of this exception, the exceptants file the affidavit of one of their number, Joseph L. Buery, which is as follows:

"This day personally appeared before me, A. K. Fletcher, clerk of the circuit court of the United States for the Western district of Virginia, J. L. Buery, who made oath that he is a creditor of the Roanoke Iron Company, holding the bonds of said company to the amount of \$12,000; that he is also a stockholder in the Mill Creek Coal & Coke Company, which is the owner of the bonds of the said Roanoke Iron Company to the amount of \$24,000; that he is well acquainted with the property of the said Roanoke Iron Company, and that it appears by exhibit filed by the receiver in this cause that the plant of said company was valued at the sum of \$534,546.21. This includes the real estate, furnace plant, rolling-mill plant, shops, stables, etc. Affiant further says that said plant was reported by said receiver as in good condition, except the lining of the stack of the furnace (which has since that time been relined and put in good condition), so that the whole property is now completely repaired and in good condition; that the sale reported as having been made by the commissioners in this cause was made at a time when the iron industry had reached a condition of depression and uncertainty such as affiant believes has never before existed, and which affiant does not believe to be permanent. Affiant further says that before the biddings were opened at said sale it was publicly announced by the solicitor for the commissioners of sale that a suit was pending in which a claim was made to the land on which the plant is located, or a large part thereof; that said suit was decided adversely to said claimants in the lower court, and that an appeal had been taken to the supreme court of the state. This announcement was followed by a statement made by an attorney for said claimants that said appeal was pending in said court of appeals, and would probably be heard at the January term of said court. Affiant further says that the price obtained for said property is grossly inadequate, and, if the sale is confirmed at that price, affiant and other bondholders of said company will realize nothing from said sale."

In support of the motion for confirmation the purchaser files the following affidavits:

"State of Pennsylvania, County of Allegheny—ss.: Before me, a notary public in and for said county, personally appeared Minor Scovel, who, being duly

sworn according to law, says that he is a resident of the city of Pittsburg, and a mechanical engineer by profession; that in the practice of his profession he has been engaged for a number of years in the repairing and constructing of blast furnaces and rolling mills, and is therefore thoroughly familiar with the construction, cost, and operation of the same; that in his opinion the improvements in manufacturing and construction, and the correspondingly largely increased output, has resulted injuriously to many establishments erected before said changes, and that by reason of the same numberless plants and establishments in the United States are either rendered useless, or incapable of manufacturing iron at a profit, under the present prices, and that in addition thereto the restricted market and the discouragements to be met with in the undertaking of the manufacture of iron at present have and will deter persons from embarking in the said manufacture; that the above circumstances, taken together in many cases, prevent a sale of such manufacturing property at any price, and that about the only purchasers left for the same, in the present conditions and circumstances, are people who propose to wreck and remove the same, and dispose of the parts thereof as scrap and old material; that he is familiar with the conditions existing at Roanoke and in the vicinity, and that in his opinion in the circumstances, and for the reasons given above, the price or sum of fifty-seven thousand seven hundred dollars (\$57,700) offered for the Roanoke Iron Company's property, at a public sale thereof by the commissioners, was a full, fair, and adequate price for the same, and as much, if not more, than the property could possibly be sold for to any other person, and probably more than could be obtained at a later date for the same.

"[Signed]

Minor Scovel.

"Sworn to and subscribed before me this 6th day of July, 1897.

"[Signed]

M. B. Bates, Notary Public."

"State of Pennsylvania, County of Allegheny—ss.: On this sixth day of July, A. D. 1897, before me, a notary public in and for said county, personally came John F. Wilcox, who, being duly sworn according to law, says that he is a resident of the city of Pittsburg, state of Pennsylvania; that he is a mechanical engineer by profession, and has been engaged in said profession for the term of 25 years last past; that in the practice of his profession he has been employed in the construction, erection, and operation of blast furnaces and rolling mills, and is therefore fully familiar with the cost and value of the same. He further says that great and radical changes and improvements have been made in the construction of such establishments, and in the method of the operation of the same, within the past three or four years, by reason of which the output has been greatly increased, and the cost of production largely decreased, and that by reason of such changes, and the advantages accruing to certain locations, that the industry is being centralized, to the detriment of many other districts; that the present stagnation in the iron trade, the largely decreased demand, and restricted markets have caused the suspension of operation in many of such manufacturing establishments, and in many cases led to the same being offered for sale at great sacrifices, in many cases the only purchasers available for the same being persons contemplating the dismantling and removal of the same for sale in parts and as scrap, and, even for such purposes, buyers can be had for the same only at greatly reduced prices. And affiant avers that in consideration of all the above particulars and circumstances, that the price of fifty-seven thousand seven hundred dollars (\$57,700), for which the Roanoke Iron Company's property was recently sold at public auction by the commissioners under order by court, was the highest price that could be expected for the same, and better than, in his opinion, could be obtained at private sale, and a higher one than could be obtained for the property later, as the said property is constantly deteriorating and getting out of repair, by reason of the suspension of operations.

"[Signed]

Jno. F. Wilcox.

"Sworn and subscribed before me the day and year aforesaid.

"[Signed]

W. B. Bates, Notary Public."

"State of Pennsylvania, County of Allegheny—ss.: Before me, a notary public in and for said county, personally came John Reis, who, being duly sworn according to law, says that he is a resident of Allegheny county, Pennsylvania,

and a blast furnace manager by profession, and that he has been engaged in the same for the past fifteen (15) years, and is thoroughly familiar with the manufacture and production of pig iron; that he is thoroughly acquainted with the latest improvements in the construction of furnaces, and the method of pig-iron production, and that the same have been many and radical, notably within the past three years; that by reason of the said improvements and the changes in the methods, and decrease in selling prices of material and improved transportation facilities, that great advantages are gained by blast furnaces in certain localities; that, in addition to all of the above, the depression in the trade, and the decrease in the demand for product, has rendered many establishments idle throughout the country, and caused the withdrawal of large amounts of capital from the industry; that in all the circumstances, and by reason of the changed conditions above specified, the price or sum for which the Roanoke Iron Company property was sold by the commissioners, viz. fifty-seven thousand seven hundred dollars (\$57,700), was as large as could probably be obtained for the same from any person, and more than the same would bring at private sale, and more than could be obtained at a later date, unless large sums were expended for the maintenance of the property against depreciation and decay.

"[Signed]

John Reis.

"Sworn to and subscribed this 6th day of July, 1897, before me."

"[Signed]

W. B. Bates, Notary Public."

While the record shows a wide difference between the estimated value of the property as reported by the receiver when he took charge of it and the price for which it sold, yet, in view of statements contained in the affidavits, and the known decline of many kinds of property, notably furnace property, constructed in the "boom" period of a few years ago, the inadequacy of the price realized for this property does not shock the conscience. The record shows that the Buerys and Cooper, who now object to the confirmation of the sale, leased this property in 1895, and operated it for a time, but found their losses so heavy that they petitioned the court to be released from their contract, and agreed to pay the sum of \$5,000 to be relieved from its performance, and, on the payment of this sum to the receiver, the lease was canceled by the court. This seems to the court very strong evidence of the fact that the property cannot now be operated at a profit.

The supreme court in *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, has stated the doctrine as follows: "A judicial sale of real estate will not be set aside for inadequacy of price unless the inadequacy is so great as to shock the conscience, or unless there be additional circumstances against its fairness." To the same effect is the holding of the court in *Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887. The grounds for setting aside a sale are thus stated in 2 Beach, Mod. Eq. Prac. § 821: "To justify the interference of the court, there must be fraud, mistake, or some accident by which the rights of the parties have been affected." "It has never yet been decided that mere inadequacy of price was a sufficient reason, of itself, to open a sale." Id. § 824.

There is no pretense of fraud, mistake, accident, or unfairness of any kind in the conduct of the commissioners making the sale, or of any party connected with it, or interested in the suit, unless the objectors intend that such fraud, mistake, or unfairness is shown by exception third, which is as follows:

"Third. Because at said sale, and before the biddings were opened, it was publicly announced by the solicitor for the commissioners of sale that a suit

was pending in which a claim was made to the land on which the plant is located, or a large part thereof; that said suit was decided adversely to said claimants in the lower court, and an appeal had been taken to the supreme court of appeals of the state. This announcement was followed by a statement made by an attorney for said claimants that said appeal was pending in said court of appeals, and would probably be heard at the January term of said court. These statements showing pending litigation over the title of said property were well calculated to deter bidders, and in fact, as shown by the report of sale, only one bid was made, and that the lowest the commissioners would receive."

The court is at a loss to see on what principle an honest statement of the condition of the title to the property, made by the commissioners making the sale, can be made a ground for setting the sale aside. To know the condition of the title to the property offered for sale is the unquestioned right of every proposed purchaser, and the commissioners only gave the information to which the bidders were entitled. There is no evidence and no charge that this information was given with a fraudulent intent or to depress or injure the sale, or that it had that effect. The counsel for the claimants of the land in the suit in the state court were present, and made the same statement as the commissioners as to the condition of that litigation. The fact of the existence of the suit in the state court was known to every one connected with this suit, and the parties, one or more of whom was present at the sale, who now object to a confirmation of the sale, knew of it, because they were parties to the objection to a decree for a sale because of the pendency of the suit in the state court.

Fourth exception: "Because the terms of sale, as shown by the report, have not been complied with by the purchaser, by making of the cash payment required by decree of sale." The commissioners report that the purchaser, Tod, has paid, on account of the purchase price, the sum of \$5,000 in partial settlement of the amount bid by him, and that the residue of his bid will be paid on confirmation of the sale. There is no evidence before the court of the inability or unwillingness of the purchaser to pay the purchase money. The court has the power to enforce the agreement of purchase, and it is only after the court finds that the purchaser will not pay the balance of the purchase money that it will order a resale of the property, and require the purchaser to pay the expense arising from the noncompletion of the purchase, the application, and resale, and any deficiency in price arising upon the second sale. 3 Beach, Mod. Eq. Prac. § 828; *Mayhew v. Land Co.*, 24 Fed. 205.

As there was no fraud or unfairness in this sale, and no advance bid being offered or guarantied, the court has no assurance that on a resale the property would bring more, or even as much, as realized at the sale made. The commissioners in their report say: "Your commissioners believe that this was a fair sale, and the price, under all the circumstances, is adequate, and they recommend the confirmation of the sale." In the facts before it the court sees no ground whatever for setting aside the sale, subjecting the creditors to the hazard of a resale, jeopardizing their claims, and delaying their collection. The exceptions to the report will be overruled, and the decree of confirmation entered.

COUPER v. SMYTH.

(Circuit Court, N. D. Georgia. November 19, 1897.)

OFFICERS—POWER OF REMOVAL—INJUNCTION.

The courts have no jurisdiction to enjoin a postmaster from removing an assistant postmaster who claims protection under the civil service law.

This was a bill in equity by James M. Couper, assistant postmaster at Atlanta, Ga., to enjoin the postmaster, William H. Smyth, from removing complainant from his office. Complainant claimed that he was protected by the civil service law.

E. A. Angier, U. S. Atty.

Hamilton Douglas, for defendant.

Before PARDEE, Circuit Judge, and NEWMAN, District Judge.

PER CURIAM. The United States circuit courts in equity are without jurisdiction to restrain or control United States post-office officials in the removal of subordinate officials or employes. We cite *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482. The equitable jurisdiction of the circuit courts of the United States is not enlarged by the civil service law of January, 1883, or by any of the rules and regulations of the civil service commission thereunder. Interesting cases bearing upon these propositions have been recently decided, though not yet officially reported. In the supreme court of the District of Columbia, Mr. Justice Cox, for the court, in an elaborate opinion held that a court of equity is without jurisdiction to enjoin the postmaster general from removing a superintendent of mails from office. In the circuit court of the United States for the Northern district of Illinois, Mr. Justice Jenkins (also filing an elaborate opinion), held that the circuit court of the United States sitting in equity was without jurisdiction to interfere with or control the post-office department in the transfer or removal of employes, although such employes might be protected in their positions by the civil service law, and the rules of the commission made thereunder. In the circuit court of the United States for the district of West Virginia, Judge Jackson appears to have held to the contrary, holding that ex necessitate the circuit courts of the United States must take equitable jurisdiction. The only reference Judge Jackson makes to *In re Sawyer*, supra, is to quote a sentence from the dissenting opinion of Chief Justice Waite.

In *Re Sawyer*, supra, not since questioned or modified, the supreme court decided upon principle and authority as follows:

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government. * * * It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is

intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error, or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure established by the common law or by statute." Pages 210, 212, 124 U. S., and pages 487, 488, 8 Sup. Ct.

The principles thus declared control the jurisdiction in this case. It follows that the application for an injunction pendente lite must be denied, and the rule nisi discharged, and it is so ordered.

NEW YORK NEWS PUB. CO. v. DE FREITAS.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

No. 17.

LIBEL—INSTRUCTION AS TO DAMAGES—DISCRETION OF JURY.

In an action for publishing a libel charging plaintiff with a grave crime, it is not error to refuse to instruct the jury that they may find a verdict for nominal damages, though the evidence may warrant such a verdict, the amount of damages awarded being discretionary with the jury, within the evidence.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action for libel by De Freitas against the New York News Publishing Company. There was judgment upon a verdict for plaintiff, and defendant brings error.

Delos McCurdy, for plaintiff in error.

S. R. Ten Eyck, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Error is assigned to the refusal of the trial judge to instruct the jury that they might find a verdict for nominal damages. The action was libel, and the libel imputed to the plaintiff complicity in the theft or embezzlement, recently discovered at Rio Janeiro, of a large sum of money. The libel was published in a newspaper of New York City, having no circulation outside of that locality. The plaintiff was a citizen of Brazil, residing in Rio Janeiro, and keeping hotel there at the time. The evidence authorized the jury to find that the article was published by the defendant without actual malice, as a news item received from a reputable news agency in the usual course of business. The trial judge instructed the jury that, although there was no proof of actual damages in the case, the law presumed the plaintiff had been injured in his feelings and reputation by the publication of the libelous article, and that they were authorized to award to him compensatory damages. He subsequently instructed them that there was no evidence that the plaintiff himself had ever seen the libelous article, or that it had ever been read by any resident of Brazil, and that there was no evidence that the plaintiff had been injured by it in his business, property, or social status. He was requested for the defendant to instruct the jury that, if they

found that the article was published without malice, in good faith, and in the usual course of business, they might find a verdict for nominal damages. This instruction was refused.

The law implies damages from a publication of a libel, as in all other cases of actionable wrong, and a party is ordinarily entitled to a substantial recovery if the libel has imputed to him a grave crime or a degrading offense. Nevertheless, there are cases in which it is apparent, from the peculiar facts attending the publication or the situation of the plaintiff, that the real injury has been inappreciable, and the wrong practically inconsequential; in which cases it is the province of the jury, in the exercise of their discretion, to award small damages or nominal damages only. Whether the circumstances in evidence in the present case were such as would have justified a verdict for nominal damages only is a question which we are not called upon to decide. Assuming that they were, and that the instruction requested for the defendant might have been properly given, the refusal was not error. The instruction was one to be given or withheld, in the discretion of the trial judge. He had instructed the jury that they were to award compensatory damages, and had called their attention to the fact tending to show that the plaintiff had not suffered in his feelings, nor to the extent ordinarily incident to the publication of a libel in other respects. It was no more his duty to instruct them that they might award nominal damages than it would have been to instruct them that they might award any other specified amount. The case was not one in which nominal damages only were recoverable. Having given them the correct rule of damages, he properly left it to their discretion to ascertain what sum would adequately compensate the plaintiff. They were at liberty, upon the evidence, to find damages in a nominal sum, or any larger sum which might not be excessive. We find no error in the rulings on the trial, and the judgment is therefore affirmed.

PERSON V. FIDELITY & CASUALTY CO. et al.

(Circuit Court, W. D. Tennessee, W. D. December 20, 1897.)

No. 3,414.

1. PRACTICE AT LAW—MOTION TO DISMISS.

An action at law may be dismissed on motion when it appears that the original plaintiff had no title to the cause of action, and that the substituted plaintiff is in no sense a successor to or in privity with him, and is wholly independent of him in respect to any legal relations to the matter in controversy.

2. SAME—ACTION BY PRETENDED ADMINISTRATOR—SUBSTITUTION OF PLAINTIFF.

An order was made by a probate court appointing an administrator, but he never qualified, and no letters of administration were issued. He nevertheless commenced an action at law as administrator, but afterwards filed his resignation with the probate court, whereupon another person was appointed, who qualified and received letters of administration. This latter appointment was as an original administrator, and not as administrator de bonis non. This administrator procured an amendment to be made in the action at law substituting him as plaintiff. *Held* that, as the original plaintiff had no title to the cause of action, and the substituted plaintiff was in no sense a successor to or in privity with him,

the amendment was not allowable, even under the liberal provisions of the Tennessee Code, and the action must be dismissed, on motion.

8. SAME—WAIVER BY APPEARANCE.

A fatal defect in the beginning of an action, so that, by the record, it appears that plaintiff has no right to sue defendant on the particular cause of action, is not cured by a general appearance, or by filing a special demurrer not going to the jurisdiction.

On Motion to Dismiss.

On the 25th of June, 1896, Robert E. Lee, assuming to be the administrator of the estate of P. B. Hudson, brought this suit in the state court, from which it was removed, upon a policy of life and accident insurance granted to the decedent, during the currency of which it is alleged he received fatal injuries. Process issued and was served in due course of law. At the return term of the writ the court allowed an amendment to be made, substituting Solon A. Person as administrator of the decedent. On the same day that the amendment was made the defendant appeared and filed its petition and bond for removal to this court, which order of removal was duly granted. After the case came here there was a demurrer filed, upon the ground that the declaration failed to state a cause of action, which was amended to insert, also, the ground that the plaintiff had not made profert of the letters of administration, nor of the insurance policy, with his declaration. The declaration was amended, making profert of the letters of administration, and, over being craved, the plaintiff was directed to file the letters of administration both of Lee and Person. The plaintiff filed the letters of administration of Person, from which it appears that he was appointed administrator on the 31st of July, 1896, more than a month after this suit was brought. They are the letters of an original administrator, and not of an administrator *de bonis non*. The plaintiff filed no letters of administration granted to the original plaintiff, Robert E. Lee. Defendants file, in support of their motion to dismiss, a transcript of the record of the probate court of Shelby county, from which it appears that Lee, on the 26th of February, 1896, preceding the bringing of this suit, had filed a petition asking to be appointed administrator, and on the same day the order was granted, "upon his entering into bond in the penal sum of twelve thousand dollars, conditioned as required by law, and duly qualifying as such administrator." It does not appear by the transcript that Lee ever qualified by giving bond and taking the necessary oath. But, on the 31st of July, 1896, Lee filed his resignation as administrator, and on the same day the beneficiaries of the estate filed a petition setting up the resignation, and asking to have his appointment vacated and canceled, and that the court appoint S. A. Person as administrator; and thereupon Person was appointed, gave the necessary bond, qualified as required by law, and letters of administration issued to him. The transcript does not show, and it is admitted, that no letters of administration were ever issued to Lee. Various motions have been made here, not necessary now to mention, until the defendants, having secured over of the letters of administration, move to dismiss—First, because it appears that no letters were ever issued to Robert E. Lee, both by the absence of the letters and the admissions of counsel in open court; and, secondly, that Person became administrator after the suit was brought. Defendants also move to vacate the order of the state court allowing the substitution of Person as administrator. There is also another ground of the motion, based upon the stipulations of the policy in relation to the time when the suit shall be brought.

Gantt & Patterson and H. C. Harriner, for plaintiff.
Finley & Finley, for defendants.

HAMMOND, J. (after stating the facts). I have not had any doubt that, on the facts disclosed upon this motion, sooner or later, this suit must be dismissed. But I have had very grave doubts whether it could be done, under the strict rules of practice, upon a motion

to dismiss; and I grant the motion now with some misgivings on this point, only because, later on, in some appropriate way for presenting the matter, that result must be inevitable, and because there is no possible way of curing or avoiding the difficulty. The ground for dismissing the suit is that the original plaintiff had no title to the cause of action, and no right to sue. The substituted plaintiff is in no sense the successor of the original plaintiff, in no sense privy to him, can in no way claim through or jointly with him, and stands in every possible sense wholly independent of him and any legal relations to the matter in controversy. It is not the case of one purchasing the thing in litigation pending suit brought, nor taking title pending suit by devolution of law, and in either case entitled to be substituted by amendment as the party plaintiff. But it is the case of one made a party who has no relation to or connection with the original plaintiff, either in estate or otherwise. The one is not privy to the other in blood, in representation, or estate, nor yet in contract,—one or the other, or both together; neither privies in fact nor privies in law. Bouv. Dict. tit. "Privies."

This substituted plaintiff has a right of action on the policies, undoubtedly; but that right of action was acquired subsequent to the bringing of this suit. It did not exist at the time the suit was brought, either in the original plaintiff or himself. It is a curious situation. But, unless you can establish the proposition that an entire stranger to the right of action, and one who is utterly destitute of any interest in the subject-matter of the suit, may issue process and bring an action, this suit cannot be maintained. It is impossible, in my judgment, when such a suit is brought, to give it vitality by substituting as the plaintiff one who, at the time of the bringing of the suit, was equally destitute of any interest in or title to the cause of action, but who has, since the suit was brought, become by operation of law invested with the legal title and the right to sue. How such a condition as this can be cured without the bringing of an entirely new suit by him having the title to the cause of action I cannot see. It presents no possibilities of amendment and supplemental process. There is nothing to amend, and counsel have well illustrated the condition by analogy to that of attempting to ingraft a live twig upon a dead tree. I can very well see how, if by some misprision the name of A. had been inserted in the original process, or declaration, as administrator, when in fact B. was administrator at that time, you may, by amendment, strike out the name of A. and insert the name of B.; but if, at that time, neither A. nor B. was administrator, and neither had a right of action as such, it is not clear how B. could be substituted for A., even though at some time subsequent to the bringing of the suit he had become the owner of the right to sue.

Our Tennessee statute provides:

"No civil suit shall be dismissed for want of necessary parties, or on account of the form of action, or for want of proper averments in the pleadings; but the courts shall have power to change the form of action, strike out or insert in the writ and pleadings the names of either plaintiffs or defendants, so as to have the proper parties before the court, and to allow

all proper averments to be supplied, upon such terms as to continuances as the court in its sound discretion may see proper to impose." Mill. & V. Code. § 3580.

Whether our own statute of amendments (Rev. St. § 954) would permit this court to indulge as broad a power of amendment as above set forth in the state statute, it is not necessary here to inquire, because the amendment involved in this case had been made in the state court before this suit was removed, and, being here by removal, it stands, under our statute, precisely in the same plight and condition that it did there. But, of course, we have here the right to entertain in any proper form a motion to vacate the order of amendment made there, if it was not allowable by law.

The language of the state statute is exceedingly broad, and, in the letter of it, undoubtedly would authorize the amendment to be made that was made. But surely the statute does not mean to allow an absolute stranger to the right to sue to bring a suit, and then allow one who has obtained the right to sue, not from this stranger, nor through or under him, but from an entirely independent source, to be entered as a party by amendment, and have the benefit, as to time and all of the other incidents, of a suit at law so brought. The language of the statute itself is that no civil suit shall be dismissed for want of necessary parties, and the paramount words here are "necessary parties," which implies that some mistake has been made by leaving out some real party having the right to sue. At the time this suit was brought nobody was in existence having the right to sue. The cause of action was in suspense or abeyance by reason of the death of its original holder, and, no administrator having been appointed for the estate, no suit could be brought at that time by anybody until such an appointment was made. Indeed, the Tennessee Code forbids it, if it does not make the bringing of the suit without authority a misdemeanor. Mill. & V. Code, §§ 3041, 5347, 3062, 3063. And one unlawfully assuming to be administrator could not found a cause of action upon which amendments might be grafted. It does not fall within the description of a civil suit dismissed for want of necessary parties, but of one dismissed because the party who brought it had no title whatever, and could acquire none to be transmitted by him to anyone claiming to take his own place by substitution. The mere statement of this proposition is conclusive, to my judgment.

By another section of the Code of Tennessee it is provided:

"At any time before trial, new plaintiffs or defendants may be added to the suit by the plaintiff, upon supplemental process taken out and served, and subject to such terms, in regard to costs, as the court may impose. If at the appearance term, it may be done without cost; if at any subsequent term, on such conditions as the court may prescribe, so as especially to prevent delay." Mill. & V. Code, § 3495.

And:

"In actions for the recovery of property, any person not a party thereto, on showing himself interested in the subject-matter of the suit, may be allowed to appear as defendant therein." Mill. & V. Code, § 3496.

These and the following sections upon substituted parties imply that the suit pending in which these changes are made shall be one

that is capable of prosecution, and of such vitality as to receive these amendments. But the case we have in hand is the simple case of a volunteer, and a stranger, bringing a suit which he has no right to bring, and has been forbidden to bring. Mill. & V. Code, §§ 3041, 3062, 3063. It would be extending the provisions of amendment beyond the ordinary process of law, and perhaps beyond what our constitution has called "due process of law," to allow a suit brought in that manner to serve the purpose of a vehicle for bringing into court, as of that day and date, other parties acquiring the right of action subsequently to the bringing of the suit, and independently, and never in privity with the original plaintiff. No case has been cited on either side which justifies such a practice as that.

It is my judgment, though it is probably unnecessary now to decide that question, that if this suit should go on without objection to the end, and at the trial it should appear that at the time the process was issued the original plaintiff had no title, and the substituted plaintiff had no title derived from or in succession to the original plaintiff, but one wholly independent of him, and acquired after the suit was brought, the court would direct a verdict for the defendant upon the simple ground that the plaintiff had no title at the time the suit was brought. Particularly this would be so in respect of administrators, whose title is one of strict law, and necessarily should be so, upon grounds of a public policy which would forbid strangers to so meddle and intermeddle in the estates of decedents as to be assuming to bring suits for them without authority of law. Mill. & V. Code, §§ 3041, 3062, 3063.

Again, if the facts we now have appearing upon this motion were embodied in a plea in abatement, and established upon that plea, the plea would be allowed, and the suit abated and dismissed. Or, if the facts were set up by a plea in bar to the plaintiff's right to maintain this suit,—not his right to maintain the cause of action set up in this suit, but his right to maintain this particular suit founded on the process issued in this case, which is the foundation of every suit,—the plea would be sustained. Or, possibly, after the profert, and oyer had, the technical practice would require a demurrer to the declaration, now showing on the profert, that there was no administrator to bring the suit, or be substituted as a plaintiff at the time the suit was brought, and hence that no one could then issue process, as the stranger, Lee, had done, or declare, as the substituted plaintiff did. This motion might be treated as such a demurrer. I do not stop to inquire whether the technical method of presenting the defense would be by demurrer, motion to dismiss, plea in abatement, plea in bar, or by waiting until the presentation of the proof, and making objections to the testimony, and asking that a verdict be directed for the defendants; but certainly at some time we would reach the conclusion that the plaintiff could not maintain this cause of action now pending. The defendants have made the objection by motion to dismiss, having first required the plaintiff to make profert of his letters of administration, from which it appears that they were issued to him, and that he qualified, after the original suit was brought. It does not appear, by those letters or by the record, that

he was an administrator *de bonis non*, or that Lee was an administrator *ad colligendum* or otherwise, but that he is the original administrator; and, of course, the necessary implication is that there has not been any other administrator within this jurisdiction. Besides, the plaintiff was required by a former order of this court to make *profert* of, and file, not only his own letters of administration, but those of the original plaintiff. His own are filed, but not those of the original plaintiff, and presumably there were none; and it is admitted by counsel that the original plaintiff was never qualified as administrator, and also there is an affidavit of an agent of defendant to that effect. This fact being thus made to appear, the motion to dismiss is founded upon it.

As before stated, I doubt very much whether this is the proper practice, and the arguments that have been made and the briefs filed do not remove the doubt. In modern code practice, which is not altogether binding on us, the uses of the motion to dismiss have been very much enlarged beyond their common-law use. They are generally made upon the basis of facts appearing in the technical record, though they may be founded on facts supported by affidavit. The ordinary function of the motion at common law is to procure some order or rule of court which is necessary to the progress of the case and does not go to the merits. If the want of jurisdiction appear upon the face of the record, the motion is used to present the question; but, if it depend upon facts *aliunde* the record, it must be presented by plea, and, when these facts *aliunde* the record are presented by plea, the case is tried upon the basis of the plea, and not upon a motion to dismiss. That one is not executor or administrator is usually presented by a plea, but that is not precisely the defense that is relied on here. It is rather in the nature of a defense setting up that the process of the court has been abused. Not fraudulently, necessarily; but it is an abuse of the process of the court for a stranger to assume that he is an administrator or executor without authority of law, and bring a suit in that behalf, and afterwards permit his suit to be used to introduce another plaintiff, who had, at the time the suit was brought, no more right than he, but has subsequently acquired it. But, if this be not so, the motion is in the nature of a suggestion to the court that it now appears by the facts in the case that the plaintiff has no right to maintain the action, and that it is not worth while to incur the costs of further proceedings, either by plea in abatement, plea in bar, or trial on the merits. It is necessary that an administrator or executor shall make *profert* of his letters. 1 Chit. Pl. § 420. And, having craved *oyer* of these letters, and had them produced, it does appear upon the record that the plaintiff could not maintain the action for the reasons already stated; and I have concluded that a motion to dismiss for that reason is, if not a technically proper method of presenting this defense, a convenient and inexpensive one, and that it would not be error to allow the suit to be dismissed in that mode.

The defendants also move to vacate the order entered by the state court allowing the amendment substituting the administrator, Person, as a plaintiff, instead of Lee, who had assumed to be administrator

when the suit was brought, but was not. It is claimed in support of this motion, and as one of the grounds for it, that the amendment was made to bring in an administrator de bonis non,—which would have been altogether a proper amendment, and authorized by the statutes we have just considered,—but that, in fact, he was not an administrator de bonis non, but an original administrator. But the transcript of the record does not show that the amendment was so made. It is true that the order allowing the amendment states that Lee, the plaintiff, had resigned as administrator; but it does not say that Person, the substituted administrator, was such de bonis non. The language of the orator is:

“In this case Robert E. Lee, administrator, having resigned as such, upon motion of plaintiff’s attorney the suit is amended by making Solon A. Person, administrator of the estate of P. B. Hudson, plaintiff.”

But, if we are correct in the ruling we have already made in relation to the meaning of the statutes and the inability of the original process in behalf of Lee to sustain a graft of this amendment, it ought to be set aside upon the very fact that he was, in truth, an original administrator, and had no succession to Lee, and, even if the court allowing the amendment proceeded upon the theory that, whether as administrator de bonis non or as an original administrator, he was entitled to the substitution, the case being brought here, we can exercise the same power over the amendment, to vacate it, that the state court could have done. We do not review or reverse that ruling, but we treat it precisely as the state court itself would treat it, upon its being made known that the right to the amendment did not exist. Setting aside that order, for the reason that it was improvidently granted, inasmuch as Lee had, in disobedience of the Code, forbidding him to assume to be administrator, brought the suit contrary to law, would result in ousting the plaintiff from any position in the case, and then the suit could be dismissed, upon a showing that the original plaintiff could not maintain it, or that the suit was here without a plaintiff, and in a condition that none could be substituted for him who had been ousted by the rulings of the court. So we come to the same result upon both of these motions, namely, that the suit should be dismissed.

It remains to consider the contention of the plaintiff that, notwithstanding what has been said, the defendants have waived this objection by their appearance—First, their general appearance in the state court to remove the cause; and, secondly, by that which they have done here in the way of filing a special demurrer not going to the jurisdiction of the court, which demurrer is partly confessed by the plaintiff, and his declaration amended, making profert of the letters of administration. This contention of the plaintiff treats the objection of the defendants to the maintenance of this suit as going merely to irregularities of procedure, which, of course, would be waived by a general appearance; but we need not inquire whether the proceedings that have been had in this case would be a waiver of irregularities, or a waiver of the nonissuance of process supplemental to the amendment, or not, because the objections taken are of a graver character than this. They do not proceed upon the the-

ory that there has been no proper process, but upon the ground that it is shown by the record that the plaintiff has no right to sue the defendant by maintaining this particular cause of action, which it was an impertinence in the original plaintiff to bring, and which he had no right to maintain, and because of that fatal infirmity at the very beginning of the suit, and nothing that has been subsequently done can amend or cure it. If there had been no process at all, the appearance of the defendants would have been good, provided the suit had been well brought in the beginning; that is to say, brought by one having the right to bring such a cause of action, either for himself or for those who might be substituted for him. The original plaintiff had no such right, and it is for this reason that the suit is dismissed, and not because he defectively proceeded in his suit.

Neither does it avail the plaintiff that this motion is substantially the same defense as would be made by a plea of prematurity of suit brought, which is, as ruled in *Carter v. Turner*, 2 Head, 52, a defense that has to be made by a plea in abatement; and it is argued that, under our system of pleading, such a plea should be filed before any demurrer to the declaration. It is quite true that, in a certain sense, the now rightful administrator of the decedent, and the rightful owner of the cause of action,—the administrator, Person,—may be said to have brought this suit prematurely in the name of another; or, in another sense, the entire stranger, Lee, assuming to be an administrator when he was not, had prematurely brought the suit before letters of administration had been granted to him or any one, or before his qualification as administrator. But, again, this is not the ground of defendants' motion. It is, not that the suits were prematurely brought, but that the suit could not be brought at all, because the particular plaintiff bringing it had no title, and a substituted plaintiff, in a case like this, must have had authority to sue at the time the original suit was brought. In other words, some one must have been administrator at the time process was issued in this case, and, as neither Lee nor Person was administrator, the subsequent granting of letters of administration to Person did not authorize him to maintain an action brought when there was in fact no administrator,—neither himself nor any one of whom he is the successor. It is, therefore, an inability to sue,—an infirmity in the title of the plaintiff,—and not the case of one having the right bringing the suit prematurely.

It cannot, for the purposes we have in hand, be treated as a new suit, or as an original suit by the substituted plaintiff, on the day and as of the date when he was admitted as a party, to which the defendants have voluntarily appeared and waived process. If, to save a statute of limitations, or a contract limitation, it may be so treated, as to which we do not decide, as a foundation for this suit, and for maintaining its progress now and here, it is a quicksand in legal procedure, for the plain reason that the defendant did not voluntarily appear. It was brought in by process, appeared to answer process, and was compelled to take the suit as it was found, amendment, substitution, and all, and the objection is, not that there has been no valid process served upon the company, for that is admitted, and could not be denied, but that it is the process of a stranger to the contract, and

that he should not have begun this suit, and, as to the real party in interest, that he was also a stranger to the contract when the suit was brought and process issued, so that he also could not have then begun it; and the defendant sets up that fact in defense to the original and only process, and it did not and should not be held, under such circumstances, to have voluntarily appeared to a suit begun without process, which they are willing to waive. That would be to falsify the facts of the record and the conduct of the defendant, and to force upon it a waiver never intended, and not to be fairly implied from the contract of the defendant in the record. Waiver is sometimes implied by estoppel against actual intention, but never forced, even in pleading, upon a party where the intention against it is manifested by his conduct and there is no estoppel on the facts. Here, from the beginning of its appearance, the defendant has been endeavoring, by demanding profert and craving oyer, to present the fact on which it relies,—that this suit was brought without right to bring it, and the substitution made without right to make it.

The other ground of the motion to dismiss, predicated of a provision in the policy that legal proceedings for a recovery shall not be brought until after three months from the date of proof at the home office of the company, nor until not less than six months from the date of the death, is not considered nor adjudged in these proceedings, for the reason that, the suit being dismissed upon the ground that the plaintiff has not been properly made a party, and could not maintain it, we have no jurisdiction to determine the question presented by the third paragraph of the motion.

On the whole, the motion must be granted. Ordered accordingly.

BOWES v. HOPKINS et al.

(Circuit Court of Appeals, Seventh Circuit. February 5, 1898.)

No. 447.

NEGLECT—RAILROAD COMPANY—LIABILITY TO EMPLOYEE.

In the case of an accident to an employé on a switching train moving at night through a city street, mere evidence that it was caused by running into a horse which had attempted to cross a culvert, supporting the tracks, and constructed in the customary manner, with ties set some distance apart so as to deter stray animals from venturing on it, and had there become fastened or caught between the ties, is insufficient to establish negligence on the part of the railroad company.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

In the court below an intervening petition was filed by the administrator of James Donahue in a foreclosure suit brought against the Chicago & Northern Pacific Railroad Company, to recover for the death of the deceased, who was killed in an accident at Forty-Fourth street, in the city of Chicago, on April 1, 1894. The case was heard before the court, which decided against the right of the petitioner to recover, and entered a decretal order dismissing the petition for want of equity. This appeal is from that order. Donahue was in the employ of the Wisconsin Central Company, which was operating the railroad of the Chicago & Northern Pacific Railroad Company as lessee.

This suit is brought against the receiver of the lessor, instead of the company which was at the time operating the road. At Forty-Fourth street, the place of the accident, there are two main railroad tracks running east and west, and at right angles with the street. Donahue was a member of a switching crew, consisting of an engineer, Stofft, a fireman, Crebum, and two other switchmen, Wincher and Andrews, the latter being foreman of the crew. The train on which the accident happened started from Forty-Eighth street, four blocks west of Forty-Fourth street, towards the east, on the south main track, and was to run with two car loads of sand ahead of the engine to Kedzie avenue, a distance of about two miles. The engineer was at his place in the engine cab, on the right or south side of the engine. The fireman was on his seat on the left or north side. Andrews and Donahue were on the forward end of the more easterly car, keeping a lookout. Behind the engineer on a seat was an extra switchman, one Stearns, who was not a member of the crew. The engine had a headlight, properly lit, at each end. Thus equipped, the train left Forty-Eighth street, at about 7:15 o'clock in the evening, towards its destination, two miles east. After slowing up for a railroad crossing two blocks to the east, it proceeded on its way until it reached Forty-Fourth street, when it struck a horse on the track, and was derailed and wrecked, both Donahue and Andrews being killed. When the cars struck the obstruction at the crossing, Crebum called out "Whoa" to the engineer, who applied the brake and reversed the engine, and stopped as quickly as he could. This train, with others, was under the charge of H. A. Meyers, who was yard master at Forty-Eighth street. It was part of his duty to give instructions generally as to where the crews and trains should go, his duty in regard to this train being the same as to the others under his charge as yard master. His instructions given to Foreman Andrews were to take two cars of sand to Kedzie avenue from Forty-Eighth street. When Andrews got the cars ready to go he remarked to Meyers that there was a dummy or suburban train due, and Meyers told him to go ahead, that he could run as fast as they could, and that he was in a hurry to get the sand to Kedzie avenue. Andrews then said, "All right," and went ahead. These instructions to Andrews were not communicated to the engineer, who, so far as appears, had no knowledge of them, and received himself no other directions except the ordinary signal of raising or lowering the lantern to show that he was to go ahead. There was a culvert on the west side of the street crossing at Forty-Fourth street, in which the appellant alleges the horse was fastened at the time he was struck by the train. This was a bridge about six or eight feet long and two feet above the ground, under which there was a water way. It had been there for several years, and was intended partly as a bridge, and partly as a cattle guard, to prevent animals from straying from the street along the track and right of way. There was no fence connecting on either side with the culvert, which was constructed with stone butments for the timbers to rest upon. It was simply a bridge over a water way. It was constructed, however, with a view to keep cattle from crossing. The evidence shows that one purpose in the construction of such culverts is to make them so that cattle will be deterred from trying to cross them; that they will look in, and, seeing that they cannot cross safely, draw back, and not become fastened in them. To that end the timbers, which in this case were common ties, were laid crosswise of the track about 8 or 10 inches apart, and upon stringers at each side running the other way; that is to say, lengthwise of the track. The rails were laid upon these ties as upon other parts of the road. The evidence shows that this was then the usual way of constructing culverts on the roads in and about Chicago, to place ties 8 or 10 inches apart. The evidence is not clear as to the time the sand cars left Forty-Eighth street. No one took note of the time, and the witnesses differ in the testimony, or rather in their opinions. There was a dummy due at that station at 7:26, going east on the same track, and, as near as can be determined, the train which was wrecked started at about 7:15 p. m., 11 minutes ahead of the dummy's time. The speed of the switch train was about 12 miles an hour, as appears by the weight of testimony. Passenger trains on the same track went at the rate of from 25 to 35 miles per hour. All trains going east, whether freight or passenger, went over this track. All going west passed over the other track. The tracks

were properly fenced, and there is no evidence that cattle or horses had been encountered at this place before. Meyers, the yard master, had full authority to determine the order in which trains should run, both freight and passenger, and to delay suburban trains when necessary. Between Forty-Eighth street and Kedzie avenue there were several switches where the switch train could have side-tracked, if pressed for time. When the dummy due at 7:26 arrived, Meyers boarded the engine, and rode with the engineer until they met Stofft, the engineer on the switch train, coming back with his engine after the accident.

James C. McShane, for appellant.

Kemper K. Knapp, for appellees.

Before WOODS and SHOWALTER, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge, after stating the facts as above, delivered the opinion of the court.

There are two principal contentions made by the appellant: First, that the train was run at an unusually high and dangerous rate of speed, which was the proximate cause of the accident, and that Meyers, the yard master, in directing the switch train to start ahead of the dummy soon to be due, acted as a vice principal of the defendant, and was guilty of negligence in causing so high a rate of speed; second, that the horse, which was the occasion of the wreck, was fastened in the culvert at the time of being struck, and that the culvert or cattle guard was constructed in a faulty and insufficient manner, by having the ties so far apart that animals straying upon the track could step through and become fastened in the culvert, which was also the proximate cause of the accident.

There is also one contention made by the appellee and argued at length, which we do not find it necessary to decide, which is that the defendant receiver, being simply the lessor of the company actually in charge of and operating the road, is not liable. The circuit court, among other things, held that Meyers, the yard master, was not a vice principal, but a fellow servant with the deceased, citing the following cases: *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983; *Railroad Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269; *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843; *Railroad Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848; *Oakes v. Mase*, 165 U. S. 363, 17 Sup. Ct. 345; *Railroad Co. v. Brown*, 34 U. S. App. 759, 20 C. C. A. 147, and 73 Fed. 970.

From the view we have taken of the evidence, we do not find it necessary to determine this question, as the evidence fails to show that there was any unusual rate of speed, or that, whatever the rate of speed was, it was the result of Meyers' directions. The engineer and fireman were the persons in best position to judge in regard to the speed of the train. They testify that it was running 10 or 12 miles an hour. Stearns, the extra switchman, says he judges they were running from 12 to 15 miles an hour. Wincher, the other switchman, who was called for the appellant, testified that he thinks the speed was 18 to 20 miles an hour. But the value of his testimony is somewhat lessened by the fact that immediately after the

accident he made several written statements in regard to the accident, in which he stated that the train at the time of the accident was running 10 to 15 miles an hour. Several witnesses were called by appellant who gave their opinions, against the objections of the appellee, that, from viewing the wreck after the accident, they thought the train was running at a much higher rate of speed. If the competency of such testimony should be conceded, the weight to be given to it would be very small. It would be difficult to judge, because the cars were derailed, and turned upon one side, and had plowed along the ground for a distance, whether they were going at the rate of 10 or 20 miles an hour. What Meyers said was said to Andrews without the engineer's knowledge. It was not communicated to him, and there is nothing to show that the engineer had not full control of the speed of the train. He testifies that no one at any time gave him any directions as to how fast he should run the engine. Several witnesses for the appellant testified, against the objections of appellee, that the rules for running trains required that trains running the same way on the same track should keep not less than 10 minutes apart. But when the rules were produced the time turned out to be 5 minutes instead of 10. But this rule was made to prevent collision between trains running in the same direction on the same track, and had no reference to the prevention of collisions with obstructions of the character in question. The switch train had but 2 miles to go. It had somewhere from 11 to 15 minutes the start of the dummy, which was to follow. It had plenty of time to make Kedzie avenue without any danger of collision with the dummy, as that was not due there until 7:33, giving the switch train about 18 minutes in which to make the 2 miles. And, as an extra precaution, the yard master, who knew well the situation, went with the engineer on the suburban train. There is no evidence to show that the speed of the train had anything to do with causing the accident. It is easy to conjecture that, if it had run either at a higher or lower rate of speed, it might not have encountered the horse at all, or, if it had, that the train would not have been thrown from the track. But it is quite impossible to determine what would have happened in either of these cases. Whether running 12 miles an hour would be more dangerous than running 8 miles an hour does not appear from the testimony. From all of the testimony it appears incontestably that the approximate cause of the accident was the wholly unexpected straying of a horse upon the railroad track in a populous city, contrary to a public ordinance. This is so obviously the case that it seems idle to strain one's vision to find some other co-operating cause which will serve to point the way to a case for damages. Under the present construction and management of railways, obstructions arising from the straying of horses and cattle upon the right of way are not wholly to be prevented. In this case we do not deem it at all material whether the horse was caught in the culvert at the time the train collided with him or not. The culvert was made in the usual manner, the purpose being to deter horses and cattle from attempting to pass over. If they attempt to pass over when the ties are 8 to 10 inches apart, they are very likely to step through

and become fastened, which the evidence shows makes a more dangerous obstruction than as though they were strayed upon the track and not fastened. On the contrary, if the culvert is planked over so as to prevent their stepping through, it makes a bridge over which all cattle and horses may safely pass from a crossing and stray upon the track, which, upon the whole, would be a still greater menace to the safe operation of the road. It is equally for the interest of railroad companies and the public that dangers from such a source should be reduced to a minimum, and that, no doubt, has been the aim of those intrusted with the management of railroads. It is one of those dangers which is not wholly avoidable so long as grade crossings are in use, giving rise to one of those hazards which an employé assumes when he engages in the business. The deceased had been employed upon this road for some time. There were many culverts of the same kind at different crossings along the track, of which he must have known. The danger from such an obstruction as this was as well known to him as to those in charge of the road. It was one of the ordinary risks which he assumed when he entered into the service of appellee as switchman.

It has already been said that it makes but little difference whether the horse was in the culvert when struck or not. But the evidence shows clearly that he was not. Several witnesses for the appellant testify that they saw after the accident blood and hair extending from the culvert along the track to the planking in the middle of the street. This, if there was no other evidence, would not show that the horse was fastened in the culvert. It would only show that he was struck near the culvert,—it might be on one side and it might be on the other,—and carried along the track to the east. But the appellee's evidence, which is wholly uncontradicted, shows also that there was blood and hair found along the track at some distance west of the culvert. M. McKernan, who was train master of the Chicago & Calumet Terminal, testified that he discovered a clot of blood, and some horse hair and perhaps a little flesh, west of the culvert, possibly 60 feet. John Conlon, a track foreman, testified that he found blood and other evidences of the horse about 35 feet west of the west end of the culvert, though he says on cross-examination that he might be mistaken about it. He is corroborated by his son, William J. Conlon, who testifies that he went to the wreck right after the accident, and that the most westerly point where he discovered any evidence of the horse was about one rail's length west of the culvert, where he found hair and blood. This evidence is not at all in conflict with that produced by the appellant on this question, and the whole together shows that the horse must have been struck some 30 to 60 feet west of the culvert, and carried over the culvert and across the street to the east. Whether he had crossed this culvert or had come on from the street west there is nothing to show. Upon the whole case we are unable to find any negligence on the part of those in the management of the road which caused or contributed to produce the injury to the deceased, and the order of the circuit court is affirmed.

ALABAMA G. S. R. CO. v. CARROLL.

(Circuit Court of Appeals, Fifth Circuit. January 3, 1898.)

No. 516.

1. APPEAL—REVIEW—RECONSIDERATION OF QUESTION ON SECOND APPEAL.

A question which has been settled by the decision of an appellate court will not be again considered by such court in the same suit.

2. JURISDICTION OF FEDERAL COURT—CITIZENSHIP—EVIDENCE.

Where the evidence is sufficient to support a finding that a plaintiff left the state of his residence, where the action was brought and the defendant is domiciled, without intention to permanently change his domicile, a federal court is justified in taking the case from the jury, and directing its dismissal, as one not properly within its jurisdiction.

3. DAMAGES—ACTION FOR PERSONAL INJURIES—EVIDENCE OF POVERTY OF PLAINTIFF.

In an action for personal injuries, evidence of the poverty of plaintiff and his relatives is irrelevant, and its admission is error.

4. SAME—MEASURE FOR LOSS OF EARNINGS.

The measure of damages for an injury depriving a plaintiff of his earning power is not the amount he might probably earn during his expectancy of life, but the present value of such earnings.

5. TRIAL—ARGUMENT OF COUNSEL.

It is error to permit counsel, over objection, to state in argument an erroneous rule of damages, or to introduce into his argument matters outside the evidence, and having a tendency to mislead the jury as to the true measure of damages, and to allow the same to go to the jury without correction.

6. MASTER AND SERVANT—INJURY TO EMPLOYEE—RAILROADS.

Where plaintiff, a brakeman, had access to the rules of the company relating to his employment, he was chargeable with notice of their requirements; and when such rules were reasonable, and they required plaintiff to inspect the links and drawheads of the cars making up the train on which he was employed, and he failed to do so, he cannot recover for an injury resulting from a defective link. If the defect was discoverable by a proper inspection, he was guilty of contributory negligence, and, if not, it was an assumed risk of his employment. Per Pardee, Circuit Judge.

7. SAME—RAILROADS—INSPECTION OF CARS.

While it is the duty of a railroad company to cause inspection of its cars, and also those of other companies handled on its road, it is not held to the same measure of thoroughness in the inspection of foreign cars received for through transit over its lines as in case of its own cars, the care required being determined by what is reasonable under the circumstances.

McCormick, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

This was an action by William D. Carroll against the Alabama Great Southern Railroad Company to recover for personal injuries sustained as an employé. There was judgment for plaintiff, and defendant brings error.

George Hoadley, Jr., A. G. Smith, and James Weatherby, for plaintiff in error.

Richard L. Brooks and S. W. John, for defendant in error.

Before PARDEE, and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge. The defendant in error in this case was a brakeman on the railroad of plaintiff in error, working on the freight trains of said railroad between Birmingham, Ala., and Meridian, Miss. The contract of employment was made in the state of Alabama, and he started to work, when he commenced, in the state of Alabama, and was to work between Birmingham, Ala., and Meridian, Miss. On the night of the 18th of June, 1890, he started out as a brakeman on a train from Birmingham, Ala., to Meridian, Miss. He was asleep in the caboose of the train in Birmingham before he started, and was aroused a few minutes before the train was to start. He got up and went to the train, and just before it started, in company with the conductor and his fellow brakeman, he made a casual inspection of the train, but none of the three inspected the links coupling the cars before starting. The train stopped at Tannehill, Ala., to get water, and stayed there about five minutes; at Woodstock, Ala., to meet another train, and stayed there about five minutes; at Tuscaloosa, to put out a car, and stayed there some ten or fifteen minutes; at Carthage, Ala., and stayed there about five minutes; at Miller's Tank, Ala., and stayed there about five minutes; at Eutaw, Ala., and stayed there several minutes; at Epp's Station, Ala., and stayed there several minutes, taking on coal, etc.; at York Station, Ala., and stayed there several minutes. At none of these stops did the defendant in error or his fellow employes make any examination of the links or couplings of the train. At Miller's the testimony showed that when the train stopped it was on a trestle, and they could not have made the examination. At all other places there was no physical reason why the examination could not have been made. Between Birmingham and Meridian there are several very heavy grades, one of them being at or near Wallace's Station, in the state of Mississippi. After the train had passed over the steep grade near Wallace's Station, and while it was on nearly level track, in the state of Mississippi, the train parted. At the time the train parted the defendant in error was on top of the cars, putting on the brakes. He had put on several, and was trotting on top of the cars, and was about to step from one car to another, when the train parted between the cars over which he was at the time passing, and he fell down in between the cars, and was run over by the rear section, and had one foot and a part of the other cut off.

The evidence shows that the two cars that separated were cars A. G. S., No. 9,341, and C., H. & D., No. 8,225. The A. G. S. car was a car of the Alabama Great Southern Railroad Company, and the C., H. & D. car was a foreign car, belonging to the Cincinnati, Hamilton & Dayton Railroad Company. The car C., H. & D. was received by the Alabama Great Southern Railroad Company at Chattanooga from some foreign road. At Chattanooga it was put in train, as a through car, and an A. G. S. car came from Chattanooga with it, a car being coupled between them. At Birmingham the intervening car was cut out, and the A. G. S. car and the C., H. & D. car were linked together, with the link that came with the C., H. & D. car from some foreign road, and this was the link that broke in two and caused the accident.

The train had 24 cars in it, and the link broke between the sixth and seventh car from the caboose, or hind car.

The evidence showed that the link belonged to the Kentucky Central Railroad; that the Alabama Great Southern Railroad Company had provided inspectors, whose duty it was to examine all trains going out, before they left, to see that all links, both foreign and domestic, about them were in proper order; that these inspectors were stationed at Chattanooga, Tenn., Attalla, Ala., Birmingham, Ala., Rising Fawn, Ga., Woodstock, Ala., and Tuscaloosa Ala.; that the Kentucky Central Railroad Company, which owned the link, purchased their links from manufacturers of the best reputation, and that the Alabama Great Southern Railroad did the same thing. There was evidence tending to show that the link which broke, which showed also a bend, was bent cold, and that iron bent cold lost some of its strength. There was evidence tending to show that the link was bent before the accident. The iron of which the link was made was a good quality of iron. There was evidence tending to show that the link was cracked before it came in two, but the evidence did not show how long it had been cracked before it broke, if it was cracked at all. There was no evidence to show that the link was defective before it was put in the train to couple the cars, other than that it might have been bent cold. The train to which the accident happened was amply supplied by the railroad company with extra links, of different kinds, to be used by the trainmen in replacing defective or broken links.

The following rules of the Alabama Great Southern Railroad Company were offered in evidence:

"Rule 126. All persons entering or remaining in the service of the company are warned that, in accepting or retaining employment, they must assume the ordinary risks attending it. Each employé is expected and required to look after and be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows, especially in the switching of cars and in all movements of trains. Stepping on the front of approaching engines, jumping on or off trains or engines moving at a high rate of speed, getting between cars while in motion to uncouple them, and all similar imprudences, are dangerous and in violation of duty. Employés of every grade are warned to see for themselves that the machinery or tools which they are expected to use are in proper condition for the service required, and, if not, to put them in proper condition, or see that they are so put before using them. The company does not wish or expect its employés to incur any risks whatever from which, by exercise of their own judgment and by personal care, they can protect themselves, but enjoins them to take time in all cases to do their duty in safety, whether they may, at the time, be acting under orders of their superiors or otherwise."

"Rule 242. They are charged with the management of the brakes, and the proper display and use of train signals. They must examine and know for themselves that the cars, brakes, ladders, running boards, steps, coupling gear, and all appliances, which they are to use, are in proper condition, and, if not, put them so, or report them to the proper parties, and have them put in order before using."

"Rule 245. They must assist in loading and unloading freight, and aid the conductor in inspecting the cars, when the train stops for water or for other trains."

It was shown that a copy of the printed rules of the company, from which the foregoing were extracted, was in the caboose of the train for the use of employés; and Carroll admitted that at a for-

mer time during his employment he had had a copy of the book in his possession, and had examined the same as far as the rules related to signals, but denied examining it further. Upon trial the jury rendered a verdict in favor of the plaintiff below, defendant in error here, in the sum of \$15,000, upon which verdict the court gave judgment against the defendant below, the Alabama Great Southern Railroad Company, which company sued out this writ of error.

The record is voluminous. It contains 182 distinct assignments of error, appropriating 50 pages of the printed record, showing a very wide divergence of opinion on questions of pure law between the learned judge presiding in the circuit court and the learned counsel representing the railroad company; for, certainly, counsel would not have taken the trouble to reserve exceptions in the trial court, and elaborate them into assignments of error in this court, unless they firmly believed in the correctness of their own opinions, and deemed it their duty to thus make up the record in order to protect the interests of their client. This court has had occasion to criticise the multiplication of exceptions and assignments of error, and we call the attention of counsel to what has been said on the subject. *Howison v. Iron Co.*, 30 U. S. App. 473, 497, 17 C. C. A. 350, and 70 Fed. 683; *Steiner's Ex'r's v. Eppinger*, 23 U. S. App. 344, 9 C. C. A. 484, and 61 Fed. 253.

Without undertaking to deal with all the assignments of error, we will consider the important ones from our own standpoint.

It is complained that the trial court erred in sustaining the demurrer of the defendant in error to the rejoinder of the plaintiff in error, which rejoinder was in reply to a replication of the fourth plea of the plaintiff in error, setting up the statute of limitations of one year in the cause of action sued on. It appears that shortly after the accident in which defendant in error, Carroll, received his injuries, he instituted an action in the city court of Birmingham, Ala., to recover damages therefor. Said action came on for trial, and, as appears from the opinion of the supreme court of Alabama, on substantially the same evidence as introduced in this action, Carroll recovered a judgment for damages. On appeal to the supreme court of the state of Alabama, the judgment of the city court of Birmingham was reversed (11 South. 803), and the cause remanded for error in refusing to instruct the jury to find for the defendant; the court in a very able opinion, supported by reason and authority, holding as follows:

"(1) Under the common law, both in Alabama and Mississippi, a master is not liable for an injury inflicted on one servant through the negligence of a fellow servant. In Alabama this rule is modified by the employers' liability act, but no similar law is in force in Mississippi. Plaintiff was injured while employed on defendant's railroad as a brakeman, the injury being sustained in Mississippi, through the negligence of his fellow servants. Plaintiff, a citizen of Alabama, was working for defendant under a contract made in that state, and defendant was a corporation organized under the laws of the same state. *Held*, that plaintiff could not recover in Alabama for the injuries, the action not being maintainable in Mississippi.

"(2) The fact that the negligence which produced the casualty transpired in Alabama will not take the case out of the general rule.

"(3) The fact that the contract between the parties was made in Alabama

does not make the employers' liability act a part of the contract, so that a failure to perform any of the duties prescribed by the act would render defendant liable for any consequent injury, wherever received."

It thus appears that the decision of the supreme court of Alabama was upon the merits, and was adverse to any recovery on the part of the present defendant in error. Immediately on the filing of the mandate of the supreme court of Alabama, the defendant in error, Carroll, dismissed his action in the city court of Birmingham; and on the 9th day of May, 1893, alleging himself to be a citizen of the state of Mississippi, brought suit in the circuit court of the United States for the Northern district of Alabama on the same cause of action. 60 Fed. 549. Among other pleas interposed by the defendant company was one that the cause of action was barred by the statute of limitations of one year, based upon sections 2612 and 2619 of the Code of Alabama of 1886. To this plea the defendant in error filed a replication, setting up the commencement of the said suit in the city court of Birmingham, in the state of Alabama, upon and for the identical causes of action, the recovery of a judgment in the said city court, and afterwards, upon appeal to the supreme court of the state, the reversal of the said judgment on the 22d day of November, 1892; and that afterwards, and before the expiration of one year from the time of reversal of said judgment, the plaintiff, on the 9th day of May, commenced this present suit against the defendant for the identical causes of action and injuries complained of in the said suit in said city court of Birmingham. This replication was based upon section 2623, Code Ala., which reads as follows:

"On arrest or reversal of judgment, suit must be brought within a year. If any action is brought before the time limited has expired, and judgment is rendered for the plaintiff, and such judgment is arrested or reversed on appeal, the plaintiff, or his legal representatives, may commence suit again within one year from the reversal or arrest of such judgment, though the period limited may, in the meantime, have expired; and in like manner, if more than one judgment is arrested or reversed, suit may be recommenced within one year."

To the foregoing replication the defendant below, plaintiff in error here, filed a rejoinder, setting up all the proceedings in the city court of Birmingham, Ala., and in the supreme court of the state, particularly as reported in 11 South. 803, and averring that the case was decided in the supreme court on its merits, and that the said action in said city court of Birmingham was voluntarily dismissed by the plaintiff therein; and charging, further, that, under this state of facts, the plaintiff's action in the circuit court did not come under the influence of the exception in the statute of limitations, as provided in section 2623 of the Code of Alabama, and that the present suit is not and cannot be brought under the authority or by virtue of said section 2623, so as to bring this action within the exception to the bar of the statute of limitations. To this rejoinder the defendant in error filed a demurrer. On the first hearing of this demurrer, the trial judge, relying upon the construction given by the supreme court of the state to section 2623 of the Code of Alabama (*Roland v. Logan*, 18 Ala. 307; *Napier v. Foster*, 80 Ala. 379), held that the rejoinder was a sufficient answer to the replication,

and overruled the demurrer thereto. The result of this ruling was a verdict and judgment for the defendant, and thereupon the plaintiff in the court below sued out a writ of error to this court. The writ of error coming on to be heard in this court, two questions were argued: First. The statute of limitations of one year applying to plaintiff's action, was the case brought within the exception provided in section 2623, Code Ala., by plaintiff's voluntary dismissal in the city court of Birmingham? Second. Was the plaintiff's cause of action *ex delicto*, and within the statute of limitations of one year, or was it an action *ex contractu*, and not within the bar made by the statute of one year?

This court, on hearing and argument, held as follows:

"Considering that the cause of action of the circuit court, under the allegations of the declaration, arose from a contract, and in point of time is within the letter of the statute, and that the plea of the statute of limitations should not have been sustained, it is ordered that the judgment of the circuit court be reversed, and the cause be remanded, with instructions to grant a new trial."

This ruling disposed of all the questions raised by the demurrer to the rejoinder, and it must be taken as deciding that the action instituted by the then plaintiff in error (Carroll) was not barred by the statute of limitations. The ruling now assigned as error was one sustaining the demurrer, raising exactly the same question determined in this court on the former writ of error. It is clear that the trial court did not commit reversible error in following the decision of this court, for such was the command in the mandate. It is equally clear that the ruling complained of cannot be re-examined in this court. It is a well-settled and long-established rule that whatever question has been decided by an appellate court on writ of error cannot, in the same suit and in the same appellate court, be re-examined. *Supervisors v. Kennicott*, 94 U. S. 498; *Clark v. Keith*, 106 U. S. 464, 1 Sup. Ct. 568; *Chaffin v. Taylor*, 116 U. S. 567, 6 Sup. Ct. 518.

The errors alleged in two of the assignments are that the court erred in overruling the motion to dismiss the suit, and in refusing to instruct the jury to find for the plaintiff in error, because the evidence disclosed that at the time of the institution of the suit the defendant in error was a citizen of Alabama, and not a citizen of the state of Mississippi. The issue as to the citizenship of the defendant in error was made by a plea to the jurisdiction of the court, and, after the evidence on the subject on the part of the defendant in error was adduced, the counsel for plaintiff in error moved the court to dismiss the case for want of jurisdiction, and afterwards, when all the evidence was adduced and before the case was submitted to the jury, the counsel for the plaintiff in error moved the court to instruct the jury to find for the plaintiff in error, because, at the time of the institution of the suit, the defendant in error was a citizen of Alabama, and not a citizen of the state of Mississippi. It is shown by the record that the plaintiff in error was a corporation organized under the laws of the state of Alabama. The defendant in error was born and reared in Alabama, and was a citizen of that state when he entered the service of the plaintiff in error. He

was injured June 18, 1890, in the manner hereinbefore set forth. On December 5, 1890, he instituted a suit for damages against the plaintiff in error in the city court of Birmingham, Ala., where he recovered a judgment. On appeal to the supreme court of Alabama, the judgment was reversed on the merits of the case. *Carroll v. Railroad Co.*, 11 South. 803. The judgment having been reversed by the supreme court of Alabama, November 22, 1892, the defendant in error very soon thereafter left the state of Alabama, carrying his trunk and all his clothing with him, for the purpose, as he testifies, of making his home with his half-brother in Yazoo or Sharkey county, Miss. Prior to his departure from Alabama, and after his arrival at his brother's home, in Mississippi, on January 8, 1893, he made declarations to several of his friends and acquaintances to the effect that his object in leaving Alabama was to take up his permanent abode in Mississippi, and live with his brother. The evidence shows that the defendant in error was unable to do much work on account of his crippled condition, and before going to Mississippi had depended largely on his mother and a brother who resided in Alabama for support. He went to Mississippi, according to the testimony of himself and half-brother, upon the invitation of the latter, to make the house of his half-brother his home. It also appears that the defendant in error wrote a letter from Mississippi to his counsel, in Alabama, some time during the "latter part of January, or in February, 1893," and, the letter having been lost or mislaid, counsel testified as to its contents, as follows:

"Well, he wrote that he had received an invitation from his brother in Mississippi.—Campbellsville, Yazoo county; the letter was written from there,—telling him to come and make it his home, and that he had accepted that invitation, and had gone out there, and was making it his home, and expected to continue to live there."

The attorney further testified that he had not advised the defendant in error to go to Mississippi, and knew nothing of his change of residence until the receipt of the letter, above mentioned. The defendant in error corroborated this testimony, and further testified that he had not been advised by any one to change his residence, and that, at the time he left Alabama, he was ignorant as to the effect of a change of residence upon his right to maintain his suit in the United States court. A few days after writing the above letter, and on February 13, 1893, the defendant in error dismissed the suit pending in the state court of Alabama, and on May 9th following instituted the present suit in the circuit court. After filing suit in the circuit court, he remained in Mississippi a few months, and about October 1, 1893, returned to Alabama, as he testified, to attend the trial of his case. Before his departure, at the date last mentioned, he stated to several of his companions that he would return to Mississippi in about three weeks. On November 11, 1893, a trial of his case was had, and there was a judgment against him on the ground that his action was barred by the statute of limitations of one year. Following this judgment, the defendant in error did not return to Mississippi, but remained in Alabama, where he registered as a voter, May 12, 1894, attended pre-

cinct political meetings, was sent as a delegate to a county political convention, and voted at an election held during that year. While the defendant in error testified that, at the time he registered, he was ignorant of the laws of Alabama affecting his right to register and vote, and thought that a residence of only three months in the state was sufficient, the testimony of the registrar indicates that his information was not so limited. Upon this point the registrar of beat 9 of Bibb county, in 1894, testified as follows:

"Q. Was Mr. Carroll, during the month of May, 1894, in Bibb county? A. I saw him. Q. State whether or not he registered before you. A. He registered before me on the 12th of May. Q. State whether or not you administered any oath to him. A. I administered the registration oath in full. Q. Did you ask him any questions as to his residence? A. Yes, sir; I asked him if he had been a citizen of the state of Alabama for a year; and I asked him if he had been a resident in the county for three months, and if he had been in the beat thirty days. Q. What did he reply in answer to those questions? A. He replied that he had."

The plea to the jurisdiction of the court was filed October 1, 1895. Although it was the avowed purpose of the defendant in error to return to Mississippi within three weeks from the date of his departure from that state, October 1, 1893, he remained in Alabama about two years, exercising, meanwhile, the right to vote, and did not return until this court, on error, reversed the circuit court as to the bar of the statute, nor thereafter, until the plea challenging his citizenship of the state of Mississippi was filed.

As to the qualifications of an elector in Alabama, it is provided by the Civil Code of that state (volume 1, § 319) as follows:

"Every man, a citizen of the United States, * * * who is twenty-one years old, or upwards, who shall have resided in this state one year, three months in the county, and thirty days in the precinct or ward next immediately preceding the election at which he offers to vote is * * * a qualified elector, and may vote in the precinct or ward of his actual residence, and not elsewhere, for all officers elected by the people. * * *"

"Sec. 321. No person shall lose or acquire a residence either by temporary absence from his place of residence without the intention of remaining, or by being a student," etc.

If the defendant in error had been a citizen of Alabama for the period of 12 months when he registered, May 12, 1894, he surely was not, during the same period, a citizen of Mississippi, as, throughout his entire testimony, he claimed to be. If he was a citizen of Mississippi when he took the registration oath in Alabama, his conduct entitles his testimony to but slight consideration at the hands of a court of justice. The sudden determination of the defendant in error, after the reversal of his case by the supreme court of Alabama, to make Mississippi his home, and his early departure thereafter from Alabama; the dismissal of his suit in the state court of Alabama, and the institution of suit in the circuit court following soon after his arrival in Mississippi; his comparatively brief stay in the latter state, coupled with his expressed intention, on leaving in October, 1893, to return in three weeks; his subsequent prolonged residence in Alabama, and his active participation in political conventions while there; his registration in Alabama as a voter, together with the subsequent exercise by him in that state of the right of

suffrage, one of the most persuasive indicia of citizenship, and its usual accompaniment, applying the term "citizenship" to male persons who have attained their majority; his hurried departure from Alabama, following the filing of the plea to the jurisdiction of the court,—impress us with the conviction that the defendant in error merely changed his residence temporarily, without effecting a change of domicile, and that while absent in Mississippi he was simply a sojourner there, having no fixed intention to remain. The *animo manendi* was wanting, without which a change of domicile may not be accomplished. The act of removing, and the intention to remain in the new place of abode, must both concur to effect a change of domicile; and, if either of these ingredients be lacking, the old domicile remains, and a new one is not acquired. We are not unmindful of the principle that a citizen may instantly change his domicile, and thereby confer jurisdiction upon the courts of the United States, but such change must be actual, not pretended; the removal must be a real one, with the intention of remaining, not merely ostensible.

Taking the foregoing view of the case as made by the evidence, we are of opinion that the trial judge would have been warranted in taking the case from the jury, and directing the dismissal of the action as one not properly within the jurisdiction of the court. *Act 1875, § 5 (18 Stat. 472)*; *Williams v. Nottawa*, 104 U. S. 209; *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510; *Farmington v. Pillsbury*, 114 U. S. 138, 5 Sup. Ct. 807; *Manufacturing Co. v. Kelly*, 160 U. S. 327, 16 Sup. Ct. 307. See, also, *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. 449; *Morris v. Gilmer*, 129 U. S. 328, 9 Sup. Ct. 289; *Turner v. Trust Co.*, 106 U. S. 554, 1 Sup. Ct. 519; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32.

As, however, the court was not asked to make such disposition of the case after the evidence in relation to the citizenship of defendant in error was all adduced, and as there was a slight conflict in the evidence in relation to said citizenship, we are not prepared to hold that the submission of the issue of citizenship to the jury was erroneous. *Railway Co. v. Ohle*, 117 U. S. 123, 6 Sup. Ct. 632, is an instructive case in point. We notice in this connection that, without objection from either side, the issue as to jurisdiction was submitted to the jury with the merits, under directions to find a general verdict. The practice is not commendable. In such a case a general verdict for the defendant leaves it in doubt whether the plaintiff loses his action because the court is without jurisdiction, or because he has no case on the merits.

In the progress of the trial one Henry Milan was introduced and sworn as a witness for the plaintiff below, and as to said plaintiff's situation testified as follows:

"Q. Do you know what his financial condition was? A. Yes, sir; I guess I do. Q. What was it? (The defendant objected to this question.) Q. Did he have any means of support there, that you knew of? A. None whatever. (The defendant objected to this question and answer, because it is irrelevant, immaterial, and illegal. The court overruled this objection, and the defendant then and there, in open court, duly excepted.) Q. State whether or not you know if he had any way of supporting himself. A. He had no way of supporting himself, that I know of, at that time, nor hadn't had. Q. Was

his brother at work at that time? A. No, sir. Q. What was the condition of his mother? A. Bad condition. The only way she had of making her living was by the needle. (The defendant objected to this last question, and moved the court to exclude the answer, because the same is immaterial, illegal, and irrelevant, which objection and motion the court overruled, and the defendant then and there, in open court, duly excepted.)"

This evidence had no legitimate bearing on any issue in the case, and we may well say of it, as was said in a similar case by the supreme court in *Pennsylvania Co. v. Roy*, 102 U. S. 451, 460:

"This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family it is impossible to determine with absolute certainty, but the reasonable presumption is that it had some influence upon the verdict."

After the close of the evidence, during the argument before the jury, counsel for plaintiff, among other things, said:

"Now, as to the question of damages; and really it seems to me that is the only question you have to consider. There is no iron-bound rule telling you what damages to give. You cannot give plaintiff more than he claims, but can give him every cent he claims, which is \$50,000. There are certain rules laid down by the courts which are intended to be guides to you in arriving at the amount of damages it is proper to give. These rules say, in estimating damages, you may take into consideration plaintiff's age, his health, what he was earning at the time he was injured, what he earns or is able to earn now, his sufferings, physical and mental, and give him enough to compensate him for these losses. You first take a man's age and health, and from that try and arrive at his expectancy in life,—how long he may expect to live. Many insurance companies make it a part of their business to form some idea on that point, from statistics and otherwise. Some of these companies take the average life of a thousand men, say, and from that arrive at about how long a man expects to live; and these averages say, in this case here, that a man 22 years old, in good physical condition, can reasonably expect to live 40 years longer. There are eminent men who have gone to work to find this out. Then you must take into consideration the amount that the man was earning at the time that he was hurt, and consider, in connection with that, how much he can earn now, or if he had been totally disabled. At the time he was hurt he said he made about seven or eight trips a week. He got \$2.25 for each single trip, and he made seven or eight of those single trips; put it at seven, the lowest number. That would be about \$16 a week. He made about that much a week. There are four weeks and a half in a month. So, multiply sixteen by four and a half, and that amounts to \$70 to \$75; about \$900 a year, what he was earning. Now, look at him, and say what he is able to earn now. And, when you take that into consideration, it is not for you to say that he must quit his chosen field of labor, and go at something else; but could he earn anything in his chosen field of labor? Not a dollar. They wouldn't even take him down here to be a flagman, because he couldn't get about fast enough. They take one-legged men sometimes, but not a man who hasn't any feet at all. They wouldn't take them. So, in forty years' time,—if you look at it that way, as you have a right to do,—in forty years' time he would earn \$36,000. I propose to present this question of damages in its various lights, and allow you to say what plaintiff shall have. It might be objected that \$36,000 would be too much to give plaintiff for his loss in earnings alone; that it would not be proper to give him, in a lump, the amount he would earn in forty years. All right; let us look at it in another way. What amount, put out at interest, would produce \$900 per year. Calculate it at seven per cent., and that is about all the interest you could safely count on getting, and it would take about \$13,000. Now, add to that enough to compensate him for his physical sufferings, and then add

enough more for his mental suffering, and you will about reach all we claim. Give him \$50,000. It is not too much; and you may rest assured neither this court nor any other court will set it aside as being excessive. (The defendant objected to this argument of the counsel beginning with the words, 'some of these companies,' and ending with the words, 'in 40 years' time he would earn \$36,000,' because it is not a proper basis for damages in a case of this sort, and moved the court to exclude the same from the jury, because it does not lay down the proper rule for the estimate of damages in a case of this kind, and because it is misleading. The court overruled this motion of the defendant, to which ruling of the court the defendant then and there, in open court, duly excepted.)"

In his charge to the jury all the trial judge said on the question of damages is as follows:

"Now, if you should be of the opinion that there was negligence here, under the law and the facts of the case, and the jurisdiction of the court is maintained, then the next thing is how much damages ought he to have. And on that subject you will consider the degree of disability,—whether he has been left by this accident disabled to do anything. Well, there ain't much doubt about that. There isn't much controversy about that by counsel, because the man is very little able to earn anything now. But I say that is to be considered, and his age when the accident happened, and his capacity for earning wages at and before that time,—that is to be considered. Twenty-two years was his age. There was a suggestion that he might be promoted,—certainly, but I think that is not insisted upon. I think that, perhaps, is going a little beyond the rule. Of course, he might be promoted to the superintendence of a railroad company, like the others, but I say that is going a little too far. But his sufferings, mental and physical— On the idea of mental suffering, counsel perhaps gave it a pretty wide range, but I think the rule is for the jury to consider sufferings, mental and physical, as you will consider it."

To this part of the charge the plaintiff in error duly excepted, and the foregoing remarks of counsel and the charge of the judge in relation to damages are assigned as error.

The remarks of counsel stated an incorrect method of arriving at the measure of damages, were unfair, and tended to mislead the jury, and there was error in permitting the same to go to the jury. In *Railway Co. v. Farr*, 12 U. S. App. 520, 528, 6 C. C. A. 211, and 56 Fed. 994, in a similar case, exactly the same error was committed. In relation to it the learned judge announcing the opinion of the court said:

"This was a manifest error. The present value of the earnings of 40 years to come, if absolutely assured, is much less than 50 per cent. of their amount, at any rate of interest that prevails in the Indian Territory; and when it is considered how uncertain these earnings are, how many chances of disability, disease, and disposition, condition the probable earnings of a young man, the rule announced is absurd. Nor was the vice of this argument, or of the court's approval of it, anywhere extracted in the general charge. The judge contented himself with the harmless remark, upon this branch of the case, that if the jury found for the plaintiff they should allow such a sum as would compensate him for his pecuniary loss sustained, or that he would hereafter sustain, by reason of the disabilities caused by his injuries, but that they should not assume that he was entirely incapacitated because he could not perform the duties of a brakeman, but should consider his power to earn money in other stations of life. He nowhere condemned the vicious and misleading rule for measuring the plaintiff's pecuniary loss which the plaintiff's attorney had laid down and he had approved. We repeat here what we had occasion to say in *Railway Co. v. Needham*, 3 C. C. A. 129, 52 Fed. 371, 377: 'General remarks of this character in the course of a charge, while they may tend to show that the court really entertains sound views of the law, do not extract the vice of an erroneous instruction, positive in its terms, which directs the jury to allow damages on a wrong basis.' Nor do these remarks of the

attorney constitute a fair argument. The jury is sworn to determine the issues of the case according to the law and the evidence given them in court, and no argument is fair which misstates the evidence, or misleads the jury as to the law."

In all this we fully concur.

Further on in the argument of the case another counsel for plaintiff said in part to the jury:

"The court will charge you that, if you find that the plaintiff is entitled to recover, then he can recover just compensation for all the injury done him, including physical as well as mental suffering. It is true that we have no rule by which to measure or weigh suffering, pain, either physical or mental. You heard the plaintiff testify that he would not express in words his suffering, which has been continuous from the injury, June 19, 1890, up to the present. Now, what amount will be just to award him for all his suffering? When you come to consider the mental suffering, will it be right to exclude all consideration of what suffering a normal mind would undergo in all these long years, when contemplating the condition to which the plaintiff has been reduced, so that, as the evidence shows you, that without those artificial limbs he has to crawl from bed to chair and from chair to bed? Will you exclude all the suffering that naturally came from young manhood's hopes blasted; that came from the realization that he was a crawling pauper, and that he could never hope to marry; that no woman would marry a pauper? I will ask any husband on that jury, I ask any father on that jury, can you measure the comfort and the joy that a life with a loving wife has brought you in dollars and cents? Can you say how much money would compensate you for being deprived of any pleasure of life as you step about in full-grown manhood, 6 feet in your stocking feet and 22 years old? How much money would compensate you to deprive you of the power of creating your kind, and transmitting your blood and your name to your child? (The defendant objected to and moved to rule out that part of the argument of counsel beginning with the words, 'I will ask any husband,' and ending with the words, 'name to your child,' because there is no such evidence as will support it in this case; which motion the court overruled, and the defendant then and there in open court, duly excepted. Counsel continuing:) I do not say that there is a scintilla of evidence in this case that this man was deprived of his genital organs, of his physical power to get child, or his physical power to enjoy connection with woman. I didn't get down to so low and brutal a plane as that. There is no such evidence. But I ask you, as common-sense men, tell me where you will find on the face of this globe his equal in society, his equal in intelligence, his equal in position, and his equal in physical condition, a woman who would marry that man, cut up and shriveled up as he is. Who would do it? Tell me, if in all this broad land you could find a woman, as I said, his equal in intelligence and position, who would voluntarily consent to become his wife and become the mother of a pauper child? And what sort of children does a pauper beget? That is what is the matter with this country now. You frequently hear it said that pauperism and crime go hand in hand. In one sense of the word, just as the mother walks along with her child,—the hand of the little pauper child in hers,—just so pauperism and crime go. When you make a man and woman paupers, and whenever those paupers beget children and bring pauper children into this world, the chances are very strong that the whole brood will be criminal. (The defendant objected to and moved the court to exclude that part of the argument of counsel from the jury beginning with the words, 'I do not say,' and ending with the words, 'the whole brood will be criminal,' because it is not a legitimate basis of damages, does not lay down the proper rule for the estimate of damages in a case of this kind, and is unfair and misleading; which motion the court overruled, and the defendant then and there, in open court, duly excepted."

So far as the record shows, the trial judge permitted the foregoing remarks to go to the jury with his quasi approval. There was nothing in the complaint or in the evidence to warrant such argument. The remarks were an appeal to the sympathies of the jury on matters

entirely outside of the case, and were calculated to arouse the prejudice and mislead the jury as to the proper rule of damages as well as on other issues in the case. That these objectionable appeals to the prejudices of the jury did mislead them, and procure a verdict on a false basis, somewhat appears by the amount of the verdict actually rendered, which is sufficiently large, at the legal rate of interest in the state of Alabama, to give the defendant in error an income in excess of what he could have earned if he had not been injured, and had continued a railroad brakeman during his natural life, and at his death leave his capital intact. We understand the general rule to be that the remarks of counsel to the jury on the merits, to constitute reversible error, must be objected to at the time, be unwarranted by the pleadings and evidence, have a tendency to mislead or prejudice the jury, and be to more or less extent approved by the trial judge.

The bill of exceptions shows the following proceedings:

"And the defendant then and there requested the court to give the following written charge: '(14) The court charges the jury that rule number 123, set out in plea number 8 of defendant, is a reasonable rule,'—which charge the court gave, with the modification thereto as appears in this bill of exceptions in the oral charge of the court; to which modification of said charge the defendant then and there in open court, and in the presence of the jury, before the jury withdrew, duly excepted. And the defendant then and there requested the court to give the following written charge: '(15) The court charges the jury that if they believe from the evidence that the plaintiff disobeyed said rule number 126, as set out in plea number 8 of defendant, and did not examine said link to see if it was in proper condition, and that such disobedience of said rule contributed proximately to his own injury, then he cannot recover,'—which charge the court refused to give; to which action of the court in refusing to give said charge the defendant then and there in open court, and in the presence of the jury, before the jury withdrew, duly excepted. And the defendant then and there requested the court to give the following written charge: '(16) The court charges the jury that rule number 242, as set out in plea number 9 of defendant, is a reasonable rule,'—which charge the court gave, with the modification thereto as appears on this bill of exceptions in the oral charge of the court; to which modification of said charge the defendant then and there in open court, and in the presence of the jury, before the jury withdrew, duly excepted. And the defendant then and there requested the court to give the following written charge: '(17) The court charges the jury that if they believe from the evidence that the plaintiff disobeyed rule number 242, as set out in defendant's plea number 9, and did not examine the link to see if it was in proper condition, and that such disobedience of said rule contributed proximately to his own injury, then he cannot recover,'—which charge the court refused to give; to which action of the court, in refusing to give such charge, the defendant then and there in open court, and in the presence of the jury, before the jury withdrew, duly excepted. And the defendant then and there requested the court to give the following written charge: '(18) The court charges the jury that rule number 245, as set out in defendant's plea number 10, is a reasonable rule,'—which charge the court gave. And the defendant then and there requested the court to give the following written charge: '(19) The court charges the jury that if they believe from the evidence that the plaintiff disobeyed rule 245, as set out in defendant's plea number 10, and did not inspect or aid the conductor in inspecting the cars when the train stopped for water or for other trains, and that such disobedience of said rule contributed proximately to his own injury, then he cannot recover,'—which charge the court refused to give; to which action of the court, in refusing to give said charge, the defendant then and there in open court, and in the presence of the jury, before the jury withdrew, duly excepted. And the defendant then and there requested the court to give the following written charge: '(20) The court charges the jury that inasmuch as the

plaintiff had possession of the rule book of the defendant corporation, and read the rules pertaining to signals, he is charged with notice of the other rules in the said book pertaining to the duties of freight brakemen,—which charge the court refused to give; to which action of the court in refusing to give said charge the defendant then and there in open court, and in the presence of the jury, before the jury withdrew, duly excepted. * * * And the defendant then and there requested the court to give the following written charge: "(22) The plaintiff, in hiring his service to the defendant as a brakeman, is to be considered as bound to have the skill and knowledge requisite to the proper performance of the duties pertaining to that position, and he is to be conclusively presumed, if he had access to the rules of the company touching the performance of those duties, to have known such rules; and if it appears from the evidence that the rules required the plaintiff, as brakeman, to inspect and examine the links and drawheads in the train, then, if such examination would have disclosed the defect in said link, the plaintiff cannot recover, for his failure to examine the said appliances was negligence which precludes his recovery. If, on the other hand, such examination would not have disclosed such defects, the same being latent, the defendant is not responsible therefor, and the accident is to be taken as embraced in the risks of the service, for which there can be no recovery,"—which charge the court refused to give; to which action of the court, in refusing to give such charge, the defendant then and there in open court, and in the presence of the jury, before the jury withdrew, duly excepted."

The record further shows the modifications of the trial judge in relation to rules 126 and 242, as follows:

"(14) The court charges the jury that rule No. 126, set out in plea No. 8 of defendant, is a reasonable rule.' The Court: I suppose I may say that, but, of course, it must be shown that the plaintiff knew of this rule or had the means of knowing. With that understanding I give the charge. '(16) The court charges the jury that rule No. 242, as set out in plea No. 9 of defendant, is a reasonable rule.' The Court: A reasonable rule, but it must be brought home to the knowledge of the plaintiff. Not only so, but it must not be a rule that tends to shift the burden of the duty which rested upon the defendant railroad company to furnish reasonably safe appliances for the operation of its train."

The specific instructions requested as to rules 126, 242, and 245, although strikingly pertinent as to subject-matter to the case in hand, were properly refused by the trial judge, because they do not recite, as a prerequisite to their application, that the jury should find from the evidence that the plaintiff in the court below had access to, or was charged with notice of, the rules of the company, and for this we find no error in the refusals to charge as requested. The charge requested above, numbered 22, however, is not open to the same objection, and should have been given to the jury. There was evidence tending to show that the plaintiff below had access to the rules of the company, and he testified himself that he had examined the said rules for the purpose of finding out his duty in regard to signals. The rules are reasonable, and the trial court so held, and the propositions of law contained in the requested charge are sound, and applicable to the facts of the case. If the defendant in error had access to the rules of the railway company, and was charged with notice of their requirements, and such rules were reasonable, and required the defendant in error, as a brakeman on the train, to inspect the links and drawheads, and the defendant in error neglected to make such inspection, which inspection would have shown the defective character of the link which caused the accident, resulting in the injuries complained of, it is clear

that the defendant in error, by his own negligence, contributed to his own injury. If, on the other hand, a proper inspection would not have shown the defective character of the link causing the accident, because the defect was latent, and not discoverable on inspection, then it is clear that the defendant in error cannot recover, because the accident and his resulting injuries were the assumed risks of his service; and this conclusion is strengthened, for this case, when we consider that the defective link was not one furnished directly by the railroad company, but came with a foreign through car, which the railroad company was bound to forward without delay, and without such opportunities to inspect as existed in relation to its own cars. When through cars are received from a foreign road, an inspection by train employes is about the only inspection practicable. The rules of the plaintiff in error required such inspection on the part of the defendant in error, and if he ought to have made it, and did not, or if he made it and the defect was latent, and the defective link was the cause of the accident, then the defendant in error should not recover.

There is no question but that railroad corporations should require, at their peril, cars, their couplings and appliances, to be reasonably inspected by competent agents, and that the ordinary employe may rely on such inspection, nor that this applies to cars received for through transit from other roads as well as its own; but it does not follow that what may be reasonable inspection for a home car shall be demanded as alone reasonable for a foreign car, received for through transit. The time, place, and general opportunity for inspection, and the fact that the foreign car comes to hand as one actually on trial, showing its fitness, all should be considered, in view of the rapid transit now furnished by the railroad companies, and demanded by the business public. Every trainman of ordinary intelligence and experience knows that there is and must be a decided difference in the inspection possible between the home cars and the foreign cars on through trains, and it is not unreasonable to hold that what necessary risks attend the inspection of the latter are risks of the service. We are aware that the adjudged cases are not wholly with us on the matter of the inspection required of foreign through cars, but, until the supreme court of the United States shall speak to the contrary, we must hold with those cases which recognize the actual situation,—the actual way the business is and must be carried on, if carried on at all,—rather than with those cases which tend to make the railroad companies absolute insurers against all the risks of a well-known dangerous employment.

In *Railroad Co. v. Meyers*, 22 C. C. A. 268, 76 Fed. 443, 445, it is said:

"If a car be accepted for transportation over the road of the receiving company, it is clear that defects which are 'visible or discoverable by ordinary inspection' must be repaired sufficiently to make the use of the car reasonably safe. *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590."

In *Mackin v. Railroad Co.*, 135 Mass. 201, 205, the supreme judicial court of Massachusetts says:

"In the present case, however, it appears that the car was not owned by the defendant, but came from the West, and was received upon the defendant's road at its western terminus, at Greenbush, and was drawn to Boston, and

thence to Brookline; and it is contended by the defendant, as the true construction of the bill of exceptions, that the destination of the car when received was Brookline, and that the defendant did not use it in the local business of the corporation, but merely drew it to its original destination, and unloaded it, and was about to draw it back to Boston, to be in readiness for its return to the West. These latter facts are not stated in express terms, but, if true (although, perhaps, the mere ownership is not material), a car so received, while in transit to its destination, and until ready for such inspection as would be suitable and necessary in preparation for its return, would not come within the rule applicable to machinery and appliances furnished by the defendant. According to the course of business, well known to the plaintiff, and notorious, the defendant was in the habit of receiving many such cars daily, and drawing them over its road as a part of its freight trains. Even in the absence of any statute or special contract, regulating the terms of receiving and drawing such cars, the defendant was bound, as a common carrier, to receive and draw them. *Vermont & M. R. Co. v. Fitchburg R. Co.*, 14 Allen, 462, 469. The obligation of drawing cars over its road would not extend to such as were in an unsafe condition; but, as to cars so received, the duty of the defendant is not that of furnishing proper instrumentalities for service, but of inspection, and this duty is performed by the employment of sufficient competent and suitable inspectors, who are to act under proper superintendence, rules, and instructions; and, however it may be as to other cars, the inspectors must be deemed to be engaged in a common employment with the brakemen as to such cars while in transit, and until ready to be inspected for a new service."

Goodrich v. Railroad Co., 116 N. Y. 398, 22 N. E. 397, holds that a railroad corporation owes to its employes the same duty of inspecting the cars of another company used upon its own road as if they were its own, and is responsible for the consequences of such defects as would be discovered by ordinary inspection; and the opinion of the court of appeals of New York is instructive, so far as applicable to the facts of the present case, and we quote:

"It was decided in *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344, that a railroad company is bound to inspect the cars of another company used upon its road, just as it would inspect its own cars; that it owes this duty as master, and is responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection; that when cars come to it from another road, which have defects visible or discernible by ordinary examination, it must either remedy such defects or refuse to take them. This duty of examining foreign cars must obviously be performed before such cars are placed in trains upon the defendant's road or furnished to its employes for transportation. When so furnished, the employes whose duty it is to manage the trains have a right to assume that, so far as ordinary care can accomplish it, the cars are equipped with safe and suitable appliances for the discharge of their duty, and that they are not to be exposed to risk or danger through the negligence of their employer. The defect complained of in this case was obvious and discernible to the most ordinary inspection, and could have been easily remedied. It is argued by the defendant that it had fulfilled its duty when it had furnished for the use of its employes crooked links, which could be used in coupling together cars upon which the bumpers were of different heights. We do not think that in this case that fulfilled the measure of defendant's obligation. It could not be so held unless it was the duty of the plaintiff to examine and inspect the cars to ascertain whether the coupling appliances were in proper condition. The duty of examination, like the duty of furnishing proper machinery and appliances in the first instance, rests upon the master. *Fuller v. Jewett*, 80 N. Y. 46; *Gottlieb v. Railroad Co.*, supra. And the degree of vigilance required from a railroad corporation in this respect is measured by the danger to be apprehended and avoided. *Ellis v. Railroad Co.*, 95 N. Y. 546; *Salters v. Canal Co.*, 3 Hun, 338. While in the case of corporations the performance of this duty must be committed to employes, there is no presumption that it rests upon any particular individual. It is not within the apparent scope of a brakeman's duty,

and does not necessarily rest upon him. In the absence of all evidence upon the subject, we cannot, therefore, presume that the examination and inspection of the particular cars in question had been committed to the plaintiff, and, unless it had, he had a right to assume that the master's duty had been performed by those having it in charge, and that the coupling appliances upon the cars were adequate to the performance of his work, without extraordinary risk or danger." Pages 401, 403, 116 N. Y., and page 397, 22 N. E.

In the present case, was it the duty of the plaintiff below to examine and inspect the cars, to ascertain whether the coupling appliances were in proper condition? The determination of this question should have been submitted to the jury, when it was properly presented, as we think it was, in requested charge No. 22, above set out.

There are many other important questions presented by the assignment of errors, but we do not think it necessary to pass upon them, because the judges are not agreed as to their proper disposition, and as, from those assignments we have considered, it is necessary to reverse and remand, we indulge in the hope that on another trial such questions may be eliminated, or else so ruled that error will not lie thereon. The judgment of the circuit court is reversed, and the cause is remanded, with instructions to award a new trial.

MAXEY, District Judge. I concur in the judgment of reversal as announced by the presiding judge; but I cannot assent to the proposition, maintained by him, that the twenty-second special instruction, requested by the plaintiff in error, should have been submitted to the jury. The trial court properly refused the instruction, because it did not embody correct principles of law. It was the duty of the plaintiff in error, as master, and not that of a mere subordinate employé, as was the defendant in error, to inspect the couplings of the train, with the view of discovering and remedying defects in the appliances. *Railroad Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491; *Goodrich v. Railroad Co.*, 116 N. Y. 398, 22 N. E. 397; *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590; *Railway Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756.

MCCORMICK, Circuit Judge, dissents.

In re CRAIN.

(Circuit Court, D. Massachusetts. December 31, 1897.)

No. 679.

1. COURTS-MARTIAL—REVIEW BY HABEAS CORPUS.

In habeas corpus proceedings to review the sentence of a court-martial, the only questions which can be inquired into are as to the jurisdiction of the court over the person of the accused and the offense charged, and whether it acted within the scope of its lawful powers.

2. SAME—AUTHORITY TO CONVENE—PRESUMPTIONS.

The designation of an officer in the proceedings of a naval court martial as "commander in chief" raises the presumption, under article 243 of the regulations for the government of the navy, that he was in command of a fleet or squadron, and was therefore a proper officer to convene the court.

3. SAME—RECITALS OF RECORD.

A recital in the precept forming part of the record of a court-martial, that it was convened by virtue of express authority vested in the officer convening the same by the president of the United States, is sufficient evidence of such authority in habeas corpus proceedings.

4. SAME—ORDER CONVENING.

The order of an admiral designating the officers to compose a general court-martial constitutes a summons, within the meaning of Rev. St. art. 39, § 1624. The fact that by a subsequent order a change is made as to one of the members of the court is immaterial.

5. SAME—FURNISHING ACCUSED WITH CHARGES.

Where the record of a court-martial shows that the accused stated at the beginning of the trial that he had received a copy of the charges and specifications against him, and no objection on that ground was made at the trial, it will be presumed that they were served as required by the statute.

This was a petition for a writ of habeas corpus by Jesse G. Crain, bringing before the court for review the proceedings of a naval court-martial.

Chas. H. Drew, for petitioner.

Boyd B. Jones, U. S. Atty.

COLT, Circuit Judge. Upon careful consideration, I find no sufficient reason for granting this petition. The briefs of petitioner's counsel touch upon many points which cannot properly be considered in the present application. This case is not before the court on writ of error, where the whole proceedings of the trial court might be reviewed; nor can this court question the sentence of the court-martial provided it was a legal sentence. The questions for review in this proceeding are limited.

In *Johnson v. Sayre*, 158 U. S. 109, 118, 15 Sup. Ct. 777, the supreme court, speaking through Mr. Justice Gray, said:

"The court-martial having jurisdiction of the person accused, and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence cannot be reviewed or set aside by the civil courts, by writ of habeas corpus or otherwise."

The fundamental inquiry is whether the court-martial has jurisdiction, and this must appear affirmatively in the record of the proceedings before that court. The petitioner was a coxswain in the United States navy at the time of the alleged offense. There can be no question, therefore, but that he was subject to the jurisdiction of a legally constituted court-martial.

Whether this court-martial was legally constituted, and proceeded according to law, are the only material points in the case. It is contended that Admiral Bunce was not such an officer as was qualified to convene a court-martial, within the meaning of article 38 of section 1624 of the Revised Statutes, for the reason that he was not a commander in chief of a fleet or squadron, as required by said article, but was designated in the proceedings of the court-martial as "Commander in Chief U. S. Naval Force, North Atlantic Station." Referring to "Regulations for the Government of the Navy of the United States, 1896" (article 243), we find the following language:

"The title 'Commander in Chief,' when occurring in naval laws, regulations, and other documents, shall be held to refer to the officer in chief command of a fleet or squadron."

Admiral Bunce was designated as commander in chief, and, by the regulations of the naval department, must be presumed to have been in command of a fleet or squadron.

The objection is also made that the record in this case does not show that the court was convened by any "express authority" from the president, as required by article 38. The precept forming part of the record of the court-martial reads as follows:

"By virtue of the express authority vested in me by the president of the United States, in accordance with the provisions of article 38, section 1624, title 15, chapter 10, of the Revised Statutes of the United States, a general court-martial is hereby ordered to convene," etc.

This allegation of the authority of Admiral Bunce to order a court-martial for the trial of the petitioner we deem sufficient. No objection to his authority having been raised during the trial, we do not think it was necessary to attach to the record of the court-martial a copy of his commission from the president.

Article 39 of section 1624 of the Revised Statutes, which requires that as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every general court-martial, was fully complied with. Admiral Bunce, in his letter to Captain Wise, designated eight officers who were to compose the court, and this communication expressly stated that no other officers could be summoned without manifest injury to the service. The order of Admiral Bunce to Captain Wise designating the members of the court was a summons, within the meaning of the statute. The fact that Admiral Bunce subsequently, in another letter to Captain Wise, substituted Lieutenant Berry in place of Lieutenant Comly as a member of the court-martial, is immaterial.

Article 43 provides that the accused shall be furnished with a true copy of the charges against him, with the specifications at the time he is put under arrest, and that he shall be tried on no others. It is contended that the record in this case does not show a compliance with this provision. The record shows that the accused, in reply to an inquiry of the judge advocate, stated that he had received a copy of the charges and specifications preferred against him; but it does not appear that such copy was served upon him at the time of his arrest. Upon this point the supreme court held, in *Johnson v. Sayre*, *ubi supra*, that the word "arrest," in article 43, meant "arrested for trial." In this case the petitioner admitted at the beginning of the trial that he had received a copy of the charges and specifications, and, in the absence of any objection on his part or on the part of his counsel at that time, it must be presumed that he had reasonable notice of the same.

The original order of Admiral Bunce directed the court to convene on board the United States ship *Maine*, at 10 a. m. on Monday, January 11, 1897, or as soon thereafter as practicable. Subsequently, on January 22d, Admiral Bunce issued a second order directing that the court convene on board the United States Steamship *Montgomery* as

soon as practicable after her arrival at Hampton Roads. The court met on January 25, 1897. We are unable to discover any irregularity or anything which was prejudicial to the petitioner in changing the date of the trial. Upon a careful review of the whole record, we find nothing which warrants the court in granting the prayer of the petitioner. Petition denied.

UNITED STATES v. PETTUS.

(Circuit Court, W. D. Tennessee. November 27, 1897.)

No. 2,052.

1. INDICTMENT—DEMURRER.

Counts of a demurrer to an indictment for perjury committed in an election contest will be overruled when the indictment is therein treated as one charging fraud at the election itself, instead of perjury at the contest proceedings.

2. SAME—SUFFICIENCY.

Under Rev. St. § 5392, an indictment for perjury is sufficient if the word "knowingly" is omitted, and the indictment charges the crime as having been "willfully" committed.

3. PERJURY—WHEN INDICTMENT WILL LIE.

An indictment for perjury will lie, though the proceedings in which the alleged perjury was committed are not concluded at the time the indictment is returned.

4. SAME—TRUTH MUST BE ALLEGED.

An indictment which charges perjury with respect to several facts sworn to by accused, and sets forth his testimony thereupon, followed by allegations that such testimony is untrue, and that accused, at the time of his testimony, did not believe such statements to be true, is insufficient, as it does not set forth the truth of the facts in respect to which he is charged with false swearing.

5. INDICTMENT—SUFFICIENCY—SPECIFIC ALLEGATIONS.

A count of an indictment charging perjury, and setting forth several alleged false statements of accused as to several distinct alleged fraudulent transactions occurring at an election, is insufficient if it does not point out the particular fraudulent transaction in regard to which the accused is charged with false swearing.

6. SAME—PERJURY—MATERIALITY OF FALSE STATEMENTS.

A demurrer will lie to a count of an indictment for perjury when it appears that the testimony alleged to be false could not be material in the action in which it was given, under the statement of the issues as contained in such count.

Henry E. Pettus was indicted for perjury committed in an election contest, and demurs to the indictment.

Chas B. Simonton, U. S. Atty., and Thos. M. Scruggs, Asst. U. S. Atty.

Geo. B. Peters, C. P. Roberts, G. T. Fitzhugh, and T. H. Jackson, for defendant.

HAMMOND, J. The suggestion of the district attorney that the vice of the argument in favor of this demurrer is in treating this indictment as if it were one charging frauds committed at the election, whereas it is only an indictment for perjury committed in giving testimony in a contested election case, is quite true, as to several of the grounds of demurrer, and much of the argument. But it is not

true as to all of them. It applies to the third, fourth, seventh, and eleventh grounds of the demurrer, and they are therefore overruled.

The corner stone of this indictment is the pendency of an election contest for a seat in congress before the house of representatives at Washington; and we need not go behind that, into any inquiries as to the election itself. The charge here is that perjuries were committed by the defendant, in giving his testimony in that proceeding; and whether considered in relation to the jurisdiction of the court, or the sufficiency of the indictment, all that need be averred is that there was a contest pending, and that the alleged false swearing was done in that proceeding, which is sufficiently averred in this indictment.

The tenth ground of the demurrer is overruled, because the Revised Statutes of the United States (section 5392) omits the word "knowingly," and only uses the word "willfully," which, presumably, was considered as including the other. At all events, the omission of the word was, no doubt, intended to settle the aggravated controversy in the books about distinctions between the two words, "knowingly" and "willfully"; and now, under the statute, only the word "willfully" need be used.

The twelfth ground of the demurrer is also overruled, because it is not conceived to be absolutely necessary that the proceeding in which the alleged perjury was committed shall be ended before an indictment can be had. It is true that one of the authorities cited by defendant's counsel says that it is customary to withhold the indictment until it has been ended, but it is not decided that an indictment will not lie until the original proceeding has been concluded.

But the first, second, fifth, sixth, eighth, and ninth grounds of this demurrer are well taken, and will be sustained. They may all conveniently be treated together.

There are no pleadings known to the criminal law which require greater precision, certainty, and particularity than those relating to the crime of perjury. 2 Russ. Crimes, p. 631. To such an extent had this requirement of particularity gone that at one time it was almost impossible to draw an indictment for perjury which would stand the scrutiny of courts in respect of its precision; and therefore statutes have been passed, both in England and the American states, for the purpose of eliminating all that which was considered unnecessarily exacting in this regard. Yet there remains, in the substantial averments of an indictment for perjury, a requirement for accuracy, certainty, and particularity that cannot be avoided by even the most liberal of these statutes. Our own statute (Rev. St. § 5392 et seq.) is one of the simplest and most liberal of modern statutes relating to the offense; but it will be found, I think, that it has preserved to the fullest extent the essential elements of the old crime, and the forms of indictment under it must still conform to the demands of the offense as defined in this statute. We have another statute which enacts that no indictment shall be deemed insufficient because of any defect or imperfection in matter of form, but all matters of substance are still required. Rev. St. 1025.

It is entirely true that perjury may be predicated of a false statement that has any tendency to prove or disprove the matter in issue, and even of that which only circumstantially tends to prove or disprove it, as where a party willfully misstated the color of a man's coat, or willfully misstated the credit of another witness. 2 Russ. Crimes, 642. And therefore the question of materiality often depends almost entirely upon the competency, relevancy, or admissibility of the circumstance to which the false oath related; and, however trivial the circumstance may seem, yet, if it be material, the indictment will lie. But whether the indictment be founded on an oath like that, or others of a graver import, in perjury, as in all other offenses, a fundamental requirement is that the defendant shall, from the allegations of the indictment, understand precisely what he is called upon to defend. This is a constitutional requirement with us, which not even a statute can evade or avoid. Const. Amend. art. 6.

In an indictment for perjury committed in an insolvent debtor's court, it was alleged that the defendant swore, in substance, that his schedule contained a full, true, and perfect account of all debts owing to him at the time of presenting his petition, whereas the said schedule did not contain a full, true, and perfect account of all debts owing to him at that time, and this is all there was in the indictment; but Lord Tenterden, after consultation with all the other judges, held that it was insufficient, because it was quite impossible that the defendant could know, from allegations so vague and indistinct, what was to be proved against him, and this allegation conveyed no information whatever of the particular charges against which the defendant ought to be prepared to defend himself. *Rex v. Hepper*, Ryan & M. 210. And, to show what is meant by this, it will be found in Whart. Prec. Ind., that such an indictment should go on, and aver, not only that the schedule did not contain a full and true and perfect account of all debts owing to him at the time, but should have distinctly averred those which had been left out; as, in the form given, where the charge was that the schedules did not contain a true inventory of his estate as sworn to, it properly averred in the indictment that he was interested in and owned, individually and as a partner, the following estate, to wit (here enumerating the items of property which had been omitted from the schedules). Whart. Prec. Ind. 584. That is precisely the matter with this indictment. It does not, certainly, in the first count, contain the least information, by any averment, of any particular fraud, trick, or other unfairness at the election which would notify the defendant of the untruthfulness of his oath in respect of which he was called to defend it. If it be conceded that the issues between the contestant and the contestee, pending before the house of representatives, were of the broadest character, so that they would include and make material the allegation of falsity contained in this count, the count does not point out with certainty and particularity any fact or circumstance which is to be relied upon by the government to show that the defendant's oath was false. You do not have to put the evidence of the fact in the indictment, undoubtedly; but you do have to point out the fact or the conduct or the act

to which the evidence will relate, with such specific averment as will enable the defendant to know what he has to defend. This count avers the false oath to have been that the defendant was present during the whole time the vote was proceeding and while the ballots were being counted, and that there was not any fraud or unfairness practiced by any of the election officers at the said poll, and that there was not any fraud, trick, or other unfairness at the said election, that he knew of, and none of his own knowledge, and that, to his knowledge, the votes, as cast, were fairly and honestly counted. And then comes this averment of negation:

"Whereas, it was not and is not true, and at the time of so swearing the said Henry E. Pettus did not believe it to be true, that there was not any fraud or unfairness practiced by any of the election officers at the said poll, and that there was not any fraud, trick, or other unfairness at the said election, and that he knew of none of his own knowledge, and that, to his knowledge, the votes, as cast, were fairly and honestly counted."

This amounts properly to an allegation of the falsity of the oath, but that is not enough. The indictment should have gone on, and pointed out to the defendant, with sufficient certainty to notify him what he was called on to defend, the particular fraud, trick, or unfairness that would be proved within his knowledge to show that he had sworn falsely, and, as to the second averment, the particular unfairness and dishonesty in counting the vote. There is not one word or syllable in this indictment to give him any such information, and it is not possible for that count to be sustained under the most liberal rules of pleading in respect of the offense of perjury. It is not necessary to consider any of the other objections that are made to it by this demurrer. The opinion of the court of appeals of Texas in the case of *Gabrielsky v. State*, 13 Tex. App. 428, very satisfactorily collects the authorities upon this subject, and states that it was well settled at common law, by all the authorities, that it was insufficient to merely negative, and declare to be false, the oath of the defendant, without stating the truth in regard to the fact. It is not sufficient that you shall say that the defendant swore falsely, but you must aver the truth as it appears in the facts, so that its falsity may appear, and he may know wherein the falsity lies. Says the court in that case:

"It is a constitutional right of the defendant to be informed by the indictment, in plain and intelligible words, of the nature of the charge against him, and with that degree of reasonable certainty which will enable him to prepare his defense. He should be told in the indictment wherein, and to what extent, the statements alleged to have been made by him were false, that he may know certainly what he is called upon to answer."

Under this rule there can be no question about the insufficiency of the first count of this indictment. No case has been cited by the district attorney to the contrary of this.

The second count in the indictment is somewhat more specific, but still falls entirely below the requirements of the rule just stated. It is only more specific because the alleged false oath pleaded in this count itself relates to a more particular fact than that pleaded in the first count, but, not more than the other count does this one tell us what the truth was; but, more especially, it does not inform the defendant in respect of what fact the truthfulness of his oath is to be

challenged. Giving, as before, the widest scope to the averments of the indictment as to the materiality of the matter inquired about in the alleged false oath, and we have it stated here that the said defendant did swear and depose that he and the other officers of election "moved the table back to the rear, as it was cold, and made a fire." This is the first substantive fact sworn to by the defendant. Then he swore "that he knew it was a cold day." This is the second substantive fact sworn to by him. Then, "that he sat in there (meaning in the polling room) all day with his overcoat on," which is the third substantive fact sworn to by him. Then, again, "that the sun may have been warm outside, but it was as cold as fits in there," being the fourth substantive fact sworn to by him. Yet again, "that the night was very frosty and cold, and that we (meaning himself and the other judges and officers of the election) made a fire in the building once or twice during the day," which is the fifth substantive fact sworn to by him. And then, taking up another subject, the allegation is that he swore "that he had no objection to a few or limited number witnessing the count, if it could have been confined to a few representing both parties (meaning a limited number of electors witnessing the count of the vote)," which is the sixth substantive fact sworn to by him. Proceeding in regular form, the indictment says:

"Whereas, in fact, it was not and is not true, and at the time of so swearing and deposing the said Henry E. Pettus did not believe it to be true, that he, the said Henry E. Pettus, and the other judges and officers of the election, moved the table back to the rear *because* it was cold, and made a fire, or that he knew it was a cold day, or that it was as cold as fits in there (meaning in the polling room), or that the night was very frosty and cold, or that he would have been willing for a few electors to have witnessed the count."

It will be observed that this averment of the indictment just quoted does not say that they did not move the table back, nor that it was not cold, nor that they did not make a fire, nor that it was not a cold day, nor that he did not sit in the polling room all day with his overcoat on, nor that it was not "as cold as fits in there," nor that the night was not frosty and cold, nor that they did not make a fire in the building once or twice during the day, which would have given the defendant sufficient notice of the facts about which the truth of his oath was challenged by this indictment; but it only says that they did not move the table back *because* it was cold, etc., including all the above-stated facts except the sixth; and it does not, by any averment, state the true reason why they moved the table back, nor any conduct or act of the defendant, or within his knowledge, which would show a different reason from that alleged in his oath. We are left entirely in the dark by this indictment as to any particular or certain facts or conduct of the defendant upon which the government will rely to show that he had another reason—presumably, in the view of the government, a fraudulent reason—for moving the table back. It is not averred, even in the most general terms, that they moved the table back for the purpose of facilitating a false and fraudulent count in the election, and the particular acts of fraud are not specified, if any were committed; and so the defendant is no more advised, under this count in the indictment, than he is under the first count in the indict-

ment, as to the reasons for a challenge of the truth of his oath on this occasion, so that he may be prepared to defend against that which may be shown against him.

The third count in the indictment might be said to be somewhat more specific than the second, but it is hardly so when we come to analyze it in the view of the rule of law above stated, requiring the defendant to be notified of the charges that are made against him. Perhaps the objection that this count in the indictment does not show that the subject-matter of the alleged false oath was material to the issue between the contestant and the contestee for the seat in congress would be quite as fatal as that we have been considering, but we will pass that for a moment, and again give the broadest indulgence upon the subject of materiality in favor of the averments of the indictment upon that subject. In this count it is charged that the defendant swore "that he saw quite a number of colored voters lay down the ticket they brought with them to the polling place upon the table at the polling place, and pick up a Democratic ticket (meaning a ticket which had Carmack's name on it for congress, instead of Josiah Patterson's), and vote the same," which is the first substantive fact sworn to by the defendant, and "that one of the judges, C. H. Hare, kept a count of such changes of tickets by the colored people, and that he knew it was between forty and fifty," which is the second substantive fact sworn to by the defendant. And then this averment follows:

"Whereas, in fact, it was not and is not true, and, at the time of so swearing and deposing, the said Henry E. Pettus did not believe it to be true, that between 30 and 40 colored voters, or any number of colored voters, when presenting themselves at the said polls to vote, threw down their ticket, and took up a Democratic ticket, and voted the same."

This averment—and the whole count—seems to abandon the second of the substantive facts above mentioned, and does not even aver that it was false, and only charges that the first was false. Now, if it be conceded that it was a material fact, tending to prove or disprove the issue between Patterson and Carmack before the house of representatives, that any one should swear that he saw between 30 and 40 voters lay down one ticket, and take up another, and vote it for Carmack, without swearing that the tickets laid down were Patterson tickets, which this indictment does not aver, still there is no averment here that these 30 or 40 voters, or any one or more of them, who did not throw down their tickets, and did not take up a Democratic ticket and vote the same, voted any other ticket, whether for Patterson, or some other candidate for congress. It is true that this count in the indictment is particular to allege that this was sworn as to "quite a number of colored voters," and possibly it is left to be inferred that the colored voters voted for Patterson, or did not vote for Carmack; but the indictment does not say this, and does not notify the defendant that the government will undertake to show that all the colored voters, or that the colored voters generally, voted for Patterson, or for some other than Carmack, as sworn to in this oath of the defendant, thereby notifying him of the nature of the charge against him with that particularity required by the rule above stated. Nor

does the count aver that any less number than 30 or 40 colored voters voted for Carmack, so that the defendant would know that the government would try to show upon the trial that not so many as 30 or 40 colored voters voted for Carmack. We are left just as much in the dark as to what the truth was about the colored voters, in respect of this, as in the other counts of the indictment just considered. Nothing can be left, in criminal pleading, to mere intendment, and whatever intendments are to be based upon the description of these voters as colored voters will not answer the rule of particularity in pleading.

But if we are mistaken in the application of the above rule to this count in the indictment, and if it be correct to say that, owing to the nature of the fact itself about which the alleged false oath was made, the mere denial of its truth is sufficient to put the defendant on notice of what he is to meet, namely, the truth of the fact whether 30 or 40 colored voters laid down another ticket, and took up a Carmack ticket, and voted it, yet there is another fatal objection to this count. The count avers that, in taking the defendant's testimony on the occasion of his examination in the contested election case, it "was a material inquiry to know and be informed why, in the returns of the election at the said poll in Mason, Tennessee, on the 3d day of November, 1896, the contestant, Josiah Patterson, was credited with only 41 votes, and whether all the votes really cast for him as a candidate for congress of the United States for the Tenth congressional district of Tennessee, in said election, were honestly and fairly counted for him." That is the statement of the issue by which the materiality averred in the count is to be tested. It is so stated for the purpose of showing the materiality of the fact involved in the false oath, and its tendency to prove or disprove this particular issue, so pleaded, must be the only test of the materiality of the oath. It might be material to some other issue between Patterson and Carmack in their contest, or it might be material to the general result, or it might be material as to the credibility of the witness, and in some phases of the contested election case the testimony might be important; but, in our scrutiny of this indictment, we are required to confine our judgment as to the materiality of this oath to the precise and particular issue above stated, which is why Patterson was credited with only 41 votes at that polling place, or whether all the votes really cast for him as a candidate for congress were honestly and fairly counted for him.

Now, the averment of the indictment is that the defendant swore that he saw "quite a number of colored voters lay down the ticket they brought with them to the polling place, upon the table at the polling place, and pick up a Democratic ticket (meaning a ticket which had Carmack's name on it for congress, instead of Josiah Patterson's), and vote the same." It is not averred that he swore that the ticket which they brought with them to the polling place, and laid down upon the table, was a ticket with Josiah Patterson's name upon it. There is no such averment in the indictment, unless it is to be inferred from the allegation that those were colored voters, and that

the colored voters came to the polls with a Patterson ticket, which inference, in criminal pleading, is not permissible, as we have already stated.

The innuendo of the clause above quoted does not aver this: that the defendant, by taking the oath in the form and phrases that he did, meant that the ticket that they brought with them and laid down was a ticket with Josiah Patterson's name upon it. The oath was, as averred in the indictment, that these colored voters picked up a Democratic ticket (meaning a ticket which had Carmack's name on it for congress, instead of Josiah Patterson's); but that innuendo only interprets the meaning of the words "Democratic ticket," and cannot be at all held to go further, and say that the defendant meant by his oath that they laid down a Patterson ticket and took up a Carmack ticket. They might have laid down a ticket without any name on it for congress, or with some other man's name than Patterson's, and we might imagine many other kinds of tickets that they would lay down at a general election, for reasons satisfactory to themselves; and, to the issue as above defined by the count itself, the laying down of any other ticket than a Josiah Patterson ticket would be wholly immaterial, inconsequential, and utterly irrelevant; and to that particular issue which is pleaded in the count itself there could be no connection made with such action of the voters, without averment of the essential fact. It is not at all material to that issue, as stated, how many votes Carmack got, nor whether these 30 or 40 colored voters laid down one ticket, and picked up another with his name upon it, and voted it; for the issue stated is, did Josiah Patterson get, at that polling place, more than 41 votes? not whether he got more or less than Carmack; and were the votes that he really got fairly and honestly counted for him? Now, is it not apparent that in order to be material to that issue, in some form, this count should have averred that these 30 or 40 voters, or some other 30 or 40 voters, or any number of voters,—all colored voters, if you please,—voting at that election, voted for Josiah Patterson? But this is nowhere alleged in this indictment. It is not alleged that he received more than 41 votes at the election, within the knowledge of the defendant, nor that the votes counted for him by the election officers were not the real number of votes that he received; nor is it alleged in any way how this transaction about the 30 or 40 colored voters throwing down one ticket, and picking up another with Carmack's name upon it, and voting it, affected this issue, as pleaded in the count. In other words, the issue as stated for the test of materiality, as it must be in the pleadings, is one thing, and the fact stated, as sworn falsely, might have no relation to it; nor does any averment that we can lay hold of in any sense connect the two together, unless it be upon the inference already stated, that the colored voters were voting for Patterson; and that is not averred as a fact, and is left entirely as a mere matter of inference. Therefore it does not appear that the alleged false oath was at all material to the issue which is pleaded by the count itself as the test of its materiality. It will not do to say that this might be material to some other issue, or to the general

result of the contested election case, or that it would go to the credibility of the witness. The averment of the indictment itself cuts off all such considerations as this, by specifying the particular issue to which the alleged false oath related. For these reasons the demurrer to this indictment will be sustained.

HART v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. January 18, 1893.)

No. 2.

1. NEUTRALITY LAWS—MILITARY EXPEDITION—QUESTIONS FOR JURY.

Whether the men and munitions of war for which the accused furnished transportation constituted a "military expedition," in the meaning of the statute, or the men were traveling as individuals, without organization or concert of action, and the arms and munitions were carried as articles of legitimate commerce, and whether the accused had guilty knowledge of the facts constituting the military expedition, if it were such, are questions for the jury, under proper instructions, when from the evidence a conclusion adverse to the accused may rationally be reached.

2. SAME—PROVIDING TRANSPORTATION.

One who provides the means for transporting a military expedition on any part of its journey, with knowledge of its ultimate destination and unlawful character, is punishable under Rev. St. § 5286.

3. CRIMINAL LAW—INSTRUCTIONS—EXPRESSION OF OPINION ON THE EVIDENCE.

A federal judge may express his opinion as to the weight and effect of the evidence, if at the same time he clearly informs the jury that they are the sole judges of all questions of fact.

4. SAME—CONDUCT OF TRIAL—ADMISSION OF EVIDENCE.

The refusal of the trial judge, after the evidence on both sides has been closed, to permit defendant to examine another witness, is a matter of discretion and not reviewable.

5. SAME—SENTENCE TO STATE PENITENTIARY.

The sentencing of a federal convict to the penitentiary of Pennsylvania, with a provision that he shall be subject in all respects to the same discipline and treatment as state convicts, is not a sentence to hard labor. It adds nothing to the punishment described by the statute, but relates only to prison government and control.

Acheson, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This was an indictment against John D. Hart for alleged violation of the neutrality laws, by furnishing transportation for a military expedition directed against the Spanish government in Cuba. The defendant was convicted in the court below (78 Fed. 868), and thereupon sued out this writ of error.

Wm. W. Ker and George Gray, for plaintiff in error.

James M. Beck (Francis Fisher Kane, on brief), for the United States.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

DALLAS, Circuit Judge. The gravity of this case has been eloquently but needlessly adverted to by counsel on either side. Its

importance both to the public and to the plaintiff in error is obvious, and it has received our most careful attention. The law generally pertinent to it has, however, been so fully considered by the supreme court in *Wiborg v. U. S.*, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, that, for the most part, we have but to apply the principles enunciated in that case to the one now before us. There, as here, the indictment was founded upon section 5286 of the Revised Statutes, which is as follows:

"Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

In the *Wiborg Case*, as in this case, the defendant below was convicted, not of setting on foot, but only of providing the means for, such a military expedition or enterprise as this section denounces; and there, as here, the main questions were as to the sufficiency of the proof—First, of the existence of a military expedition or enterprise, under the statute; and, second, of the defendant's knowledge of the facts by which, if at all, a military expedition or enterprise was made out. In *Wiborg's Case* the trial judge had submitted these matters to the jury, and this action, and the instructions which accompanied it, were approved by the supreme court. As to the first question, the court said:

"From that evidence the jury had a right to find that this was a military expedition or enterprise, under the statute, and we think the court properly instructed them on the subject."

And as to the other it used this language:

"We repeat that on the second material question, namely, whether the defendants aided the expedition, with knowledge of the material facts, the jury were instructed that they must acquit unless satisfied beyond reasonable doubt that defendants, when they left Philadelphia, had knowledge of the expedition and its objects, and had arranged and provided for its transportation. We hold that the defendants have no adequate ground of complaint on this branch of the case."

That case and this one were tried by the same learned judge, and it is apparent that he intended to, as it is clear that he did, charge upon the subjects now under consideration to the same effect on both occasions. Therefore the only question now is as to whether the evidence in the present case was so materially different and inadequate as to require its withdrawal from the jury, notwithstanding the prior authoritative decision that the jury's judgment in the previous one had been rightly invoked. If the evidence in this case were believed (and whether or not it should be was left to the jury), there could be no doubt respecting the primary facts, from which the ultimate facts (the existence or nonexistence of a military expedition, and of incriminating knowledge on the part of the defendant) were to be deduced. The court below held that upon both these points it was for the jury to draw the inference which, upon giving the defendant the benefit of any reasonable doubt, they should be satisfied was the proper one; and the correctness of this ruling depends upon whether or not, as to

each of the questions so submitted, a conclusion adverse to the accused could rationally be reached. If there could not be, we agree that a conviction should not have been permitted, and thus we are brought to consider the evidence. It shows that the defendant was the president and manager of the J. D. Hart Company, and that that company was the owner of the steamship Laurada, which carried the men, weapons, and military supplies, charged to have constituted a military expedition, from a point off Barnegat to the Island of Navassa, where they were transferred to another vessel, the Dauntless, which thereupon took them away in the direction of Cuba. A recital of the more particular facts, so far as they need be recited, is embodied in the charge of the court below, from which we quote:

"Your first inquiry therefore will be, was the expedition which was taken on board the Laurada off Barnegat, and carried to Navassa Island, in sight of Cuba, a military expedition, within the meaning of these terms as I have defined them, set on foot in this country to make war against the government of Cuba? That the destination of the expedition was Cuba does not seem open to reasonable doubt, though this, as well as all other facts in the case, must be decided by you. The people of the Island of Cuba, or a part of them, are engaged in war against their government. Several of the men composing the expedition said, if the evidence is believed (and that, of course, is for you), that Cuba was their destination, and that they were going there to fight the Spanish; and when transferred to the Dauntless, at Navassa, they went in that direction. The men, according to the testimony, were principally Cubans. Was the expedition, however, military, such as I have instructed you the statute contemplates? In other words, had the men combined and organized before leaving this country, and provided themselves with arms, as before described, for the purpose of going to Cuba to make war against the government? They came to the Laurada in a body, apparently acting from a common impulse, as by preconcert. The arms and other military stores came at the same time, though from New York. The men immediately went to work, transferring the arms, ammunition, and other military stores from the schooner on which they came to the Laurada, under the orders of one or more of their number. On the way to Navassa they continued to work about this cargo, opening boxes, assorting ammunition, and making sacks from canvas brought for the purpose, as the witnesses described, under the orders of Capt. Sutro, who, the witnesses say, conferred with and received orders, or appeared to receive orders, from Gen. Roloff. When approaching Navassa, three of the men, wishing, apparently, to desert, if the testimony is believed (and that is a question for you), withdrew from the others, and hid themselves in a part of the ship where they supposed discovery might be avoided, whereupon, as I understand the testimony (and you will judge whether I am right or not), Gen. Roloff had them sought for, brought out, and sent upon the Dauntless, with the other members of the expedition. If this latter statement respecting the desertion of these men, or attempted desertion, hunting them up, bringing them out, and requiring them to go, is true (and you must judge whether it is or not), it shows that the men were not at that time, at all events, free agents, but were subject to orders which they could not disobey. From these circumstances, and from all the evidence bearing on the subject, you must determine whether the men had combined and organized as I have described, in this country, to go to Cuba as a body, and fight, or were going as individuals subject to their own wills, with intent to volunteer in the insurgent service there, if they should see fit to do so on arriving there. You must judge from the evidence whether the men had combined, organized, and consented to the government of one or more of their number here in this country, to go to Cuba and make war there upon the Spanish government, or whether they were going individually, each on his own account, with liberty to volunteer or not, as they saw fit, when they reached Cuba.

"If you do not find that they had so combined and organized before leaving this country, then they did not constitute a military expedition, and the defend-

ant must be acquitted. If, on the contrary, you find that they had so combined and organized in this country, you must next determine whether the defendant provided means for their transportation, not the whole way, but to Navassa. It is not necessary that he should transport them to Cuba, as I have said. If he provided means for their transportation to Navassa, on their way to Cuba, and made this provision here in Pennsylvania, with knowledge of the character of the expedition and of its destination, he is guilty. The transportation was made by the Laurada. This is an undisputed fact. That somebody here provided her for this service seems clear, though this question, as other questions of fact, I repeat, is for you. It seems to be beyond room for controversy that somebody here provided the Laurada for that service, and provided her with stores and extra boats. I say it appears so to the court, but still you are not bound by what the court thinks of the evidence. The fact is for you. She started from the port of Philadelphia, taking on here, if the witnesses are believed, an unusual supply of coal for her alleged voyage, and an unusual supply of other stores. After clearing for San Antonio, she surrendered this clearance, taking another for a coastwise trip to Wilmington, and upon her arrival there immediately took a clearance for Port Antonio again. After passing down the river 20 miles further, she anchored and awaited the arrival of small boats brought down from Camden, on an order given in Philadelphia. She then proceeded to the breakwater, and out to sea; but, instead of going on a direct course to San Antonio, she turned northward, and went to the point off Barnegat, where she took on the men, arms, ammunition, and other military stores before alluded to. She then proceeded, by the route described, to Navassa, where she transferred the men and other cargo to the Dauntless, together with the boats, or a part of them, taken on down the Delaware. It further appears, as her first officer, Rand, testifies, that her captain pointed out to him on the chart, before leaving Philadelphia, the location off Barnegat, as their next objective point after passing the breakwater. When she got there she took on the cargo, under circumstances which seem to leave no room for doubt that she expected it. Now, gentlemen, you must judge from these circumstances,—from all the testimony relating to the subject,—whether it is not reasonably clear that the Laurada and her supplies, including extra boats, were not provided here, in this district, expressly to carry the expedition subsequently taken on off Barnegat. If they were, you must next determine whether it is proved that the defendant, Hart, made this provision. The vessel was in the service, at the time, as it would seem, of the John D. Hart Company, of which he is president and manager. Who else, or whether anybody else, is in the company, does not appear, so far as I remember. If there is testimony showing that anybody else is in that company, you will remember it. There may be. I remember no such testimony. It is clear, however, according to the testimony, that he was the president of that company, occupied the office, and managed its business. The evidence, if believed (and it is uncontradicted), shows that the defendant gave several orders respecting the vessel about this time, when she came in before this trip, and when she was going out (among these orders was one, if not both, respecting her clearance); that he directed supplies to be put on board; that he took part in employing her crew, and that while the order to overtake her down the Delaware with extra boats was not signed by him, nor anybody else, the tugboat man, Smith, usually employed by the John D. Hart Company, who had taken the Laurada out and turned her down the river that day, to whom this order for extra boats was delivered unsigned, executed it, and presented his bill for this service to Mr. Hart (I believe, the next day, or soon after), and that Mr. Hart tore it up, did not hand it back, saying he knew nothing about the matter. It was, however, paid a day or two later, by the hand of some one whom the witness says was unknown to him. That Mr. Hart knew that the Laurada was going to the point off Barnegat to take the men on board would seem to be clear, if the witnesses are believed; and whether they are to be believed or not is for you, because they testify that he procured the Fox, and sent the men on her to the point where they met the Laurada. If this latter statement is true, the inference seems irresistible that he knew the Laurada was going there for these men. From these circumstances, and from all other evidence, and with a recollection of what counsel have said, you must determine whether the

defendant, here in Philadelphia, provided this vessel and her supplies for the purpose of carrying the expedition to Navassa, on its way to Cuba. If you do not find he did, you will acquit him. If, on the contrary, you find he did, you will pass to the only remaining question in the case. Did he know at the time that the expedition was a military expedition, as charged, when he provided the means for its transportation? To satisfy you he did, the government points to what it calls 'suspicious circumstances' attending the fitting out of the vessel, her clearances, and voyage from this port to the point off Barnegat. What weight these circumstances should have in deciding the question of knowledge on his part is entirely for you. The government argues that the object was to deceive the officers of the United States, which, it says, the defendant could have no object in doing if he did not believe he was violating its laws. On the other side, it is urged for the defendant that it is just as reasonable to believe that the object of these circumstances called suspicious was simply to deceive the Spanish authorities and Spanish agents hereabouts. You must say whether this position of the defendant is a reasonable one or not. The government further points, in this respect, with a view of showing knowledge in the defendant of the character of this expedition, to the fact that the defendant had intimate relations, if the testimony is believed, with the men comprising the expedition; that he forwarded most of them from Atlantic City to the point of embarkation; that he knew who were going,—those with military titles, as those without; that he knew arms and other war material were to be taken on with the men, and must have understood the character of the expedition. If he sent the vessel, the Laurada, to the point off Barnegat, the inference would seem to be entirely reasonable that he understood at that time that she was to take these men, because, if the testimony is believed, he sent the men there,—the principal part of them,—and that he knew that she was to take the military stores, because the vessel took them as if she had previous orders. The vessel was not surprised in finding, so far as appears, that military stores were to be taken. They were taken as matter of course, just as the men were. You have heard and must consider the answer the defendant's counsel have presented to this contention of the government that the defendant, Hart, had knowledge, when the Laurada went out from here, of the character of this expedition; and, from all the evidence bearing on the question, you must determine whether it is proved that the defendant here furnished the means of transportation for the expedition, with knowledge at the time that the expedition was military, as before described. If he did not, he is not guilty. If he did, he is guilty."

That the evidence referred to in this extract is not precisely the same as that from which in *Wiborg v. U. S.* it was held that providing the means for a military expedition with knowledge of the facts might rightfully be found, is, of course, true; but that it was amply sufficient to warrant its submission to the jury necessarily follows, we think, from the reasoning of the opinion in that case. As is said in *Boyd's Wheat. Int. Law*, there cited, "the question is one of intent"; and questions of intent and of knowledge, as of other conscious mental conditions, have always been regarded as peculiarly appropriate for solution by a jury. That there were "suspicious circumstances attending the fitting out of the vessel, her clearances, and voyage from this port [Philadelphia] to the point off Barnegat," and that these circumstances were known to the defendant below, is indubitable; but it is contended that as all persons are at liberty to go abroad to enlist in a foreign army, and as the transportation of munitions of war is not prohibited, the court below should have ruled that the evidence adduced was as consistent with a lawful enterprise as with an unlawful one, and upon that ground ought to have directed an acquittal. We cannot assent to this proposition. It begs the question which it was the province of the jury to decide. If it had

appeared that these men were "traveling as individuals, without any concert of action," and that, "as for the arms and ammunition, they were articles of a legitimate commerce," merely, there can be no doubt that a verdict of guilty should have been prevented. But, as we have said, the truth or falsity of the charge of unlawful combination, and of defendant's inculcating knowledge, could be determined only by inference from the facts shown; and the inference which the plaintiff in error insists should have been arbitrarily assumed was surely not a necessary one, and the jury has found it to be not even a reasonable one. We are clearly of opinion that it was not error to allow them to decide whether it was or not. The rule that, to justify conviction of crime, the evidence must be such as to exclude every reasonable hypothesis but that of guilt, has not, it will be observed, been overlooked. But by whom is this rule to be applied? In some cases, no doubt, by the court; but certainly not in such a one as this, where the reasonableness of the only hypothesis of innocence propounded presents at least a question upon which men of ordinary intelligence might honestly differ. The learned judge was therefore right in telling the jury that it was for them to "say whether this position of the defendant was a reasonable one or not," and there is nothing in the evidence which would warrant the supposition that they were mistaken in concluding that it was unreasonable. The same point was made in *Wiborg v. U. S.*; and there, although the right to transport both contraband goods and individuals intending, but not combined, to engage in war, was distinctly maintained, the court (page 653, 163 U. S., and page 1135, 16 Sup. Ct.), after saying, as might equally well be said in this case, that the district judge had ruled nothing to the contrary, affirmed his action in leaving the questions of combination and of knowledge to the jury, with instructions respecting them which were essentially the same as those which were given in this instance.

We have now expressed our views upon the most important questions which the case presents, and our conclusion is that none of the averments of error which relate to them can be sustained. The others may be briefly disposed of.

It plainly appears on the face of the record that no error to the defendant's disadvantage was committed in overruling the several objections to the district attorney's questions to witnesses which are referred to in the first five errors assigned; and the course pursued by the learned judge (errors 21 and 22) in denying the motion of defendant for leave to examine Henry Lecaste after the evidence on both sides had been closed, and in declining to admit his testimony under the circumstances, is not reviewable here. We may add, however, that we do not doubt that his discretion was justly as well as competently exercised.

We concur in the statement of the court below that it was not necessary that the defendant should have provided the means for carrying the expedition in question to Cuba, but that if he provided the means for any part of its journey, with knowledge of its ultimate destination and of its unlawful character, he was guilty.

The several objections made to the expression by the learned judge of his opinion upon the evidence present no ground for reversal. It

appears that he did, at several points, state his own impressions with distinctness, but it also appears that every disputed fact in the cause was fairly and unreservedly left to the jury.

The twenty-fourth error assigned is not supported by the record. The defendant was not sentenced to "hard labor." He was sentenced to pay a fine, and to be imprisoned in the Eastern Penitentiary of Pennsylvania, with the provision "that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of said commonwealth." This proviso adds nothing to the punishment prescribed by the statute. It relates only to prison government and control. Its presence accords, we believe, with the customary practice of the courts of the United States sitting in the state of Pennsylvania; but, if it were absent, the effect of the judgment would necessarily be the same, for the use of the state penitentiaries is allowed to the United States only upon condition that the sentences of the United States courts shall subject their convicts to the same discipline and treatment as those of the state courts. Act Pa. April 15, 1834, § 3 (Purd. Dig. 1660, pl. 9). No error is disclosed by this record, and the judgment of the district court is affirmed.

ACHESON, Circuit Judge (dissenting). I am not able to concur in the views expressed by the majority of the court in this case, and must dissent from the judgment of affirmance. From the very foundation of the government,—both before and since the passage of our neutrality laws,—the right of citizens of the United States to sell to a belligerent, or to carry to a belligerent arms and munitions of war, subject to the opposing belligerent's right of seizure in transitu, and the right of our citizens to transport out of the country, with their own consent, persons who have an intention to enlist in foreign military service, have been firmly and steadily maintained by the executive department, and uniformly upheld by judicial decisions. Mr. Jefferson, secretary of state, to minister of Great Britain, May 15, 1793 (3 Jeff. Works, 558); Mr. Hamilton's treasury circular of August 4, 1793 (1 Am. St. Papers [For. Rel.] 140); 1 Kent, Comm. 142; Richardson v. Insurance Co., 6 Mass. 101, 113; *The Santissima Trinidad*, 7 Wheat. 283, 340; Mr. Marcy, secretary of state, to Mr. Molina, March 16, 1854 (3 Whart. Int. Law Dig. p. 511); *U. S. v. Kazinski*, 2 Spr. 7, Fed. Cas. No. 15,508; *The Florida*, 4 Ben. 452, Fed. Cas. No. 4,887; opinions of Atty. Gen. James Speed, of December 23, 1865, and March 24, 1866 (11 Op. Attys. Gen. 408, 451); Atty. Gen. Akerman to Hamilton Fish, secretary of state, December 4, 1871 (13 Op. Attys. Gen. 541); *U. S. v. Trumbull*, 48 Fed. 99; *The Itata*, 49 Fed. 646; *Id.*, 15 U. S. App. 1, 5 C. C. A. 608, and 56 Fed. 505; *U. S. v. Pena*, 69 Fed. 983; *Wiborg v. U. S.*, 163 U. S. 632, 652, 16 Sup. Ct. 1127, 1197. So pertinent to the facts of the present case is the opinion of Atty. Gen. Akerman, *supra*, that a portion of it may well here be quoted:

"Assuming the credibility of the sworn statements which he [the Spanish minister] has transmitted, I do not think that they prove against the Hornet any violation of the neutrality laws of the United States. They show that the Hornet conveyed from Aspinwall, to the coast of Cuba, men, arms, and munitions of war, destined to aid the Cuba insurgents. This proof, by itself,

does not bring the vessel within the third section of the neutrality act of April 20, 1818 (3 Stat. 448)."

That this is a sound exposition of our neutrality laws is abundantly shown by the authorities. The *Itata*, 15 U. S. App. 39, 5 C. C. A. 608, and 56 Fed. 505.

The leading facts of this case, as shown by the record, are these: The defendant, John D. Hart, was the president of the J. D. Hart Company, which owned the steamship *Laurada*. This vessel was employed to carry to the Island of Navassa a large lot of arms and ammunition which had been purchased in the usual course of trade in the city of New York by a Mr. Eston, but with which purchase the defendant was not connected. The said arms and ammunition were carried in original packages upon a lighter from New York, and placed on board the *Laurada* off Barnegat, whither the *Laurada* went after she left the port of Wilmington, Del. At the same time about 18 men, whom the government's witnesses described as Cubans, went in a launch from Atlantic City, and joined the *Laurada* while she lay off Barnegat. These men assisted in transferring the cargo of arms and ammunition from the lighter to the *Laurada*, and then went with the *Laurada* on her voyage. The 18 men came to Atlantic City by railway. They traveled on the same train, and arrived together. They were in citizen's dress, and unarmed. There was evidence tending to show that the defendant had some control over the movements of the *Laurada*; took part in the shipping of her crew at Philadelphia, and in her sailing orders from that port; and also that he was present at Atlantic City when the 18 men arrived there, and that he participated in providing the launch which took them out to the *Laurada*. Here the defendant's direct connection with this transaction terminated. It appears, however, that the *Laurada* proceeded to the Island of Navassa, and was there met by the towboat *Dauntless*. The cargo of arms and ammunition, still in original packages, was transferred in that form from the *Laurada* to the *Dauntless*, which proceeded therewith in the direction of Cuba. To transport the cargo required the *Dauntless* to make two trips. The men who came on the *Laurada* from Barnegat put the first load upon the *Dauntless*, and went off with her. Some of these men returned with the *Dauntless* to the *Laurada*, but they did not assist in putting the second load upon the *Dauntless*. They complained that they were "broken down," and procured the crew of the *Laurada* to do the second loading. The only thing the men who went on the *Laurada* from Barnegat are shown to have done in respect to the cargo of arms and ammunition was to perform the services of stevedores. There was no evidence that any of these men had enlisted in the United States for military service in Cuba, or that they had ever been drilled in military tactics, together or singly. There was no evidence whatever that they had formed or were members of any military organization, nor was there any direct evidence that they were acting in a body for any purpose. The one solitary fact tending to show any "preconcert" of action on their part is that they came to Atlantic City in the same railway train, and took passage together upon the launch which carried them to the *Laurada*, their point of common destination. Certainly the defendant is

not justly chargeable with knowledge of any other inculpatory fact. The evidence as to what took place on board the *Laurada* after she left Barnegat was admissible, as I conceive, only as tending to show that this was a military expedition or enterprise, and not as bearing upon the question of the defendant's knowledge. The substance of this evidence is that the men who were carried by the *Laurada* opened the large boxes, and took out smaller ones, and stowed them in the hold, on each side of the vessel, under the direction of one of their number; that on one occasion a box of cartridges was opened, and the contents examined by one who was called "General Roloff," and another, who was called "Captain," but the box was then fastened up again; that the men had some canvas, out of which they made small sacks or bags, with a strap to fit one's shoulders; and that several of the men said that "they were going to Cuba to fight,—to fight the Spaniards." There was no evidence that arms were distributed among these men, or that they were drilled, or under military discipline. These 18 men left the *Laurada*, as they had boarded her, in citizen's dress, and personally unarmed, so far as appears. The first mate, Rand, a witness for the government, testified:

"I never saw an arm, the whole passage out, to my recollection. I did not see the men drilled or uniformed. I did not see them practicing with rifles or with cannons. I became acquainted with Gen. Roloff on board. He was lying down on the quarter deck, nearly the whole passage. I saw large boxes opened, and small boxes taken out. Those boxes had rope handles to them. They were transferred to the *Dauntless* at Navassa. When the goods were transferred from the *Laurada* to the *Dauntless*, they were still in those boxes."

I cannot agree that the case of *Wiborg v. U. S.*, *supra*, is decisive here. How wide apart the two cases are upon the question of the existence of a "military expedition or enterprise," the following extract from the opinion of Chief Justice Fuller (163 U. S. 654, 16 Sup. Ct. 1136) shows:

"It appears to us that these views of the district judge were correct, as applied to the evidence before him. This body of men went on board a tug, loaded with arms; were taken by it thirty or forty miles, and out to sea; met a steamer outside the three-mile limit, by prior arrangement; boarded her with the arms, opened the boxes, and distributed the arms among themselves; drilled to some extent; were apparently officered; and then, as preconcerted, disembarked, to effect an armed landing on the coast of Cuba."

The distinguishing features of the *Wiborg* expedition were lacking here. I am of the opinion that the evidence here did not justify a finding that this was a military expedition or enterprise, within the ruling in *Wiborg's Case*. In origin and purpose, these two enterprises differed essentially, as it appears to me. The adventure on which the *Laurada* entered was a commercial transaction, neither obnoxious to the law of nations, nor punishable by our municipal law. The *Laurada* was the carrier of a very large cargo of articles, contraband of war, destined, doubtless, for the use of the Cuban insurgents in their struggle to achieve independence; and on the same voyage she also transported, as she might lawfully do, even with knowledge of their intention to engage in military service abroad, 18 unarmed and ununiformed men, who embark on the vessel, apparently, as mere passengers.

But even if it could be affirmed, in view of after developments, that this was a military expedition, within the prohibition of the statute, still, in my judgment, there was not sufficient evidence upon which to base a finding that the defendant had knowledge that such was the character of the enterprise. In its origin, and while the defendant had any personal connection with it, it was apparently a lawful adventure. It was then incumbent upon the government to furnish some evidence to show that the defendant knew the contrary. Such evidence I do not find. Upon the question of scienter, it must not be overlooked that this defendant's personal connection with the Laurada's voyage ceased at Atlantic City, whereas Wiborg was the master of the Horsa, and was, of course, cognizant of everything that transpired, both when the men boarded her, and during the ensuing voyage. It is said that there were secrecy and mystery in the movements of the Laurada. Be it so. These things in themselves are not criminal, and in this instance do not indicate criminality. They are here consistent with entire innocence. The owners of the Laurada, dealing as carriers with contraband of war, had a perfect right to elude the vigilance of Spanish officials and agents, and avoid a seizure of the cargo on the high seas. It can, I think, confidently be affirmed that all the circumstances relied on to show the defendant's guilt are compatible with his innocence. Now, it is a familiar rule in criminal cases that, to justify a conviction upon circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. 1 Greenl. Ev. § 13; Wills, Circ. Ev. 149. In *Com. v. McKie*, 1 Gray, 61, 62, the supreme court of Massachusetts, in discussing the doctrine of the burden of proof in criminal cases, used language which is apposite to the present case:

"If therefore, the evidence fails to show the act to have been unjustifiable, or leaves that question in doubt, the criminal act is not proved, and the party charged is entitled to an acquittal. * * * In the case supposed, if it is left in doubt on the whole evidence whether the act was the result of accident or design, then the criminal charge is left in doubt. * * * The defendant has a right to say that, upon the proofs so introduced, no case is made against him, because there is left in doubt one of the essential elements of the offense charged, namely, the wrongful, unjustifiable, unlawful intent."

Here, as it seems to me, there was an entire lack of evidence to show guilty knowledge on the part of the defendant. I am not able to discover in this record evidence sufficient to sustain the conviction. I am of opinion that the defendant was entitled to an affirmance of his request for binding instructions in his favor.

SILVER et al. v. HOLT.

(Circuit Court, D. Massachusetts. May 13, 1895.)

No. 514.

COPYRIGHT SUITS—CONTRACT RELATIONS—JURISDICTION OF FEDERAL COURTS.

A suit which, though charging infringement, and praying an injunction and account, is in reality merely a suit to enforce a contract between author and publisher, is not a case arising under the copyright laws, so as to be within the jurisdiction of the federal courts.

This was a suit in equity, brought by Edgar O. Silver and Silver, Burdett & Co., a New Jersey corporation, against Hosea E. Holt, praying an injunction against the publication and sale of certain musical compositions, and for an accounting of sales and profits made by defendant. The bill contained the following allegations:

(1) Shortly prior to March 28, 1885, the defendant and one John W. Tufts, both being then, as ever since, citizens of the United States, jointly composed two certain books, respectively entitled "The Normal Music Course. First Reader," and "The Normal Music Course. Second Reader," and a book of musical charts, entitled "Normal Music Course. Charts. First Series." Thereafter, and prior to said date, the titles of said three books were, as the plaintiffs are informed and believe, duly entered, for the securing of the copyright thereof, in the office of the librarian of congress at Washington, by certain persons, co-partners, under the firm name of D. Appleton & Co., being, as the plaintiffs are informed and believe, citizens of the United States, assigns of the said Tufts and the defendant of the said books; and said Tufts and the defendant and their said assigns, as the plaintiffs are informed and believe, did all other acts and things required by law for the procuring of the copyright in the said books. Thereafter, and between February 3, 1883, and March 28, 1885, said D. Appleton & Co. reassigned the said copyrights to the said Tufts and the defendant. (2) On or about January 1, 1887, said Tufts and the defendant, by a written agreement, a copy of which is hereto annexed, marked "Exhibit A," assigned to the plaintiff Edgar O. Silver the said copyrights, or granted to said plaintiff an exclusive license of publication of said books. No notice has been given by said Tufts and the defendant, under the third article of said agreement, or otherwise, for the termination of said assignment or license, and the plaintiffs are informed and advised and believe that the same is still in force. (3) Thereafter, and prior to July 19, 1889, said Tufts and the defendant jointly composed a new and revised edition of said "Normal Music Course. First Reader," entitled "The Normal Music Course. First Reader. New and Revised Edition," embodying therein new and original matter, and also a new and revised edition of said "Normal Music Course. Charts. First Series," entitled "Normal Music Course. Charts. First Series," and assigned the same to the firm of Silver, Rogers & Co., a co-partnership, composed of the plaintiff Edgar O. Silver and others, and then also, as the plaintiffs are informed and advised and believe, assigned to said Silver, Rogers & Co., by equitable assignment, the copyright then held at law by them, said Tufts and the defendant, in the matter contained in the said first edition of said book and book of charts, respectively. Said firm, as assigns of said Tufts and the defendant, then duly entered, for the securing of the copyright thereof by them, the said Silver, Rogers & Co., in the office of the librarian of congress at Washington, the title of the said books, to wit, the said new editions; and all other acts and things have been done required by law for the securing of the copyright in said books. (4) On or about August 25, 1892, the said Tufts, by a written assignment, such as is required by the laws of the United States, duly assigned to the plaintiff Edgar O. Silver all the plaintiff Tufts' interest in all the books, charts, and copyrights hereinbefore mentioned, and said assignment was duly recorded. Since the taking out of the copyrights of said new editions, all the rights of

said firm of Silver, Rogers & Co. in any and all the books, charts, and copyrights hereinbefore mentioned, except such as have, by reason of the premises, vested in the plaintiff Edgar O. Silver, have been assigned, by equitable assignment, to the plaintiff Silver, Burdett & Co. (5) The plaintiff Edgar O. Silver still continues to be, and is, the owner at law of all the legal interest of said Tufts in said books and copyrights vested in said plaintiff by the foregoing assignment from said Tufts; and he and the plaintiff Silver, Burdett & Co. still continue to be equitable owners of the interest assigned to them, as aforesaid, by said Silver, Rogers & Co. (6) At divers times during the period of twelve months preceding the filing of this bill, the defendant has, as the plaintiffs are informed and believe, unlawfully printed and published large numbers of a book entitled "H. E. Holt's New and Improved Normal Course in Music. First Reader," and a book of charts entitled "H. E. Holt's New and Improved Normal Course in Music. First Series. Charts"; and the same has been done by the defendant without the consent in writing or other consent, and against the protest, of the plaintiffs. Said books contain and embody large portions of the said books, charts, and editions described in the preceding paragraphs of this bill, and are, in large measure, reproductions of said books, charts, and editions, and are unlawful infringements of the same. (7) By the said unlawful acts of the defendant, the plaintiffs have sustained great damage, and are aggrieved in respect of their said titles to the said copyrights.

The contract attached to the bill, and marked "Exhibit A," was in full, as follows:

This agreement, by and between John W. Tufts, of Boston, county of Suffolk, and commonwealth of Massachusetts, and Hosea E. Holt, of Lexington, county of Middlesex, in said commonwealth, parties of the first part, and Edgar O. Silver, of said Boston, party of the second part, witnesseth: First. That said Tufts and Holt, as they are joint authors of a series of music readers, charts, and supplements thereto known as the "Normal Music Course," as well as co-equal owners of the copyrights, electrotypes, etc., of said publications, agree that said Silver shall have the exclusive right to print and publish the said series, including the First Reader, Second Reader, Third Reader for Female Voices, Third Reader for Mixed Voices, Aædean Collection, High School Collection, First Series of Charts, Second Series of Charts, Drill Charts, and Rhythmic Charts,—other and future publications in the series to be subject to special contract,—during the term of three years from the date hereof; that they will not, without the consent in writing of the said Silver, write, print, or publish, or cause to be written, printed, or published, during the continuance of this agreement, any other edition of the said series, revised, corrected, enlarged, or abridged, or otherwise, or any series or books of a similar character tending to interfere with or injure the sales of the said series of music books; and that they will furnish the said Silver with all electrotypes or other plates, wood or other designing or engraving, chart drawings, and generally everything of a similar character necessary to the manufacture of said series, and will keep the same in repair, and renew them when worn out. Second. That the said Silver agrees to print and publish the said Normal Music Course in a neat and appropriate manner, to pay all expenses of printing, publishing, and advertising the same, to employ the usual means of selling the said publications, save as hereinafter provided for, and to keep the market supplied with them as long as there shall be a reasonable demand for the same; that he will annually during the continuance of this agreement, on the first day of February, render to the said Tufts and Holt a statement in writing of the number of copies of said series that shall have been printed to the first day of January next preceding the date of such statement, and also of the number of copies that shall have been sold to the same date; and that he will thereupon pay to the said Tufts and Holt a sum of money equal to fifteen per cent. of the net wholesale prices of said publications, such wholesale prices to be determined by deducting the average rate of discount allowed the jobbers of Boston, New York, and Chicago with whom agreement shall be made for the supply of the trade of those cities, from the regular wholesale list prices of said publications, provided that such

percentage shall not be reckoned upon books given away, exchanged, or sold for introduction, unless the net proceeds of books for introductory purposes amount in any case to seventy-five per cent. of the wholesale list prices. Third. That said Tufts and Holt and Silver mutually agree that, to terminate this agreement at the end of three years from the date thereof, a notice in writing must be given thirty days at least before the expiration of the first year from the date hereof, and that, in default of such notice at the end of the first year, a period of one year shall be added to the term of this agreement, and also that, in default of such notice at the end of the second or any succeeding year, a further period of one year shall be added to the term of this agreement as then existing; so that in any event this agreement shall not be terminated absolutely until the end of two years, after that year in which such notice may be given. Fourth. That said Tufts and Holt and Silver mutually agree that, after any notice to terminate this agreement as above provided shall have been given, said Silver need not continue any agency work employed by him to sell or introduce said publications; but said Holt, in his prior capacity as publisher of said series, may undertake at his own expense to continue such agency work, provided that all sales in that way shall be made from the stock of said Silver. In witness whereof, we, John W. Tufts and Hosea E. Holt, parties of the first part, and Edgar O. Silver, party of the second part, have hereunto severally subscribed our names, this first day of September, in the year one thousand eight hundred and eighty-six.

The prayers of the bill were as follows:

That the defendant, his servants and agents, may be enjoined from further printing or publishing, and from selling or disposing of, any copies of so much of said book and book of charts so published by the defendant as aforesaid as is taken from the said book and charts of the plaintiffs, and from printing, publishing, or selling any other book or publications containing any portion of the matter so copyrighted and held by the plaintiffs as aforesaid; that, pending this suit, a preliminary injunction may issue against the said Hosea E. Holt, his servants and agents, from doing such acts as are sought to be restrained by the preceding prayer.

H. W. Chaplin, for complainants.

A. S. Hall and S. J. Edder, for defendant.

COLT, Circuit Judge. Upon the allegations contained in this bill, as I view them, the right to the relief prayed for is founded upon the agreement of September 1, 1886, between the plaintiff Silver and the defendant. This agreement appears to be the ordinary contract made between authors and publishers. The bill, therefore, does not present a case arising under the copyright laws of the United States. The suit is brought to enforce a contract. The case arises on the contract or out of the contract, and not under the copyright law. As jurisdiction in this case is not based upon diversity of citizenship, but upon the subject-matter, it follows that the court has no jurisdiction, and the demurrer must be sustained. *Manufacturing Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. 756; *Felix v. Scharnweber*, 125 U. S. 54, 8 Sup. Ct. 759; *Wilson v. Sandford*, 10 How. 99; *Hartell v. Tilghman*, 99 U. S. 547; *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550; *Trading Co. v. Glaenzer*, 30 Fed. 387; *Routh v. Boyd*, 51 Fed. 821; *Pulte v. Derby*, 5 McLean, 328, Fed. Cas. No. 11,465. Demurrer sustained.

SOCIETE ANONYME DU FILTRE CHAMBERLAND SYSTEME PASTEUR
et al. v. ALLEN et al.

(Circuit Court, N. D. Ohio, W. D. August 31, 1897.)

No. 1,344.

1. PATENT INFRINGEMENT SUITS—PRELIMINARY INJUNCTION—PRIOR DECISIONS.

A decision by a circuit court of appeals affirming an order granting a preliminary injunction will not prevent the circuit court, in a subsequent suit against a different infringer, from exercising an independent judgment, when it has before it new evidence, consisting of correspondence between the applicant and the patent office, which presents strong grounds for giving the claims a much narrower construction than was given them in the former suit.

2. SAME—DEFAULT DECREE SUSTAINING PATENT.

A final adjudication sustaining a patent, which is the result of an earnest, honest, and effective litigation, free from any suspicion of collusion or arrangement between the parties, or negligent abandonment of the defense, is conclusive on an application for a preliminary injunction in a subsequent suit. But all other adjudications are at most only persuasive, and it is open to the court in the subsequent suit to re-examine the case *de novo*. *Held*, therefore, that such a decree, taken after defendant had failed to appear to further contest the case on final hearing, was not conclusive in a subsequent suit.

3. SAME—NEW DEFENSES.

Even if a prior decree sustaining the patent is without suspicion of collusion, it is not conclusive where the defendant in the new litigation presents a new attack upon the patent, or new evidence of importance, entitled to consideration as presenting a really new issue, and not a mere pretense of one.

4. SAME—CONSTRUCTION OF PATENT—PRIOR ADJUDICATION.

Where a patent has been sustained in prior litigation, the court, in a subsequent suit against a different infringer, may, on motion for a preliminary injunction, be required to decide whether the claims shall be given a broad or narrow construction, in order to determine the question of infringement; and if, in such case, the broader construction is seriously and formidably brought in question by the evidence, the injunction should be refused unless there is sufficient judicial support on plenary hearing for the broader construction.

5. SAME.

On application for a preliminary injunction the court will not be inclined, on *ex parte* affidavits, to determine the proper construction of the patent in a doubtful case, but will refuse the injunction, and leave the question for the final hearing, unless it shall appear that irreparable injury will result to the plaintiff.

6. SAME—EVIDENCE OF INFRINGEMENT.

Where the question of infringement depended upon the composition of a certain compound, the analysis of which was difficult, and the affidavits of the experts were uncertain and equivocal, amounting to little more than the statement of an opinion that the substance did infringe, *held*, that a preliminary injunction should be denied.

7. SAME.

Patent No. 336,385, for the Pasteur filter, considered on motion for preliminary injunction, and said injunction denied.

This was a suit in equity by Societe Anonyme du Filtre Chamberland Systeme Pasteur and the Pasteur-Chamberland Filter Company against M. H. Allen and the Allen Manufacturing Company. The case was heard on an application for a preliminary injunction.

This is a bill by the plaintiff as the assignee of Charles Eduard Chamberland, claiming as the American patentee of the well-known Pasteur filter. The patent

Involved is that of February 16, 1886,—No. 336,385. Besides the ordinary allegations charging infringement against the defendants, the bill contains this allegation: "And your orators further show that the validity of said letters patent has heretofore been affirmed, after strenuous litigation, by various decrees in equity in several of the circuit courts of the United States and in the circuit court of appeals for the Sixth circuit, and that the public have long and generally acquiesced in that validity." The bill then alleges that the defendant Allen had been the agent of the plaintiff the Pasteur-Chamberland Filter Company at Toledo, Ohio; that he became familiar with the business of the company, and built up a profitable business, which he sold out with his principal's consent, but continued in the confidential employment of the principal for the purpose of detecting infringements; that in that way he became familiar with the processes of manufacture and with the business of plaintiff, and, after this, produced a counterfeit imitation of the filters made under the patent, and introduced the said counterfeit imitation to the market, greatly to the plaintiff's damage. It contains the usual prayer for injunction, account, plea for damages, etc.

The specifications of the patent, after describing the unsatisfactory condition of filtration through burnt brick, and various other materials used for the purpose, states that, however efficient the above-named substances may be for filtering purposes, they do not "retain all germs or microbes or extremely fine organisms which are in suspension in the water or other liquid, such as in infected blood taken from an animal having died of splenic fever, or generally any blood infected with microbes. * * * My invention is designed more completely to hold back and retain such germs; and it consists of a compound to be used for filtering water, wines, beverages, and all liquids generally." "The compound is formed, substantially, of pipe clay, or any other suitable clay, and porcelain earth, or its equivalents, hereinafter named. The clay is diluted in water, and then mixed with the porcelain earth or its equivalents. The porcelain earth is ground or reduced to fine powder in a suitable mill, after having been previously baked in any suitable kiln. The proportions are from 20 to 40 per cent. of clay to 60 or 80 per cent. of porcelain earth or its equivalents. They may, however, vary more or less. I wish it, however, to be understood that I do not limit myself to the above-named substances, for the same, or very much the same, results may be attained by using, for instance, siliceous, magnesia, or its equivalent, instead of porcelain earth." "The above-described compound is preferably intended for filtering liquids under pressure, owing to its being porous but to a small extent; and for this purpose any suitable filtering apparatus may be employed." "The manufacture of the filtering bodies may be effected by casting, molding, or turning, as in the manufacture of pottery ware. The filtering body is then baked in a biscuit or other kiln, in the usual way; the temperature at which it is baked ranging, say, from 1,850 degrees to 2,400 degrees, Fahrenheit." "A filtering body produced from the above compound is homogeneous, and fulfills the required conditions for filtering the hereinbefore named substances, and thereby obtaining the results herein mentioned." "I do not wish to be understood as laying claim, broadly, to the materials hereinabove mentioned as a filtering compound, but only when they are treated as above specified."

The patentee then claims as follows: "I claim a filtering compound formed of porcelain earth, baked and reduced to a powder, and pipe clay, combined in the proportions set forth, the said compound being baked, substantially as set forth."

The answer, so far as it is necessary to state its contents, denies that the plaintiff's assignor was the first inventor in this country or elsewhere, or that the alleged invention was not known in this country at the time of his application; denies that the defendant has made, used, or sold any of the compound contained or embodied in the invention set forth and covered by the patent; denies any infringement or injury to the plaintiff. It alleges that the compound has long been well known to those skilled in the pottery art, and names a great many persons acquainted with it before the issuance of the plaintiff's patent; alleges that it was anticipated by many other patents, which are numerously named. It also alleges that the compound was well known to named persons in France, and that it was largely on sale there and elsewhere and in the United States prior to the issuance of this patent; that substantially the same com-

pound and process was in very old and common use among the people in connection with cisterns, wells, the cells of galvanic batteries, etc., and states that it was thoroughly well described in many books of science and art, which are named and described in the pleadings. It alleges that while the patent was pending in the patent office, under the demand of the commissioner of patents, the patentee was required to so limit and confine his claim that he cannot now ask for a construction so broad as that put upon it by the bill, and so broad as to cover the contrivance used by the defendant. The answer denies any acquiescence by the public, and especially denies that the patent has been affirmed by any final decree of any court of the United States, and alleges that the plaintiffs had begun many suits against divers alleged infringers, but had designedly and purposely failed and neglected to prosecute any of them to a final decree. It denies that the defendant Allen was the special or confidential agent of the plaintiffs, except that he says that he was a dealer in filters, and purchased and sold the plaintiffs' filters until he found that they were not marketable, because of their high price, etc.; sets up that the filters manufactured by the plaintiffs have not been marked "Patented," as required by law; and pleads also that the alleged invention was patented in Great Britain and in Austria, and that this patent is subject to the life of the patents in those countries respectively, but it does not aver that the patents have expired in either of those countries.

The proof submitted on this motion consists of affidavits, counter affidavits, documentary proof, and the file wrapper of the patent office, certified transcripts from the records of the courts, etc.

Paul A. Staley, for complainants.

Almon Hall, for respondents.

HAMMOND, J. (after stating the facts). When this argument was first presented, there seemed to be no escape from the apparently conclusive precedent found in the case of *Blount v. Chamberland Systeme Pasteur*, 3 C. C. A. 455, 53 Fed. 98, in which our own circuit court of appeals had pronounced in favor of the patent, to say nothing of the other cases relied upon where the patent has been involved. That court was then acting under the authority of the case of *Watch Co. v. Robbins*, 6 U. S. App. 275, 3 C. C. A. 103, 52 Fed. 337, since overruled in the case of *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.*, 19 C. C. A. 25, 72 Fed. 545. But whether, under the authority of the one or the other of those cases, the judgment in *Blount's Case*, *supra*, cannot be taken as at all final, nor in any sense conclusive of our judgment here. Mr. Circuit Judge Jackson, in rendering the opinion, expressly disclaims any consideration of the validity of the patent, further than to ascertain whether the preliminary injunction which had been granted by the circuit court was an improvident exercise of its legal discretion, and, as the case appeared upon that record, he held that it was not; and that is all there was in that case. It is true that in presenting the *prima facie* case of the plaintiff for a preliminary injunction the court considered particularly the prior patents then in evidence, and pronounced that they were not sufficient as against the *prima facie* presumptions which had been found in favor of the patent of the plaintiff "to clearly show its invalidity"; and on the proof then before the court long public acquiescence in the patent was regarded as an important fact towards establishing the plaintiff's *prima facie* case. But, mainly, the decision seems to have been based upon the defendant's prior business relation to the plaintiff, which it is said "presented a strong equity in favor of the com-

plainant, if it did not estop him from denying its validity under the authorities." On the question of infringement, as the question was then before the court, the learned judge says this:

"If, as the appellant's counsel contends, the granular element of the patented compound is confined to baked porcelain earth ground or reduced to fine powder, the question of infringement would be doubtful; but we are not prepared to hold that this is the proper construction to be placed upon the specification and claim of the patent."

The court then proceeds upon the face of the patent to hold that it is at least open to a broader construction than that suggested in the quotation from the opinion just made. But it is entirely evident from the opinion itself, and from an inspection of the record in that case, filed in evidence here, that the proof presented and set up in the answer in this case, coming from the file wrapper of the patent office, and exhibiting the struggle which took place there between the applicant and the examiner for a limitation on the words of the claim as originally presented, was not before that court in any way. Counsel for the plaintiffs here ask us to assume that it was, because "the file wrapper is made a part of the defense in probably 99 per cent. of all contested patent cases," relying upon a statement in *Carter-Crume Co. v. Ashley*, 68 Fed. 378, protesting that the fact that nothing appears in the opinion of the court about a point is not conclusive evidence that the point was not made. This is undoubtedly true, but the presumption that it was made is always overcome by positive proof drawn from the record and the pleadings that it was not. But, apart from all this, it is not upon any such presumptions as that indicated that this court would act when, upon the proof made here, it is apparent that the records of the patent office contain formidable evidence that this very question of the nature and extent of the equivalents that may be protected by the patent was the subject of controversy there, and that the patentee, by his own correspondence and amendments to his original application, has undertaken to settle with the examiner the precise meaning of his claim in this regard. If there were nothing else in this case, that fact alone, specially pleaded in the answer, and supported by the exhibition of the record, would require any court to consider independently and de novo such a question as that. *Thomas v. Spring Co.*, 23 C. C. A. 211, 77 Fed. 420, 431. It is entirely plain that the court of appeals, in the opinion by Judge Jackson, was giving a broad construction to the words of the patent as written therein, wholly uninfluenced by any such fact as that just mentioned, or else it surely would have been noticed. That opinion could not have been written without calling attention to the nature and force of such proof as that if the file wrapper had then been before the court. In a case directly between the selfsame parties there had been an action at law involving the same patent, and this was pleaded as an estoppel; but it was held by the supreme court that it must appear either upon the face of the record, or be shown by extrinsic evidence that the precise question raised was determined in the former suit, that the burden of proof is upon him who claims the estoppel to

show that this was so; and that, unless it was done, the case will be at large, and open to a new contention whenever any uncertainty as to this appears which is not removed by extrinsic evidence. *Russell v. Place*, 94 U. S. 606; *Lantern Co. v. Meyrose*, 27 Fed. 213. Surely, if this be so as to the technical estoppel of a judgment between the same parties, it is far more operative as a principle where the suit is between other parties, and there is no pretense of any technical estoppel, as in this case. As was well remarked by counsel for the defendant, if this case, upon the record we have here, should come before the court of appeals itself, they certainly would not be bound by anything contained in the opinion of Mr. Circuit Judge Jackson as to the validity of this patent, or be compelled to extend its effect beyond the facts then exhibited; and this court, in a condition like this, is not more bound by such an interlocutory proceeding in that court than itself would be.

It is not quite so clear that the other defense set up in the answer, of the alleged insufficient description of the thing patented and the process by which it is made, might not have been made in the case before the circuit court of appeals. The defense is based mainly upon the words of the specification and claims themselves, and does not so much depend upon evidence extrinsic to the letters patent, though there is in the file wrapper very suggestive proof that in the controversy with the examiner, already mentioned, the patentee undertook with much more detail than is contained in the specification to explain the exact process by which his compound was to be made, which, in a patent like this, as we shall presently see, was a matter of great importance; and, in view of the limitations imposed upon the patentee by the examiner in the progress of the case through the patent office, it does seem a little astonishing that the specification should have been allowed to assume the indefinite form in which the description of the process is given. The reading of the record in the patent office leaves the impression that it was not there understood that the patentee was entitled to the broad and generous construction given to the language of his claims by Mr. Circuit Judge Jackson; and when we come to examine that language in the light of its official history in the patent office there is considerable force in the contention on the part of the defendant that this is substantially a new defense. At least it makes somewhat justifiable the claim of the defendant that it is new evidence introduced in favor of whatever defenses were made in the former adjudication. And certainly, in the light of that record, it is very doubtful whether the broad construction given to this patent by counsel for the patentee in his argument can be sustained. It seems to me the argument made here goes a bowshot beyond the opinion of Mr. Circuit Judge Jackson.

There is another defense set up in the answer of the expiration of a prior Austrian patent, and still another that the patented articles of the plaintiff are not marked "Patented," but I do not know that on the proof we have here I should feel authorized to regard these as sufficiently pertinent, or as taking the case out of the rule of precedent. The other alleged new defenses are, for the time being at

least, more important; and it does seem to me that both in the pleadings and the proof the defendant has presented an entirely different case from that which was presented in the court of appeals.

What has been said here in reference to the former case in the court of appeals equally applies to it in the circuit court at Cincinnati, when it was returned there from the court of appeals for further proceedings. Whatever additional proof was on file in that case, and, whatever additional questions may have been projected into it, clearly it was not a straight-out litigation between the parties, resulting in a binding decree having the force of precedent, either directly or by comity between the courts. In form, to be sure, it is a final decree between the parties, but it was substantially a judgment by default. It may have been, without collusion, and without any understanding between the parties, a contested case up to the crucial time of the taking of the final decree, but the nonappearance of the defendant at that time to further contest it on the final hearing, and the fact that it was not so contested, makes it, substantially and in legal effect, so far as the question of the binding authority as a precedent is concerned, almost an *ex parte* proceeding. It is well known to every lawyer who is familiar with the proceedings of courts, and particularly of courts of equity, that where, on the final hearing, the defendant stands mute, abandons the case, and gives it up, the plaintiff is allowed to write such decree as he may choose within the technical limitations of the prayer of the bill. Any plaintiff, guided by skillful counsel, when such an opportunity occurs, may rightfully write up his decree to suit himself within all the possibilities of his opportunity; and it is not at all often, if ever, that the court will restrict him in this liberty of taking whatever may be taken by the bill; and so it has seemed to me from the beginning to be idle to talk about such a decree being final and conclusive as a precedent in a patent case, any more than it would be in any other case.

What has been said about the prior case in our own circuit may be said with greater certainty and force in regard to the other prior cases of the Pasteur-Chamberland Filter Co. v. Funk, in the Northern district of Illinois, 52 Fed. 146, and of *Societe Anonyme du Filtre Chamberland-Pasteur Co. v. Egerton Pipe Co.*, in the Western district of Wisconsin (not reported). The one was an application for preliminary injunction and a consent decree, while the other was a final decree upon a *pro confesso*. Taking all these cases together, I have not been able to resist a suspicion that the plaintiffs have avoided a square-out stand-up battle royal over this patent, such as seemingly is now offered to them, and that for some reason, whatever it may be, anything like a conclusive, or even persuasive, adjudication has not yet taken place about it; and a reading of the brief of defendant's counsel in this case has convinced me that in such a contest it is not at all certain that the patent can stand the ordeal. At least, it is a grave question of doubt whether it can be sustained in the broad form claimed for it in the argument upon this motion, or whether it can be so extended as to comprehend the compound used in the construction of the filter found in possession of the defendant, and exhibited in this case. In the wide scope assumed for it

by plaintiffs' counsel it is, perhaps reasonably to be maintained that the defendant's compound is within the patent; but, if the narrower construction suggested by the patent-office record as contained in the file wrapper is to be established, repeating the words of Mr. Circuit Judge Jackson in the case before the circuit court of appeals, "it is extremely doubtful whether there has been any infringement," as we shall presently see. But, before going into that question, it is proper that I should refer to the elaborate citation of authorities upon the question of the binding force and effect of prior adjudications, and the cases that fall outside of that doctrine. The plaintiffs' counsel have cited numerous authorities to the effect that, where there has been a prior adjudication in favor of a patent, a preliminary injunction is almost, as a matter of course, in every circuit; but the limitation on this rule which is insisted upon by the defendant is suggested in the leading case the plaintiffs cite of *Brush Electric Co. v. Accumulator Co.*, 50 Fed. 833, where Judge Green remarks that:

"The rule is well established that where, as the result of a contested controversy, letters patent have been sustained, preliminary injunctions will be granted against infringers as a matter of course by the court which has adjudged such letters patent valid, and as a matter of comity by the federal courts in other circuits."

The limitation is found here in the use of the words "contested controversy," which, in my judgment, the patent we have under review has never had as yet.

One of the latest and most satisfactory statements of the law relating to preliminary injunctions is found in the case of *Palmer Pneumatic Tire Co. v. Newton Rubber Works*, 73 Fed. 218, in which Judge Goff states the law thus:

"It must be conceded that the mere patent itself is an unsatisfactory foundation on which to base a preliminary injunction. The rule is now well established that the patent alone does not create a sufficiently strong presumption as to its own validity as to justify a court in granting a preliminary injunction. It must be established either by prior adjudication, or a strong presumption of its validity must exist because of continuous public acquiescence, or it must have successfully withstood an action by interference in the patent office."

For this he cites an abundant list of cases, the enumeration of which I do not deem it necessary now to repeat.

I have already disposed of the question of prior adjudication in this case, and as to the claim of public acquiescence, which is also made in the bill, it may be said that the very circumstance of these suits which have been relied upon as adjudications, and which were not adjudications only because they were adjusted by the parties without trial, shows that there has not been that almost universal acquiescence which the law requires. Besides, the infringement must be clear, and, if doubtful, mere acquiescence will not support an injunction, as it should not, for there can be no injury if there be no infringement. It must be palpable. *Drill Co. v. Lobdell*, Holmes, 450, Fed. Cas. No. 2,166. The proof does not advise us, but I understood counsel for the plaintiff to say in argument that there have been other cases than those already mentioned, involving this patent. At all events, I do not think it has been established by proof

here that there has been any such public acquiescence as will take the place of prior adjudications. The following cases abundantly establish the exceptions to the general rule of the force of prior adjudications either directly, as precedents, or indirectly, through comity:

In *Wells v. Gill*, Fed. Cas. No. 17,394, 6 Fish. Pat. Cas. 89, Mr. Justice Strong declares that ordinarily a verdict and judgment—speaking of final judgments—sustaining a patent are controlling over the discretion of the judge when he is asked to award a provisional injunction. They relieve him from the necessity of inquiring into the validity of the patent, and, if he is satisfied that there has been an infringement, an injunction may be said to be almost a matter of course. But in that case there was an appeal to the supreme court pending, and he held that he should look into the whole record, to see what was the character of the errors assigned; and although, under such circumstances, the court does not sit as a court of errors, it should not grant an injunction unless satisfied that the plaintiff has a clear right which the defendant has infringed.

In the case of *Blake v. Rawson*, Fed. Cas. No. 1,499, 6 Fish. Pat. Cas. 74, and *Holmes*, 200, Judge Shepley had a patent before him which had been sustained by another judge in the same circuit and by the circuit justice sitting with him on a motion for a new trial, and also in another case by another judge in a different circuit, and yet he ruled that:

"If the answer sets forth and counsel contend that the facts and law applicable to the machines as compared with the combination patented to the complainants were not properly presented to the judge who tried and decided those cases, and also shows that some of the facts adduced and proved by the defendant in support of some of the allegations now made by this defendant were not made and proved in either of the cases above named, he would carefully consider the testimony of the witnesses and the opinions of the experts in relation to the matter, without regard to any previous action on the patent by any court, as if it had never been tried or adjudicated upon."

In that case, upon such an investigation *de novo*, he sustained the action of the court in the previous cases; but, if it were proper, under such circumstances, to look into it at all, of course it would be proper to decide it the other way, if the case justified it.

In the case of *Kirby v. Manufacturing Co.*, Fed. Cas. No. 7,838, 6 Fish. Pat. Cas. 156, and 10 Blatchf. 307, Judge Woodruff held that a previous decision of the supreme court between other parties involving the same patent was not conclusive upon him, because the facts presented in the later case were not the same. He said that the decision in the one case did not operate upon the defendants as an estoppel in the other, and that, while the decision of a question of law arising upon the same facts is an authority which a judge would not feel at liberty to disregard, and which he should have no disposition to disregard, nevertheless in the case he had before him a very different one was shown upon its face, and the decision he was about to make was, therefore, not inconsistent with the other.

In the case of *Manufacturing Co. v. White*, 1 Fed. 604, Judge Treat states the rule to be that there must be a final decree upholding the validity of the patent upon its merits to invoke the rule that in subsequent cases by precedent or comity provisional injunctions will

issue without more ado, but it must be a fair contest, and a bona fide contest resulting in a decision that the patent is valid. He says:

"I make the remark 'after a fair contest,' because sometimes it has been supposed that a mere decree entered pro forma on the merits is sufficient in itself to require all other United States circuit courts to grant a provisional injunction. Not so. We have held in this circuit that it must have been an honest, and not a collusive, matter."

Again:

"When one of these matters is presented to the judges of the circuit court, they are bound to see whether it is a consent or a collusive decree, in order to form a basis upon which the party obtaining it might go through the country levying tribute."

He then decides the case against the plaintiff upon the ground that in that particular case there was no infringement shown. The affidavits of the plaintiff showed that he was of the opinion that his patent had been infringed, but that was merely to assume the functions of the court, and swear to the case as he had averred it in his bill. He did not prove the specific facts necessary to show the infringement.

In the case of *Wilson v. Coon*, 6 Fed. 611, 621, in speaking of the force of prior decisions in cases of reissue, Judge Blatchford remarks:

"General observations by a judge or a court in deciding a case must always be read in view of the facts of the case that was sub judice, and are not necessarily authoritative, *ex vi termini*, in another case, where the facts are not the same, although entitled to consideration as are the views of a text writer of experience and repute."

In the case of *Hayes v. Leton*, 5 Fed. 521, Judge Benedict declined to be bound by a former adjudication in the same circuit, where the answer set up that that case was the result of a collusive agreement between the parties, saying, however, that he did not determine the effect of the answer in this regard, but found the circumstances to be such that the final decree had no greater effect than as evidence of the acquiescence of the parties sued in that case in the validity of the patent. "For," says the learned judge, "that decree was because of an understanding between the parties that contests should cease, and not because the court had examined the plaintiff's patents, and found them to be valid." He held, also, that the acquiescence which was evidenced by such consent was not sufficient to support an application for a preliminary injunction.

In *De Ver Warner v. Bassett*, 7 Fed. 468, a consent decree was entered against the defendants after a struggle for a preliminary injunction, the granting of a temporary injunction, and a subsequent rehearing; and Judge Shipman held distinctly that such a proceeding as that was not an adjudication to support the application for preliminary injunction, and, speaking of the acquiescence of the public in the validity of the patent, he says:

"But, in the absence of an adjudication, made after full investigation of the art and a final hearing, I am very loath to grant an injunction, because, although this patent may have been heretofore respected, out of the multitude of different styles of corsets which have been worn it would be not unlikely that it should hereafter be ascertained that some manufacturer had made and sold a style which anticipated the patented article."

In *Worswick Manuf'g Co. v. City of Kansas*, 38 Fed. 239, Judge Philips, speaking of this rule of prior adjudications in a case where it was not between the same parties, says that:

"The broadest application that can possibly be claimed for this principle is that the decision of courts of co-ordinate jurisdiction upon the same subject-matter of controversy is entitled to high respect as a precedent, when the subsequent case presents substantially the same state of facts. The former case is not conclusive. After giving due weight to all prior adjudications, the question of infringement of a patent is still to be determined in each particular case as it arises on the evidence adduced. * * * Where the facts in evidence are materially different, a decision of the supreme court itself sustaining a patent may not be followed in a suit between other parties. * * * A comparison of the pleadings and evidence in the *Buffalo Case* [20 Fed. 126] with these in the pending case satisfies us that the questions of fact as well as law to be considered and determined here are materially different. The defense is not only placed on new and additional grounds, but new and important facts have been developed and presented. The case, therefore, must stand on its own merits."

In *Coburn v. Clark*, 15 Fed. 804, Judge Treat adverts to the necessity of giving careful attention, upon an application for preliminary injunction, to the question of confining the prior adjudications to those matters which were fairly decided, and says that:

"Preliminary injunctions are not to be granted, it may be destructively, to defendants merely because an indefinite decision has been made by some court whose views are not disclosed in its decree; and, on the other hand, when plaintiff's rights have been fairly determined, should piracy be tolerated *pendente lite*?"

In the case of *Foster v. Crossin*, 23 Fed. 400, there is a discriminating opinion by Judge Carpenter, in which he was considering the question whether a preliminary injunction should ever be granted where there is no prior adjudication in favor of the patent, and no satisfactory proof of acquiescence by the public, and he held that an injunction might be issued even in such a case. He says this:

"Undoubtedly, the production of the patent alone can in no case raise the presumption in favor of the patentee sufficient to justify the order of a preliminary injunction; and it is perhaps usually true that the most satisfactory basis for finding such a presumption will be in a judicial decision, or in long uninterrupted use. But I am not prepared to say that the presumption can arise in no other way. It is true that a rule will be found laid down in many cases in terms which, taken by themselves, are broad enough to support the contention of the respondents; but it is also true that in many, if not most, of these cases, the rule is stated more broadly than is necessary to the decision.
* * *

And he proceeded to grant an injunction in the case of a recent patent, where there had been no previous adjudication, upon proof that was satisfactory to him, showing that there is still left in both directions ample freedom of judgment; and I think the general result is that substantially each case must stand upon its own merits, except in the case of a final decree after a manifestly contested litigation, when that decree will be taken as sufficient, in itself, for a preliminary injunction, if it appear that the facts were substantially the same, and no new issues have been made, and no new proof produced. The correctness of Judge Carpenter's decision in the above case is, however, challenged in *Dickerson v. Machine Co.*, 35 Fed. 143, in which Judge Lacombe quotes approvingly that:

"Under the uniform ruling of the courts of the United States for more than half a century, if there has been no decision on the patent by a United States court on the merits, the party is driven to show that his patent went into use undisputed, for a sufficient time to raise a prima facie case in his favor."

The only relaxation of this rule pointed out by the learned judge comes when the validity of the patent has not been assailed, and the proof of infringement is clear, as one judge says, "beyond a reasonable doubt."

In the case of *Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co.*, 54 Fed. 678, Judge Colt holds that:

"The general rule is that, where the validity of the patent has been sustained by prior adjudication, and especially after a long, arduous, and expensive litigation, the only question open on a motion for a preliminary injunction in a subsequent suit against another defendant is the question of infringement, the consideration of other questions being postponed until final hearing."

—For which he cites a great number of cases. He remarks further that:

"The one exception to this general rule seems to be where the new evidence is of such a conclusive character that, if it had been introduced in the former case, it probably would have led to a different conclusion. The burden is on the defendant to establish this, and every reasonable doubt must be resolved against him."

—For which, also, he cites a large number of cases.

Other cases cited by the plaintiffs in favor of the contention that we are bound by the prior adjudications here presented are: *Electric Manuf'g Co. v. Edison Electric Light Co.*, 10 C. C. A. 106, 61 Fed. 834; *American Bell Tel. Co. v. Western Tel. Const. Co.*, 58 Fed. 410; *American Bell Tel. Co. v. Brown Telephone & Telegraph Co.*, Id. 409; *Norton v. Can Co.*, 57 Fed. 929; *Telephone Co. v. Cushman*, Id. 842; *Edison Electric Light Co. v. Mt. Morris Electric Light Co.*, Id. 642; *Spindle Co. v. Turner*, 55 Fed. 979; *Consolidated Electrical Storage Co. v. Accumulator Co.*, 5 C. C. A. 202, 55 Fed. 485.

The defendant also cites numerous other cases in favor of his contention that it is only final adjudications in contested cases that have any conclusive force: *Consolidated Roller-Mill Co. v. George T. Smith Middlings Purifier Co.*, 40 Fed. 305; *Parker v. Brant*, Fed. Cas. No. 10,727, 1 Fish. Pat. Cas. 58, where it is said that, if the new evidence has been overlooked, the case is open; *Machine Co. v. Hedden*, 29 Fed. 147, where Judge Wales quotes approvingly from Judge Blatchford in *Page v. Telegraph Co.*, 2 Fed. 330, this comprehensive language:

"It is well settled that, even after the validity of the patent has been established in a suit, and notwithstanding the presumption thereby raised that the patent is valid, it may always be shown in another suit on the patent against another defendant, and even in answer to an application for preliminary injunction in such suit, that the right claimed by the plaintiff in the new suit was not, either as to its nature or its extent, fairly in controversy in the former suit, or that the material facts were not known or considered when the former suit was tried, or that there are relevant matters which were not adjudicated in the former suit,"—citing *Pavement Co. v. City of Elizabeth*, Fed. Cas. No. 312, 4 Fish. Pat. Cas. 189.

Defendant's counsel also cites in his brief *Consolidated Safety-Valve Co. v. Ashton Valve Co.*, 26 Fed. 319, where Judge Colt boldly declared that a decision of the supreme court of the United States is

not sufficient to control if there be a doubt about the effect of that decision, at least not until a final hearing, when, upon a full investigation of the facts, it could be seen whether or not the pending case was comprehended within the ruling of the supreme court in the prior case; and that on an application for preliminary injunction it was open to the court to postpone the determination of the force and effect of the prior adjudication until there had been a full investigation. He also cites *Tyler v. Hyde*, 2 Blatchf. 308, Fed. Cas. No. 14,309; *Cary v. Bed Co.*, 27 Fed. 299; *Edgerton v. Manufacturing Co.*, 9 Fed. 450; *Spring v. Sewing-Mach. Co.*, Id. 505.

In all these citations on both sides there is a notable absence of any decision by the supreme court of the United States, and only a few are cited from the recently established circuit courts of appeal upon this question, which fact seems to me to be worthy of passing remark. Hence it is difficult to find any settled rule of judgment in the courts. The best opinion I can form from these authorities is that the courts everywhere recognize as quite conclusive a final adjudication that has been the product of an earnest, honest, and effective litigation, free from any suspicion of having been procured by arrangement between the parties or negligent abandonment by the defendant; but all other adjudications at most are persuasive only, and it is open to the court in the pending case to re-examine the question *de novo*. And, even where there has been a final decree without suspicion of collusion, if the new litigation presents a new attack upon the patent, or new evidence of importance entitled to consideration as presenting a really new issue, and not a mere pretense of one, to regain a footing in the courts, the pending case is still open, and not concluded by the old litigation about the patent. The patentee is entitled to stability of decision, and to be free from vexatious litigation, or the grant of invention is of little value to him; yet he can claim this only when the patent has stood the test of genuine litigation, and thorough judicial scrutiny in all its parts. And there is a difference in the effect of the old decree where the new case is between the same parties and where they are different, for one not a party to the old suit cannot be bound by any neglect in that suit to present all issues and all available proof to sustain them.

We come now to the question of infringement. Upon the proof before us, consisting of *ex parte* affidavits, the fact of infringement does not seem to be established by convincing evidence of even a preponderating character, to say nothing of the rule of reasonable doubt suggested in some of the cases. I note that it is frequently said in the cases, as by Judge Treat in *Coburn v. Clark*, *supra*, that it is always inadvisable on a preliminary motion to express an opinion concerning the merits of the controversy to be determined at the final hearing. But a good deal depends here upon the essence of the thing patented. Some of the things are so simple that the affidavits, as applied to the issues, will be sufficiently convincing; but where the patent is for complicated processes that involve obscure and hidden laws of mechanical or chemical action, mere affidavits and *ex parte* opinions of experts are not so forcible in the consideration of the question of a preliminary injunction. In a case involving photo-

graphic films made according to the formula of a patent, Judge Coxe said that:

"This important question ought not to be determined on affidavits. The present aspect may be changed when the ex parte opinions of the affiants have passed through the alembic of a trial, and have thus been distilled and purified. Many theories now advanced may not be able to stand the test of cross-examination. It is sufficient that the question of infringement should not be determined upon affidavits in a case where no serious injury will be done by postponing the decision until the final hearing." *Celluloid Manuf'g Co. v. Eastman Dry Plate Film Co.*, 42 Fed. 159,—citing many cases not necessary to be repeated here.

Also, in *Carey v. Miller*, 34 Fed. 392, where the patent had been several times before the courts, and had been sustained to the extent of covering a process "when the springs are kept below red heat," Judge Lacombe said:

"It may be that the patent is sufficiently broad to cover any degree of heat whatever, but that has not been as yet held by the courts which have had it under consideration, and therefore upon application for preliminary injunction the patent will be presumed valid only to the extent expressly covered by the decisions referred to. Upon the case as it now stands the weight of evidence indicates that the defendants, in the process used by them, heat the springs above this limit. It may be that the defendants' affidavits are disingenuous, and that when the later details of their process, now so briefly described, shall be set forth, it will appear that they do infringe the patent, even when given the limited construction which would confine it to heating not above red heat. This motion, however, can only be decided upon the papers before the court, and giving due weight to the sworn statements presented by both sides."

—And he denied the motion, with leave to renew it if the plaintiffs should thereafter produce any further evidence that the process was within the narrow construction of the claim that was admitted.

Again, in *Dickerson v. Machine Co.*, 35 Fed. 143, Judge Lacombe draws pointed attention to the distinction between a case where a broad construction of the claims to the patent would comprehend the disputed contrivance or article of the defendant and one in which a narrower construction of those claims would exclude it. In such a condition it necessarily requires that the court hearing the application for a preliminary injunction shall decide which is the correct construction of the patent; and, if that be seriously and formidably disputed, as it is in this case, it seems to me that the preliminary injunction should be refused, unless there is a sufficient judicial support upon plenary hearing for the broader construction demanded; or at least a court will not be inclined, upon ex parte affidavits used at the preliminary hearing, to decide upon the proper construction of the patent in a doubtful case, unless it shall appear that irreparable injury will result to the plaintiff, and then it might be that the court would grant an injunction upon terms which would protect the defendant.

This case seems to me to be one beset with doubt and difficulty upon the questions relating to both the construction of the words of the patent and the essential elements of the compound alleged to be an infringement of the plaintiffs' patent by the defendant. The affidavits filed are exceedingly unsatisfactory and inconclusive. That of Miles, the manager of the plaintiff company, is nothing more than the expression of his opinion that there has been an infringement. And, as remarked by Judge Treat in one of the cases just cited, this

is only a reiteration of the averments of the bill in that regard. Incidentally, in his affidavit, he fully explains the reason for this peculiarity. He says:

"The location and detection of infringing devices under this patent has been extremely difficult from the fact that it is desirable, if not essential, in order to determine the exact compound, to obtain this compound before it has been burned or baked; and as the compound can be made in any pottery, and with the aid of machinery such as is generally used in a pottery, it is possible for almost any potter to enter into the manufacture of infringing devices," etc.

Again:

"It is difficult for the complainants to furnish the proofs usually required in infringement cases when the infringement is carried on secretly."

Further, he says that his agent, Hoffman, "was unable to secure any of the compound in a state which would enable us to make a mechanical separation, which would enable us to determine the exact proportions of the granular and plastic materials used, which elements are absolutely necessary, as has been repeatedly demonstrated." Now, this may be unfortunate for the plaintiff company, but the courts cannot, upon such an application as this, take that difficulty into consideration, and, because of it, grant a preliminary injunction, without satisfactory proof. Mr. Miles, further along in his affidavit, says that his experience in the matter leads him "to believe that it is impossible to make such a tube for a filtering medium without infringing this patent, and I have not the slightest hesitancy in saying that I believe fully that this tube is an infringement." This, undoubtedly, is his own opinion, but it is not proof of the facts which are required to enable us to determine whether there has been any infringement of this patent. The affidavits of the experts Dickore and Wesener are quite as unsatisfactory. They seem to have analyzed a piece of the filter exhibited as the defendant's infringement, and a bit of unburned compound which the plaintiffs' detective, Hoffman, furnished from the Tiffin pottery. But, laying aside the equivocal character of this material that was analyzed in its relation to the defendant, the testimony of the experts falls far short of any conclusive proof that the compound found in the exhibit is an infringement of the plaintiffs' patent. Dr. Dickore says:

"I am of the opinion that there is strong reason to believe that the sample, No. 2, analyzed by me, contains the invention set forth in the said patent. Of course, it is not possible to tell by a chemical analysis the exact proportion of the amorphous or plastic materials and the granular or crystalline materials, inasmuch as it is the physical qualities which determine the character of porosity, and therefore a physical or mechanical separation is essential to determine this accurately."

This explains the reason for the want of satisfactory proof, when you to turn to Hoffman's affidavit, and see the difficulties which have surrounded the plaintiffs in being unable to procure and establish as certain a sample of the unburned compound out of which the defendant's alleged infringing contrivance is made. This kind of proof will not do on an application for preliminary injunction. It does not make certain, or even probable, in such processes as we have under review, the fact of infringement. Prof. Wesener's affidavit is equally inconclusive. He says:

"The burned sample referred to shows it to be extremely porous, and indicates that it has been burned at substantially the temperature named in the patent, and I have no doubt that the same would answer for filtering in substantially the same manner as the compound set forth in the said patent."

This evidently is only guesswork as to the temperature, and it is to be noted here that one has only to fairly consider the specifications and claims of this patent to see from the face of it that the fact that the defendant's filter will do precisely what the Pasteur filter will do in the way of arresting disease germs, or any other microbes, is not at all any evidence of infringement; and, when we read its words in the light of the records of the patent office, the conclusion is irresistible that the plaintiffs cannot claim this capacity as a test of their patent, and must be confined to a showing that the alleged infringing filter arrests these germs by the use of a compound the substance of which is the same as that described in the patent, both as to elemental constituents and the treatment used in the process of its manufacture. And, if equivalents be relied on, they must be of constituent elements and processes, and not of mere functions or results. If any manufacturer can produce a filter that will do what the Pasteur filter does without the use of the same constituent elements contained in the description of the patent, and put together by the same process that is described in the patent; or if, by the use of the same constituent elements, put together in an entirely different way, he can produce the same results, it seems to me there would be no infringement. Of course, this is said with due regard to the use of what may be, in the light of the history of this patent in the patent office, regarded as equivalents covered by the patent. But is it not plain to see that in this kind of a complicated issue the court can come to no satisfactory conclusion on the question of infringement until there has been a most complete and thorough investigation of the facts upon the final hearing? And this delay, I conclude, is all the more available to us in this case without a preliminary injunction, because, confessedly, the bill is aimed more at a threatened infringement than at any large or extensive present dealings by the defendant in the alleged infringement itself; and the circumstances of the defendant disclosed by the proof indicate that he cannot, pending the hearing, do any very serious injury to the plaintiffs. It is alleged that he is insolvent, and without capital, and he himself says that his operations in the manufacture of this class of filters have been more in the way of experimentation than otherwise. But, however this may be, it does not seem to me to be a case for preliminary injunction upon the plaintiffs' own proof of the injury that is threatened, or of the infringement that is claimed or feared by them.

The defendant's affidavit denies almost seriatim the affidavits of Miles and Hoffman,—the latter the detective agent of the plaintiffs,—and it appears by the affidavits that there was quite a game of shrewdness going on between this detective and the defendant. The detective was trying furtively to get proof from the defendant, and the defendant says that, discovering this, he imposed on the detective by furnishing him with a character of filter that was the rejected product of one of his experiments, and does not at all represent any-

thing that he is using or selling: and, as to the sample of the unbaked material which this detective furnished the plaintiffs' experts, it is plain that he obtained it under circumstances that would not be binding on the defendant as any admission of its identity, and it may or may not be the substance that is used by the defendant. There is no certainty of it, and only suspicion that it may be the same used in the exhibit.

The defendant asserts ignorance of the chemical and mechanical nature of the filters which have been manufactured for him, and states his information and belief that they are not the same as that substance described in the patent. Somewhat amusingly, he exhibits and calls attention to a circular of the plaintiffs, in which they say that the material they use is imported by them from France. This is what they say in the circular:

"We import the filtering medium directly from France, where alone the material is found of which it is made. We construct the filters entirely in our own factory, according to our improved methods, which are covered by letters patent. The material that is employed in their construction is the best that is known for the purpose, and we carefully test every filter before it leaves our factory."

The defendant suggests in his affidavit and argument that, if this be true, the American materials of which his filters are made cannot be an infringement of the plaintiffs' patent; or, at least, that it will not be held so to be in favor of their application for a preliminary injunction until they show that since the circular was issued it has been discovered that the materials which they thought could be found only in France could be found also in Ohio.

The affidavit of Albert Brewer, who is the manager of the Tiffin manufactory, where the defendant's filters are made, is somewhat more satisfactory. He swears positively from his experience as a manufacturer of all kinds of pottery that he had no knowledge and no information as to the processes described in the plaintiffs' patent, and that there was no attempt on his part to select the same compounds, or to follow the same processes. In the matter of heating, he says that the defendant's tube is much less porous than the plaintiffs' tube, and is burned at a much higher degree of heat, say from 2,500 to 3,000 degrees Fahrenheit. This brings the case quite closely within the ruling made by Judge Lacombe in the case of *Carey v. Miller*, 34 Fed. 392, where he had under consideration a patent for tempering coiled springs, and the process set forth in the patent was that the springs were to be subjected to a degree of heat which is about 600 degrees, more or less. He refused the preliminary injunction because it was claimed and shown by the defendants that it was probably true that they heated their springs above this limit. The baking heat described in the plaintiffs' patent here is from 1,850 to 2,400 degrees Fahrenheit, a very wide margin, by the way, for accuracy, in a patent like this; and the affidavit of Brewer says that the defendant's tubes are subjected to a heat from 2,500 to 3,000 degrees Fahrenheit, an equally wide margin for accuracy of information. We cannot say here any more than Judge Lacombe could say, on this application for preliminary injunction, whether or not this article

of the defendant's is an infringement, under such circumstances as these. It is quite true that this affidavit of Brewer's is somewhat disingenuous in its refusal to disclose the precise character of the compound he uses for the defendant, and the exact processes by which it is completed in the factory. He offers, in connection with his refusal, to disclose it confidentially to a commissioner of the court, but this scarcely will relieve the fact that he does refuse to disclose it, claiming it as a trade secret of his own. But I am not prepared to say that, if we give the most comprehensive effect to this refusal, the defendant is bound by it; nor am I quite prepared to say that on a defense like this of his manufacturer he is bound to make such a disclosure in an affidavit. If the plaintiffs need the proof in aid of their bill, they have the remedy of a bill of discovery, or of an examination of witnesses, and, in the absence of a resort to some such remedy for obtaining proof, it may be that the refusal to disclose is not reprehensible. The defendant is under no obligation to aid the plaintiffs in the procurement of their proof, and this is only another illustration of a necessity for waiting, in a case like this, until the final hearing, before issuing any process of injunction.

I do not deem it necessary to go into any consideration of, or to express any opinion upon, the validity of this patent. I may be permitted to say, however, that it seems to me that there is much force in the contention of the defendant's counsel that the plaintiffs cannot, on this application, claim any consideration for what may be called the hygienic qualities of this Pasteur filter. It may be a useful discovery that filters may be made of sufficient compactness to arrest and detain the smallest microscopic germs that are found in liquids, and that it is desirable to remove them whenever they are deleterious to human health; but is such a discovery patentable if the filter that is used is obtained by a process of production that is as old as the oldest civilization itself? I do not undertake now to answer this question, but only to say that the argument of defendant's counsel is so cogent upon that subject, and his quotations from the books of science and art, like Ures, Dict. tit. "Clay," Encyclopædia Britannica, tit. "Pottery," Zell's Encyclopædia, tit. "Cooler," Knight's Am. Mech. Dict. tits. "Alcarraza," "Crucible," and "Seggar," and his citations from the patent adjudications, are so apt, that my own mind is left in a state of serious doubt whether or not this patent can have any aid whatever from the fact that its filter is put to so important and beneficent a use as that which has been suggested.

It was said in *Corning v. Burden*, 15 How. 252, 268, that "it is for the discovery or invention of some practical method or means of producing a beneficial result or effect that a patent is granted, and not for the result or effect itself"; or, as counsel puts it, "a function is not an invention, and is never patentable." This is for the present, upon this application for a preliminary injunction, quite a sufficient answer to the ostentatious display in the bill and affidavits of the great benefit of the Pasteur system of filtering out the germs of disease from the liquids we use for food or drink. If it be the application of an old thing to a new use, it certainly is not patentable; and, as we are unable to say upon the proof whether it is anything

more than this, we ought not to interfere with the defendant as an infringer until there is more satisfactory evidence upon the whole subject.

The defendant further contends that it is only a difference in degree between the meshes of the filter and the flour or meal sieve or the common strainers for liquids in domestic use, and that this Pasteur filter is based upon the well-known fact that bodies to be arrested can be intercepted by meshes which are smaller than themselves; that the elimination of microscopic bacteria is nothing more than the old process of eliminating tadpoles, water bugs, and wrigglers; that the operation is not patentable unless some new process is invented for the purpose; that this patent must be confined to the peculiar and particular compound itself; and that the invention in this case consists, if there be any, of a compound that is identified solely by its designated constituents, their given proportions, and the expressed manner of their compounding. This seems to me to be a formidable attack upon the patent, and that it is not impossible that it may result, if not in its overthrow, at least in limiting it to very much narrower benefits of protection than those indicated by the contention and the argument of the plaintiffs. As stated by Judge Jackson on another occasion in the court of appeals, to the naked eye this exhibit of the defendant seems quite like, if not identical with, the filter of the plaintiffs; and, if the patent is to receive the broad construction he seemed to approve in considering the application for a preliminary injunction then pending in another case, it may be that this defendant will be found to have infringed the plaintiffs' patent, but, until it is settled by a more thorough investigation of the facts that the patent is to receive that broad construction, a preliminary injunction should not issue. Application denied.

PALMER v. CURNEN et al.

(Circuit Court, S. D. New York. January 10, 1898.)

PATENTS—ANTICIPATION—INFRINGEMENT—HAMMOCKS.

The Palmer patent, No. 272,311, for improvements in hammocks, was anticipated by various prior patents as to claims 4 and 8, which relate, respectively, to the construction of the suspension cords and the spreader, if these claims are to be broadly construed; and, if they are valid for the specific devices covered, *hdd*, that they are not infringed.

This was a suit in equity by Isaac E. Palmer against Cornelius C. Curnen and Edmund Steiner for alleged infringement of a patent for improvements in hammocks.

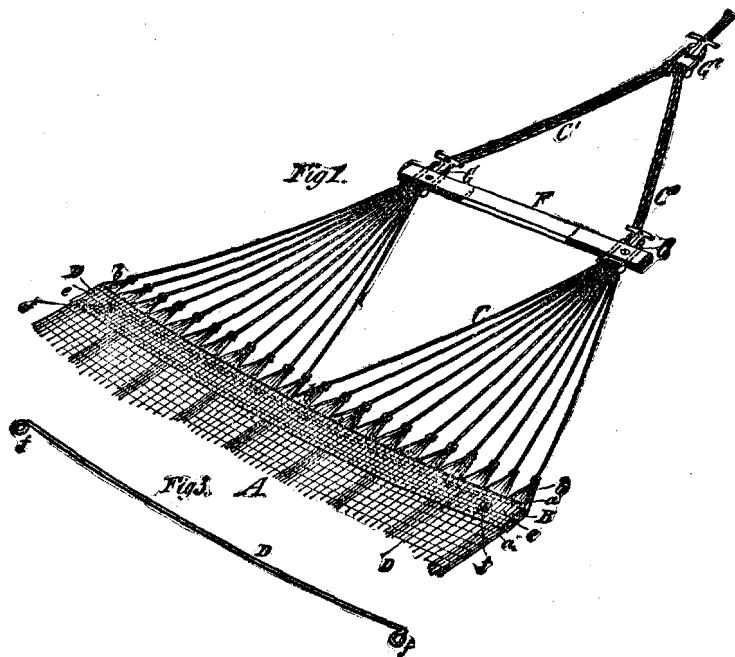
Edwin H. Brown, for complainant.

Benedict & Morsell and Henry M. Brigham, for defendants.

TOWNSEND, District Judge. This is a suit for an injunction and accounting by reason of the alleged infringement of patent No. 272,311, granted February 13, 1883, to I. E. Palmer, for hammocks. The claims alleged to be infringed are the fourth and the eighth, which are as follows:

"(4) The combination, with a hammock, a stretcher bar, arranged beyond the end thereof, and a suspension stirrup or device of suspension cords converging from the hammock toward the stretcher, and attached to the stretcher at two or more points, and suspension cords converging from the stretcher toward the stirrup or suspension device, and attached to said device, substantially as described."

"(8) The spreader, D, provided with heads, f, substantially as and for the purpose described."



The defenses are lack of patentable novelty, and denial of infringement.

Complainant admits that the special construction of defendants' stretcher and stirrup is not embodied in complainant's exhibit "Infringing Hammock." The question at issue, therefore, is confined to the construction of the suspension cords and the spreader. Travers patent, No. 221,754, shows a hammock suspended by cords attached at numerous points across the ends thereof, the suspension cords being confined at any desirable number of points to a stretcher bar located outside of and beyond the ends of the hammock, and converging to a stirrup or suspension device. If the suspension cords of the Travers hammock be so shifted as to pass them through or attach them to the stretcher in groups of two or more, it embodies the construction covered by said fourth claim, independent of the specific devices therein. The patent in suit is practically for two Travers hammocks. The Craft patent, No. 142,327, and Hicks hammocks, Nos. 1, 2, and 3, show a stretcher, suspension cords, and suspension device. Patent No. 271,510, granted to complainant herein in 1883, includes all that is embraced in said fourth claim, when construed broadly. Under a broad

construction of a spreader,—i. e. a stick or rod having ends sufficiently blunt to prevent the ends from sticking through the pockets,—the spreader device is anticipated by the Forbusch patent, No. 33,678; Woods patent, No. 68,927; Leycester patent, No. 209,275, which has a spreader the ends of which are held by eyelets, like that of defendants; Travers patent, No. 221,754; Palmer patent, No. 270,836; and in the Wells patent, No. 261,796. The spreader of the Forbusch patent, No. 33,679, specifically meets the construction of the eighth claim of the patent in suit, and adapts the spreader for the same use as that of the spreader of the patent in suit. Also defendants' exhibit Vendt hammock of 1878 shows a construction precisely like that of defendants' spreader, and eyelets for holding its ends; the only difference being that defendants' spreader is of wire, while that of the Vendt hammock is an ordinary stick of wood.

It is difficult to conceive of patentable invention in a mere spreader at the date of the patent in suit, in view of the great variety and extensive use thereof, in the ordinary swing boards, in laths with furcated ends, and curved sticks with hooks at intervals for holding the suspension cords of the ordinary hemp hammock either singly or in groups, to suit the fancy of the occupant. It is clear, however, that the mere bending over of the ends of a wire to prevent its punching through the fabric would not involve invention. Furthermore, the spreader found in defendants' hammock does not have the specific construction of the spreader shown and described in complainant's hammock, and does not infringe the said eighth claim, inasmuch as it does not have any eye or loop at the end, bent at a right angle to the axis of the spreader. Defendants' spreader is provided with hooks at the end, adapted to take into eyelets, and thus hold the hammock extended, which construction is intended not to bear against the fabric, which would, if in contact therewith, push through and destroy the fabric by constant rubbing and wearing.

The only evidence favorable to complainant's device is its popularity. This rests on two features,—“triangular suspension,” so called, and adaptability for use by two persons at the same time. This triangular suspension, whereby the strain is referred from the two ends of the stretcher to a single point of support, is old in the general field of practical arts. The experiments at the hearing satisfied me that it was not of any practical value to prevent the uptilting of the hammock. As is stated by defendants' expert Knight, the “uptilting of these hammocks depends wholly upon the tension under which the hammocks are strung up, and the distance laterally from a right line through the points of suspension, at which the person or weight is applied.” But it looks as though it were steadier, and the public prefer it for that reason. That the devices in suit are practically desirable in hammocks built for two persons, is immaterial upon the question of patentable novelty, for it is merely the aggregation of two hammocks of the prior art. If the patent in suit can be sustained for the specific devices covered by the claims in suit, the defendants do not infringe.

THE ASHER W. PARKER.

CURTIN v. THE ASHER W. PARKER.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

No. 4.

1. MARITIME LIENS—WAIVER—LACHES.

A furnisher of supplies, who, for about a year and a half after the vessel has been sold, takes no steps to enforce his lien or ascertain her ownership, and then, on learning of the sale, waits about six months longer before filing his libel, though the vessel was continuously within the jurisdiction, thereby loses his lien; the purchaser having in the meantime paid the deferred purchase money notes, in ignorance of the existence of the claim.

2. SAME—STATE STATUTES—DEFENSES.

A lien for supplies given by state statute, when enforced in a court of admiralty, is subject to all defenses recognized by such courts as meritorious, including that of laches.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel in rem by John Curtin against the schooner Asher W. Parker to enforce an alleged lien for supplies. The district court dismissed the libel on the ground that libelant had lost his lien by laches, and the latter has appealed.

J. A. Hyland, for appellant.

Thos. Alexander, Jr., for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We agree with the court below that the laches of the libelant were such as should defeat his suit. The supplies were furnished to the schooner August 5, 1893, at which time one Clayton was her owner. In November, 1893, Clayton sold her to Kemp, the present owner, representing that there were no liens upon her. The certificate of enrollment, showing Kemp to be the owner, was duly entered at that time with the collector of the port at which the supplies were furnished. Prior to the spring of 1894, Kemp had paid the full purchase price of the vessel. The libelant had known Clayton for many years; having sold him supplies previously for this vessel and another vessel. He seems to have ascertained in the spring of 1895 that Clayton had divested himself of his property and become irresponsible, and it was not until after this time that he took any active measures to communicate with Kemp and assert his rights. The libel to enforce the lien was filed in December, 1895. The vessel had always been within the jurisdiction since Kemp had become her owner, and could have been arrested at any time. If the libelant had used any real diligence, Kemp would have been apprised of the claim seasonably, and possibly could have indemnified himself from Clayton. The state statute giving a lien upon vessels for supplies furnished within the state, when enforced in a court of equity, must be enforced conformably with the principles of such courts, and subject to all defenses which such courts recognize as meritorious. The decree is affirmed, with costs.

HUGHES v. GREEN et al.

(Circuit Court of Appeals, Eighth Circuit. January 31, 1898.)

No. 914.

1. STATE AND FEDERAL COURTS—DISMISSAL OF STATE-COURT SUIT—SUBSEQUENT SUIT IN FEDERAL COURT.

That a plaintiff first commenced his action in a state court, and procured its dismissal (leaving him free, under the local statute, to institute it anew), is not a bar to a suit, seeking the same relief, subsequently brought by him in the federal court of the same state, involving matter over which that court has primary and original jurisdiction. 75 Fed. 691, reversed.

2. SAME—CONCURRENT SUITS—SUSPENSION OF PROCEEDINGS IN SECOND SUIT.

While, as between two suits for the same relief in the enforcement of a lien on specific property, or similar purposes,—one in the state and the other in the federal court,—the one in which process is first issued and served must be allowed to proceed without interference from the other, the practice is not to dismiss, but to suspend action in the second suit until the first is tried and determined.

Appeal from the Circuit Court of the United States for the District of Colorado.

W. J. Roberts (Felix T. Hughes and H. R. Hughes, on brief), for appellant.

T. A. Green, for appellees.

Before SANBORN and THAYER, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This was a suit brought by Felix T. Hughes, the appellant, against Thomas A. Green, Edward B. Green, Thomas A. Green, Jr., Charles H. Green, and Amos V. Green, the appellees, in the circuit court of the United States for the district of Colorado, for an accounting, and to foreclose a mortgage on certain mining property located in Pitkin county, Colo. It is averred in the bill that the mortgage in controversy was executed by the defendant Thomas A. Green, and given to secure the payment of one certain promissory note for the sum of \$3,925, and three certain assignments of an interest in a contract for attorney's fees, dated as follows: One for \$10,000, dated March 31, 1893; one for \$10,000, dated November 20, 1893; and the other for \$1,500, bearing even date with the mortgage, viz. October 9, 1894. For the purpose of disposing of the question before the court upon this appeal, it is unnecessary to state the averments of the bill more at length. The record shows that on the 12th day of July, 1895, Felix T. Hughes, the plaintiff, brought a suit in the district court of Pitkin county against the defendant Thomas A. Green to foreclose this mortgage; that on August 15, 1895, he brought a suit in the circuit court of the United States for the district of Colorado against the same defendant, and asking the same relief; that on the 16th day of May, 1896, the defendant Green filed a motion in that case to dismiss it for the reason that a suit was then pending in the state court, brought by the same plaintiff against the same defendant, and concerning the same property mentioned and described in the bill therein. The circuit court sustained the motion to dismiss.

Thereafter, on May 29, 1896, and before the same had been set down for hearing, the plaintiff dismissed his suit in the district court of Pitkin county, the order providing that the dismissal should be without prejudice to the plaintiff's rights, and at his cost. June 16, 1896, the defendant Green presented a motion in the district court of Pitkin county to set aside the order dismissing the plaintiff's suit, which motion the court overruled, and the defendant thereupon took an appeal to the court of appeals of the state of Colorado. On the 29th day of June, 1896, the plaintiff filed his bill in the circuit court in the present suit. As filed originally, the suit was against Thomas A. Green alone, but by subsequent amendment the other defendants were made parties. July 15, 1896, the defendant Thomas A. Green filed a motion to dismiss the suit, for the reasons stated in his motion to dismiss the former suit, alleging in his motion that the suit in the state court was still pending upon his appeal from the order of that court denying his application to set aside the order dismissing plaintiff's case. On the 29th day of July, 1896, the circuit court sustained the motion to dismiss, and dismissed the bill at plaintiff's cost, and it is from this order dismissing the bill that the present appeal is taken.

The sole question presented by this record is whether the proceeding had in the state court was a bar to or abated the plaintiff's right to bring his bill asking for the same relief in the federal court. The law of Colorado upon the subject of the dismissal of actions is as follows:

"Sec. 166. An action may be dismissed or a judgment of nonsuit entered, in the following cases: First. By the plaintiff himself, at any time before trial, upon the payment of costs, if a counter-claim has not been made. If a provisional or ancillary remedy has been allowed, the undertaking shall thereupon be delivered by the clerk to the defendant, who may have his action thereon. Second. By either party, upon the written consent of the other. Third. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal. Fourth. By the court, when upon trial, and before the final submission of the case, the plaintiff abandons it. Fifth. By the court, upon motion of the defendant, when upon the trial, the plaintiff fails to prove sufficient case for the jury. The dismissal mentioned in the first two subdivisions shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly.

"Sec. 167. In every case, other than those mentioned in the last section, the judgments shall be rendered upon the merits." Sess. Laws 1887, p. 149.

Clearly, under this statute, the dismissal of an action by the court on motion of the plaintiff is not an adjudication upon the merits, which can be pleaded in bar of a subsequent proceeding involving the same subject-matter in the same, or any other, court. The cases holding that under the provisions of the federal removal acts a plaintiff, who, having instituted his suit in a state court, has been subjected to a cross action, or by amendment of his opponent's answer has become a defendant, is not entitled to remove his suit, on the ground that he must abide the forum originally selected, are not applicable here. While it is true that Hughes, having brought his action in the state court, could not, under the acts of congress, remove his suit directly to the federal court, the fact that he had first commenced his action in the state court, and, upon leave, dismissed his case upon the payment of costs, is not a bar to, and will not abate, a suit seeking the same relief, subsequently brought in the circuit court, involving matter over which that

court has primary and original jurisdiction. The record shows that the plaintiff is a citizen of the state of Iowa, and that the defendants are citizens of the state of Colorado, and that the property described in the mortgage is located in the state of Colorado. The circuit court had jurisdiction, concurrent with the state court, over the parties and the subject-matter; and the plaintiff might have brought his suit in the circuit court originally, and, before going to trial upon the merits, dismissed it, and commenced over again in the same court, or filed his suit in the state court. In either case the original pendency of the suit in the circuit court would not operate as a bar to, or abate the plaintiff's right to prosecute, the second suit. It is insisted, however, that the order dismissing the suit in the state court is not operative, because of the appeal taken in that case by the defendant. While this contention may well be doubted (*Railway Co. v. Twombly*, 100 U. S. 81), yet we do not deem it necessary to consider or decide that question, as the order of the circuit court dismissing the bill cannot be sustained, even if the contention of counsel is true. The rule is perfectly well settled that, where two suits are pending between the same parties,—the one in the state and the other in the federal court,—the object of both suits being to secure the same relief, where the relief sought is the enforcement of a lien against specific property, to administer trusts, or liquidate insolvent estates, and in all other suits of a similar nature, where in the progress of the litigation the court may be compelled to assume the possession and control of specific personal or real property, the court which first acquires jurisdiction by the issue and service of process must be allowed to proceed with the hearing of the case to final judgment or decree, without interference on the part of the other court wherein the suit is pending. The practice in such cases, however, is not to dismiss, but to suspend further action in the second suit until the first suit is tried and determined. In the case of *Zimmerman v. So Relle*, 25 C. C. A. 518, 80 Fed. 420, Judge Thayer announced the rule in the following language:

"It would be manifestly improper, however, to order a dismissal of a second suit because of the pendency of a prior suit between the same parties in those cases where the bringing of the second action was a necessary or proper step either to create or preserve a lien, or to avoid the bar of the statute of limitations, or to give due notice by *lis pendens* of the plaintiff's rights, or to guard against the results of a possible dismissal of the first suit before its determination upon the merits. * * * Indeed, considering the numerous reasons which may render it advisable and not improper to commence a second suit, although a prior suit is pending, in which the plaintiff's rights may be fully adjudicated, we think it is the better practice in all cases to pursue the course last indicated when a plea of *lis pendens* is interposed and sustained. The mere pendency of a second suit, if no action is taken therein, does not affect the orderly prosecution of the first suit, and the court is much better able to determine after the first suit has ended whether it is necessary or proper to grant further relief in the action which was last brought."

The decree of the circuit court must be reversed, and the cause remanded, with instructions to that court to overrule the motion to dismiss.

CITY OF TACOMA v. WRIGHT et al.

(Circuit Court, D. Washington, W. D. January 26, 1898.)

1. REMOVAL OF CAUSES—LOCAL PREJUDICE.

Under section 2 of the judiciary act of March 3, 1875 (18 Stat. 470), as amended by Act Aug. 13, 1888 (25 Stat. 433), relating to removal of suits to the circuit court on the ground of prejudice or local influence, the evidence necessary to support the federal jurisdiction does not have to prove morally that the petitioning defendant cannot obtain a just decision in the state court, but it is only necessary to present to the circuit court evidence suitable to the case, and sufficient to prove legally that prejudice and local influence does exist which will naturally operate to the disadvantage of the defendant in the trial of his case before a state tribunal.

2 SAME—EFFECT OF STATE STATUTE.

A state law which merely authorizes a change of venue, in the discretion of the court, on the ground of local prejudice, without giving to a defendant the right to remove the cause, does not affect in any way his right to remove it into the circuit court.

On Motion to Remand to the State Court.

Ben Sheeks, for complainant.

Charles S. Fogg and Silas W. Pettit, for defendants.

HANFORD, District Judge. This is a suit in equity, commenced in the superior court of the state of Washington, for Pierce county, by the city of Tacoma, a municipal corporation of the state of Washington, against C. B. Wright, a citizen of the state of Pennsylvania, and several others, who are citizens of the state of Washington. The defendant Wright filed in the superior court his petition and bond for removal of the cause into this court, and in his petition for removal alleged, as his ground for removal, "that, from prejudice and local influence, he will not be able to obtain justice in your honorable court, or in any other court of the state of Washington to which he may, under the laws of the state of Washington, have the right, on account of such prejudice or local influence, to remove said cause." An order was entered accepting the petition and bond, and directing the cause to be certified to this court. Said defendant has also petitioned this court to take jurisdiction, and has filed several affidavits tending to prove that in the city of Tacoma, during several years preceding the commencement of this suit, there has been public denunciation of the defendant Wright and his associates, on account of the transactions out of which this lawsuit has arisen, and that there has been, and is, in the minds of a great number of citizens of Tacoma, a strong belief that the people of Tacoma have been defrauded in said transactions, and a disposition to hold the defendant Wright responsible therefor. The plaintiff has filed in this court a motion to remand the cause, supported by affidavits controverting the affidavits on the part of said defendant.

The amount at stake in the litigation is so large in proportion to the amount of taxes annually collected in Tacoma that it is argued every taxpayer of the city and county has a direct pecuniary interest sufficient in amount to create a presumption of bias. I am sat-

ified from the showing made that there is in Pierce county considerable prejudice against the defendant Wright, and local influences which may operate against him in the trial and determination of this case. If it were only necessary for a nonresident defendant to prove the existence of prejudice and local influence in order to make the complete showing necessary to the right of removal, the defendant's right in this case would be clear; but the statute seems to require the circuit court to make a finding that, because of prejudice or local influence, the defendant will not be able to obtain justice either in the court in which the action is brought, or in any other court of the state to which he will have the right, on account of such prejudice or local influence, to have the cause transferred. If by this statute it is meant that the circuit court must remand an equity case which has been removed on account of prejudice or local influence, unless satisfied from the evidence presented that the judge of the court in which the case was commenced, and all the other judges of the state courts who might be called to hear and decide the case, are so far affected by prejudice and local influence as to be incapable of rendering a fair decision, this case would necessarily have to be remanded; and there would be few cases in which a United States circuit court would feel warranted in making the finding necessary to support its jurisdiction. But the statute, as it has been construed by the higher courts, does not impose so heavy a strain upon the circuit courts.

In the case of *City of Detroit v. Detroit City Ry. Co.*, 54 Fed. 1-21, Judge Taft interpreted the statute as follows:

"The 'justice' which the defendant must be prevented from obtaining in the state court to entitle him to a removal is certainly not a judgment or decree in his favor. The phrase does not refer to any particular result in the case, but rather to the influences which will operate upon the tribunal in deciding it. The justice which the defendant has the right to obtain is a hearing and decision by a court wholly free from, and not exposed to the effect of, prejudice and local influence. If it is made to appear to the United States court that prejudice and local influence do exist, which would have a natural tendency to operate directly upon the state court, and furnish an interested motive for the judges to decide the case against the petitioning defendant, it is the duty of the United States court to grant the removal without any inquiry into the facts whether the particular state judges before whom the case is pending could and would rise above such prejudice and local influence, and decide the case unmoved by any personal benefit or disadvantage which would follow their decision. In a majority of cases, doubtless, the state judges would do their duty without fear or favor; but the petitioning defendant is not to be exposed to the chance that prejudice and local influence may work against him. The existence of local influence, and its natural tendency to operate upon the court, being shown, the tribunal is no longer one in which, in the sense of the removal statute, justice can be obtained."

The evidence necessary to support the federal jurisdiction does not have to prove morally that the petitioning defendant cannot obtain a just decision in the state court. It is only necessary to present to the circuit court evidence suitable to the case, and sufficient to prove legally that prejudice and local influence do exist, which will naturally operate to the disadvantage of the defendant in the trial of his case before a state tribunal.

On this point, the supreme court, in an opinion by Mr. Justice

Bradley, in the case of *In re Pennsylvania Co.*, 137 U. S. 451-457, 11 Sup. Ct. 143, held as follows:

"Our opinion is that the circuit court must be legally (not merely morally) satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the state court. Legal satisfaction requires some proof suitable to the nature of the case; at least, an affidavit of a credible person; and a statement of facts in such affidavit, which sufficiently evince the truth of the allegation. The amount and manner of proof required in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered."

All the affidavits filed herein were made by reputable persons, who are well informed, and in whom this court has confidence. It is my opinion that the showing in favor of the petitioner's right to remove the case into this court is as strong and satisfactory as, in the nature of things, such showing can be made; and although the evidence does not justify a finding that the judges of the state court cannot or will not treat the petitioning defendant fairly throughout the proceedings, and render a just decision, notwithstanding the prejudice shown to exist in the community, and all local influences, still I consider that it is the duty of this court to grant the petition.

Counsel for the plaintiff has directed attention to the law of the state of Washington on the subject of change of venue (2 Ballinger's Codes & St. Wash. §§ 4857, 4858), in which it is provided that:

"The court may, on motion, in the following cases, change the place of trial, when it appears by evidence or other satisfactory proof: * * * (2) That there is reason to believe that an impartial trial cannot be had therein [that is, in the county in which the venue of the action is laid in the complaint]. * * * (4) That from any cause the judge is disqualified, which disqualification exists in either of the following cases: In an action or proceeding in which he is a party, or in which he is interested. * * * If a motion for a change of the place of trial be allowed, the change shall be made to the county where the action ought to have been commenced, if it be for the cause mentioned in subdivision one of the last preceding section, and in other cases to the most convenient county where the cause alleged does not exist."

It is argued that the right to invoke the jurisdiction of a federal court on the ground of prejudice and local influence is not given except in cases wherein the petitioning defendant is able to show that he cannot obtain justice in the state court in which the action was commenced, or in any other court in the state to which the cause may be removed on a motion for a change of venue.

In the case of *Rike v. Floyd*, 42 Fed. 247, 248, Judge Sage is reported to have said:

"The removal act requires a showing that the local prejudice complained of would prevent an impartial hearing, either in the county where the action is pending, or any other county to which, under the state laws, it could be removed."

This is not an accurate statement of the words or meaning of the statute. State laws which merely authorize a change of venue, without giving to a defendant the right to remove a cause, are not

to be considered as affecting in any way a defendant's right to remove a cause into a United States circuit court. *Smith v. Lumber Co.*, 46 Fed. 819-824; *Herndon v. Railroad Co.*, 73 Fed. 308; *Bonner v. Mickle*, 77 Fed. 485. Under the laws of this state, it will be within the discretion of the superior court for Pierce county to grant or refuse an application for a change of venue, unless the defendant can prove that the judges in Pierce county are actually prejudiced or financially interested in the case. *Barnett v. Ashmore*, 5 Wash. 163, 31 Pac. 466.

The defendant's petition will be granted, and the motion to remand will be denied.

ELK FORK OIL & GAS CO. et al. v. JENNINGS et al. JENNINGS et al. v. ELK FORK OIL & GAS CO. et al. FOSTER v. SAME.

(Circuit Court, D. West Virginia. January 25, 1898.)

1. QUIETING TITLE—EQUITY JURISDICTION—OIL AND GAS LEASES.

One in possession of lands under oil and gas leases may maintain a suit to quiet title against others claiming possession under other leases.

2. EQUITY JURISDICTION—DISPOSING OF WHOLE CASE.

When a court of equity has obtained jurisdiction of a controversy, in order to make effective such jurisdiction, and to give due force to its decrees, it will proceed to dispose of all questions properly presented by the pleadings, and fairly pertaining to the full and equitable disposition of the cause.

3. OIL AND GAS LEASES—CONSTRUCTION—WAIVER OF FORFEITURE BY LESSOR.

A stipulation in a lease of oil and gas lands to the effect that the lessee shall, within a given time, complete one well, "unavoidable accident" excepted, on pain of forfeiture, or else pay the lessors a certain amount per acre per annum after the time for completing such well shall have passed, will be deemed to have been waived by a recognition by the lessors of the unavoidable character of accidents by which such completion is prevented, coupled with assent to and acquiescence in such delay.

4. SAME—ABANDONMENT OF RIGHTS BY LESSEE.

By numerous leases, in substantially the same terms, obtained from different parties, a lessee acquired the exclusive right in a large territory "of drilling and operating for petroleum oil, and gas." He stipulated to give the lessors a certain proportion of the oil obtained, and pay them a fixed sum annually for each paying gas well; and he was required, on pain of forfeiture, to complete one test well within the territory in one year from the dates of the leases. *Held*, that he did not, immediately on the performance of this latter condition, become vested with an absolute right for 10 years to the oil and gas privileges in the whole territory, but was bound, within a reasonable time thereafter, to search for these minerals on the premises described in each lease, and a failure to do so as to some of the leases was an abandonment thereof.

5. SAME—"LEASE SUBJECT TO PRIOR LEASE."

Where, in a subsequent lease of such abandoned property, a clause is inserted to the effect that it is to be held subject to the original lease, such clause is to be construed as meaning that the lessors intended to incorporate into their contract the fact that they had advised their lessee that the land had been theretofore leased, and that he was to take it subject to the old lease, with the understanding that if the latter was valid he should take nothing by the contract, but that if it was invalid the conveyance should then stand as a contract binding upon the parties.

T. P. Jacobs, David Sterrett, R. S. Gregory, and W. P. Hubbard,
for Elk Fork Oil & Gas. Co.

George C. Sturgiss and Caldwell & Caldwell, for E. H. Jennings and others.

B. M. Ambler, A. Leo. Weil, and C. M. Thorp, for George E. Foster.

Before GOFF, Circuit Judge, and JACKSON, District Judge.

GOFF, Circuit Judge. The Elk Fork Oil & Gas Company, and certain parties in interest with that company, on the 19th day of March, 1897, filed a bill in equity in the circuit court of Tyler county, W. Va., against E. H. Jennings, James M. Guffey, R. H. Glatzau, and others, in which suit on said day an injunction was issued restraining said defendants from taking possession of 1,077 acres of land situate in said county, claimed by the complainants in said cause for oil and gas purposes, under and by virtue of certain leases thereon made by the owners of said land. Such suit was, by due proceedings had, removed into this court. The complainants, on April 2, 1897, filed in this court an amended bill against the same defendants, and also against George E. Foster and others. On the 14th day of April, 1897, the complainants filed an amended and supplemental bill. On the 6th day of April, 1897, George E. Foster (who was named as a defendant in said amended bill, but who was not served with process until April 8, 1897, filed his bill against the Elk Fork Oil & Gas Company and others, and obtained from this court a restraining order against the complainants in said original and amended bill. It appears from the record that Foster, when he filed his bill, was aware of the fact that the questions raised by the same concerning what is known as the Hawkins lease of September 4, 1889, had been presented to the court by the amended bill filed on the 2d day of April, 1897. When the amended and supplemental bill was filed on April 14, 1897, the Elk Fork Oil & Gas Company moved for an injunction against Foster, as prayed for in said bill, and also moved to dissolve the restraining order which had been awarded to Foster on the 6th day of April, 1897. The court, after hearing counsel on said motions, and duly considering the questions raised by the pleadings, ordered that the two suits should be heard together, and also that the bill filed by Foster should be treated as a cross bill in the suit brought by the original complainants. The court also at the same time appointed Charles W. Brockunier receiver, with instructions to drill wells on the 50 acres of land in controversy between Foster and the Elk Fork Oil & Gas Company, at such places and in such manner as he might deem best and proper, provided that the funds required for that purpose should be advanced by the parties in interest, with the understanding that the same should be returned from the production of the territory, should the same be sufficient; otherwise the party making such advances to lose the same. All parties to the controversy were enjoined from interfering with the receiver in the exercise of the rights conferred upon him by the order of the court. On the 17th day of April, 1897, the defendants Jennings, Guffey, and Glatzau filed their answer, and at the same time tendered their cross bill, which was duly filed. On the filing of their answer and cross bill the court appointed W. A. McCosh

receiver, so far as the oil and gas rights were concerned in the 100 acres of land claimed by the Elk Fork Oil & Gas Company known as the "Wood Lease," and also so far as the Tuttle lease was concerned, claimed by the same parties, the purpose and duties of such receiver being virtually the same as those theretofore given Receiver Brockunier. On April 30, 1897, the Elk Fork Oil & Gas Company filed their answer to said cross bill, and moved the court to discharge the receiver; the defendant Foster at the same time demurring to complainants' bill. On the 10th day of May, 1897, Foster filed an amended bill against the original complainants and certain others, lessors of part of the lands in controversy, and asked for and obtained from the court an order extending the powers of Receiver Brockunier over the land owned by Joshua Hawkins, T. G. Hawkins, Eli Wetzel, David Summers, and James Eddy. On the 19th day of June, 1897, the defendant Foster filed his answer to the complainants' bill.

The complainants in their amended bill alleged that one L. B. Hill, during the months of December, 1896, and January, 1897, leased from certain persons in Tyler county, W. Va., for oil and gas purposes, certain tracts of land, making in the aggregate 1,077 acres; that soon thereafter, under said leases, the complainants took possession of said lands, located a well on the 100-acre tract leased by Warren and James Wood, and drilled the same to completion, in pursuance of the terms of said lease; that about the 16th of March, 1897, the complainants heard that the defendants Jennings, Guffey, and Glatzau claimed the right to drill on the land covered by the lease from Warren and James Wood; that they had contracted for the erection of a derrick thereon, and were endeavoring to oust the complainants from the possession of the same; that they (the complainants) then secured the restraining order in the proceedings instituted in the circuit court of Tyler county; that about that time said defendants served notice on the complainants forbidding them to operate for oil on the Wood land, and claiming title to the oil and gas rights thereof, under a lease made to one William Johnston in September, 1889, by Lyman Wood, the father of Warren and James Wood. It was also alleged by complainants that on September 4, 1889, Lyman Wood made an oil and gas lease on 200 acres of land then owned by him, of which the 100 acres leased to complainants by Warren and James Wood is a part, to William Johnston; that on November 14, 1889, the said William Johnston assigned to C. G. Dickson, D. C. Gruntz, and Julius McCormick thirteen-eightieths of his holdings in a certain block of leases (which included the lease of Lyman Wood to him), and that on March 19, 1897, Johnston, McCormick, Gruntz, and Dickson's executors assigned said leases to one John Stealey, who on the same day assigned a one-third interest in the same to one L. E. Smith, and that on March 20, 1897, Stealey and Smith assigned to George E. Foster an interest in the said leases, which also included certain leases made by Eliza and B. F. Hawkins and James Eddy to the said Johnston in the year 1889, the lands covered by the same being a part of the 1,077 acres claimed by the complainants under the leases executed to L. B. Hill, before

mentioned. Complainants also averred that the defendants had no rights under any of the leases so made to William Johnston in 1889, because the same were, each and all of them, void; and that, therefore, all such rights as had theretofore existed under them had long before become forfeited; that Johnston, and those claiming under him, had made default in the stipulation contained therein to complete a well within one year from the date of said leases, respectively, in Ellsworth, Meade, Lincoln, or Union districts, unavoidable accidents excepted; that neither Johnston, nor any one claiming under him, had ever drilled a well upon any of the lands covered by the complainants' leases, and that no development in fact had been made under any of the leases so given to Johnston; that certain parties, claiming under other and subsequent leases from the owners of the land, had drilled two wells within Ellsworth district, but, finding no oil, they had dismantled their rig, and had abandoned all of the territory so tested and leased to Johnston; that neither Johnston nor any one else ever paid to Lyman Wood the sum of 10 cents per acre per annum on account of the payment provided for in the leases made by him to Johnston, nor was any sum paid to any of the lessors of the other leases, nor was any such amount ever tendered until after oil was produced on the Wood land by complainants, when the defendant Johnston tendered to Warren Wood, James Wood, and other lessors of Johnston certain sums of money alleged to represent the payments provided for in the leases to him, which tender complainants allege was an admission on the part of Johnston of his failure to comply with his contract requiring the drilling of a well within one year from the date of the leases; that Warren Wood, James Wood, and the other lessors to Johnston, being well aware of his failure to drill a well as required, and to make the payments provided for, as also of his abandonment of the property described therein, had repeatedly declared the forfeiture of said leases; that the leasing of the land by Warren and James Wood to Hill was such a declaration of forfeiture, and that the refusal of the lessors to accept the tender of 10 cents per acre, before mentioned, was also such a declaration, and that Johnston and those claiming under him had years before recognized such forfeiture by refusing to proceed with the drilling of wells, unless the owners of the different tracts of lands would grant new leases on the same, which in a number of instances had been done for the purpose of securing development; that the said Johnston, in the fall of 1889, obtained many leases in Tyler county, aggregating thousands of acres, which were all of the same character as the one made by Lyman Wood, and that all of them have been abandoned and forfeited on account of the facts before mentioned; that the land leased to Johnston by Lyman Wood is now owned by Warren and James Wood, his sons, and that when they leased the same to Hill they regarded the lease made by their father to Johnston as null and void, but still, in order to protect themselves from any liability or expense of litigation, in case the Johnston lease should thereafter be asserted against them, they caused the words, "This lease is taken subject to the William Johnston lease, September, 1889," to be inserted in the lease made by them to Hill.

In their supplemental bill the complainants alleged that the lease made in September, 1889, by Eliza Hawkins and Benjamin Hawkins to William Johnston had become forfeited and void; that George E. Foster, claiming under the same, and asserting the right to drill for oil upon the 100 acres of land leased by said parties to Hill, had undertaken to occupy the ground covered by that lease and to oust the complainants therefrom; that he had on April 7, 1897, caused a notice to be served upon the complainants requiring them to desist from their operations on that tract of land; that the complainants had taken possession under the Hawkins lease to Hill, had located a well thereon, and were about to drill the same, and that said land was separated from the Wood tract of land, on which they had a producing well, only by a tract of 9 acres, said producing well being only 600 feet from the well located on the Hawkins land.

In the cross bill filed by Foster the execution of the lease by Eliza and Benjamin Hawkins to William Johnston on September 4, 1889, is alleged, and also that Johnston at the same time took a large number of similar leases in the same territory, which was then undeveloped for oil or gas, and that consequently the lessors in said leases were most eager to have a test well in that section, and that the procuring of such a well was one of the considerations moving the lessors to make such leases; also that Johnston procured to be drilled, in accordance with the terms of the Hawkins lease, an oil well upon one of the tracts leased to him; that the drilling of said well was attended with much difficulty, because of its great distance from the point of supply of material, and also because the character of the territory and the strata to be drilled through had been theretofore unknown; that the well was begun in April, 1890, and the work prosecuted continuously until the drill had reached a depth of 1,200 feet, when the tools became fastened; that the drillers tried, but failed, to extricate them, and that the work was finally abandoned, and the rig moved about 20 feet, where another well was started, which was prosecuted continuously to completion; that such well was drilled to the "Big Injun" sand, which was the usual oil-bearing sand in the Tyler county territory, and that, as no oil was found, the drill was run still deeper, through the "Gordon" sand, in all to the depth of 2,700 feet, but that no oil was found, and the hole was dry; that the "Big Injun" sand was reached in October, 1890, and the well completed, as mentioned, in December of that year; that the drilling was attended by numerous accidents, and that the well caved, and caused many delays, and that the fastening of the tools and the caving of the well were "unavoidable accidents," whereby at least five months of delay was caused, and that the well cost over \$11,000; that the drilling of said well complied with the requirements contained in the Hawkins lease to Johnston, and that, but for the delays mentioned, it would have been completed within a year after the date of said lease; that all the lessors, including Hawkins, were greatly interested in the well, and were anxious to see it completed, and that they conceded that the failure to complete the same within a year was due to "unavoidable accidents," and therefore none of them demanded rental, or claimed the right to declare a forfeiture;

that in fact the well was drilled in accordance with the terms of the lease to Johnston; that in all respects said terms were complied with, and that there was no forfeiture of any of his leases; that Johnston, who was the pioneer contractor in said territory, was at great expense in taking the large number of leases secured by him in Tyler county during the years 1889 and 1890, and that he either drilled or caused to be drilled a large number of wells on various of said leases situated in said districts of Lincoln, Ellsworth, Union, and Meade, at a cost of over \$100,000; that said wells were drilled during the years of 1890, 1892, 1893, 1894, and 1895.

The defendants Jennings, Guffey, and Glatzau in their answer admit the making of the leases by the different lessors to Hill, as alleged by the complainants, and claim that the same are void, and subordinate to the leases given for the same land, in 1889, to Johnston. They deny that they or Johnston ever abandoned any of said leases, and especially any portion of the Lyman Wood land. They assert that they had no notice of the lease made by Warren and James Wood to Hill, or of Hill's assignments of the same, until March 19, 1897, when they notified the complainants that they were the lawful owners of the Lyman Wood lease, and that they were entitled to all of the oil and gas under that land; that the complainants drilled their well on said land in bad faith, and with full knowledge of the exclusive right of the defendants, or of Johnston and his assigns, to operate upon the same; and that they have been the equitable owners of the leases claimed by them ever since August, 1892, and the legal owners of the same since March 23, 1897. Other matters are set out in the answer of Jennings, Guffey, and Glatzau, and also alleged in the cross bill filed by them, of similar import to the claims made by Foster in the cross bill filed by him, setting forth the execution of the leases to Johnston in 1889, the work done by him and his assigns in connection with the same, the assignment of said leases and their subsequent transfer to others, and also showing the present claimants of the same; also asserting that said leases have not been forfeited, and declaring their validity at the time of the institution of these proceedings. We do not deem it necessary to repeat them in detail. The answer of the Elk Fork Oil & Gas Company to the cross bill filed by Jennings, Guffey, and others reiterates the averments of the amended bill, and sets up some additional matters, which will be alluded to only as they are drawn in question in the disposition of the matters in controversy. The allegations and claims found in the amended bill filed by Foster, and in the answer tendered by him to the amended bill of the Elk Fork Oil & Gas Company, will be likewise referred to and disposed of.

It is claimed by the defendants Jennings, Guffey, Glatzau, Foster, and others that a court of equity is without jurisdiction to grant the relief sought by the Elk Fork Oil & Gas Company in the proceedings instituted by it. The complainants allege that they are in the actual possession and occupancy of the land covered by the leases made to Hill, and that their title to the same is good, but that the Johnston leases under which the defendants claim, although forfeited and abandoned, operate as a cloud on their title, which should be removed

by a decree of a court of equity. If the Elk Fork Oil & Gas Company have title to the leases on the 1,077 acres of land as claimed in the amended bill, then the leases under which Jennings, Guffey, Glatzau, and Foster claim are evidently void, and cloud the title of that company to its property. The complainants' title depends upon the validity or invalidity of the Johnston leases, and so we have those claiming under the leases to L. B. Hill, who are in possession, contending against those who claim under the Johnston leases, who are out of possession, and who not only claim the right, but ask the court to decree them permission to enter. That equity has jurisdiction of the suit of one in possession of real estate to remove a cloud from his title is, we think, without doubt,—is too well established to be seriously questioned. *Clayton v. Barr*, 34 W. Va. 290, 12 S. E. 704; *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682; *Hoopes v. Devaughn* (W. Va.) 27 S. E. 251; *Crawford v. Ritchey* (W. Va.) 27 S. E. 220; *Harding v. Guice*, 42 U. S. App. 411, 25 C. C. A. 352, 80 Fed 162; *McConihay v. Wright*, 121 U. S. 201, 7 Sup. Ct. 940.

The demurrer filed by Foster is not well founded, and is therefore overruled. As we have, because of a distinct ground of equity jurisdiction, held that this court has jurisdiction of this controversy, it follows that, in order to make effective such jurisdiction, and to give due force to its decrees, the court must dispose of all questions properly presented by the pleadings, and fairly pertaining to the full and equitable disposition of the cause.

Having thus disposed of the questions relating to the jurisdiction of the court, we come now to consider the real matters at issue between the parties to these controversies. The leases under which the defendants claim were all taken by Johnston in the year 1889, their terms practically the same, and they are, in substance, as follows:

"The said party of the first part, for the consideration of the covenants and agreements hereinafter mentioned, has granted, demised, and let unto the party of the second part, his heirs or assigns, for the purpose and with the exclusive right of drilling and operating for petroleum oil and gas, all that certain tract of land situate, * * *. The party of the second part, his heirs or assigns, to have and to hold the said premises, for the said purposes only, for and during the term of ten (10) years from the date hereof, and as much longer as oil or gas is found in paying quantities. The said party of the second part, in consideration of the said grant and demise, agree to give to the party of the first part the full and equal one-eighth part of all the petroleum oil obtained or produced on the premises herein leased, and to deliver the same in tanks or pipe lines, to the credit of the party of the first part. It is further agreed that, if gas is obtained in sufficient quantities to utilize, the consideration in full to the party of the first part shall be one hundred dollars per annum for each and every gas well drilled on the premises herein described, if of sufficient pressure to guaranty the laying of a pipe line to convey it to market, payable in ninety (90) days after the line is laid. The party of the first part grants the further privilege to the party of the second part of using sufficient water from the premises herein leased necessary to the operation thereon, the right of way over and across said premises to the place of operating, together with the exclusive right to lay pipes to convey oil and gas from this as well as adjoining farms, and the right to remove any machinery or fixtures placed on said premises by second party. The second party hereby agree to pay any damage done to growing crops by the laying of pipes. One well to be completed within one year in Ellsworth, Meade, Lincoln, or Union districts from the date hereof, unavoidable accident excepted; and, in case of failure

to complete operations on a well within such time, the party of the second part agree to pay to the party of the first part for such delay the sum of ten cents per acre per annum after the time for completing such well as above specified, payable by deposit at the —, or directly to the party of the first part; and the party of the first part agree to accept such sum as full consideration and payment for such yearly delay, until one well shall be completed; and a failure to complete one well, or to make such payment within such time as above mentioned, renders this lease null and void, and to remain without effect between the parties hereto. Ten (10) acres surrounding the building are hereby reserved, to be operated by second party only, if said first party decides to have it drilled. Operations to be conducted so as to interfere the least with farming privileges. The party of the first part may have gas for domestic use, if there is sufficient, after supplying the boilers on the premises. It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, and assigns."

The defendants who claim title under the Johnston leases insist—First, that Johnston and his assigns, by virtue of said leases, secured the right to drill and operate for petroleum oil and gas, on the lands described in the leases, for the period of 10 years from their respective dates, and as much longer as oil or gas should be found in paying quantities, subject to an earlier termination by forfeiture, in case of failure to complete one well in one of the four districts named within one year from date of said leases, unavoidable accident excepted, and subject, also, to forfeiture if the said lessee, failing to complete operations on a well in such time, should also fail to pay to the lessor for delay the sum of 10 cents per acre per annum after the time for completing such well had expired; second, that there has been no forfeiture or cause for forfeiture, because such well was completed in the specified time, and also because that, even if the well was not so completed, it was in fact completed before a yearly sum fell due as rental, and that, therefore, there was no such default in payment as gave cause for forfeiture; third, that the title of the lessee, when once perfected by the fulfillment of his covenant to drill a test well, became vested and fixed for the term of 10 years, and as much longer as oil or gas should be found in paying quantities, and that thereafter the lessee was under no obligation to operate further, until developments in the vicinity of said leases necessitated operations, and gave rise to the implied covenants of the lessee to protect the property from damage, and to take out the oil when found within a reasonable time, and that meanwhile there could be no abandonment of said leases unless there was an actual intention to do so, and that nonaction would not constitute abandonment; fourth, that under the evidence in this case there was in fact no abandonment.

The contention of the Elk Fork Oil & Gas Company is that the leases to Johnston granted no interest in the oil or gas in the premises leased, but simply the right to search for them, and that only when such search had been made, and oil or gas actually found, did the leases operate to grant to the lessees any interest in such substances so searched for and found; that such leases not only conferred the right to search, but that they also imposed on the lessee the duty to do so within a reasonable time, and that, if he did not do so, his rights must be considered as at an end, because abandoned by

him; that, if no oil or gas was found, the rights of the lessee ceased when the search was finished and the explorations abandoned.

On one point the parties to this controversy seem to be in accord, and the court is able to agree with them, and that is if Johnston or his assigns failed to complete one well in either Ellsworth, Meade, Lincoln, or Union districts of Tyler county within one year from the date of each of said leases, "unavoidable accident" excepted, and if they, in case of failure to complete operations on a well in such time, failed to pay to the several lessors the sum of 10 cents per acre per annum, after the time for completing such well had expired, that the lease, at the option of the lessor, became forfeited and void. So far as the question of forfeiture is concerned, we are impelled to the conclusion, after giving due weight to all the testimony relating thereto, that the test well on the Smith farm was completed within the period provided for in the leases; and also, so far as this point is concerned, we hold that it is immaterial whether we regard the well as completed when the "Big Injun" sand was drilled through, or at the time when the drill had passed through the "Gordon" sand. It is quite evident that all of Johnston's lessors were watching the Smith well with interest as well as anxiety, and that they also regarded the delay occasioned by the caving of the well, the fastening of the tools, the moving of the rig, and the injury of the employés to be of the character of accidents mentioned in the leases as unavoidable; and while we think that, after making due allowance for the time so consumed by such "unavoidable accidents," the well was completed within the time stipulated for, still, so far as these controversies are concerned, that point is not essential, for the reason that the lessors not only assented to the delay, but were anxious that the work be continued, and after the well was completed they, by their conduct and acquiescence, clearly made it appear that they did not regard the time consumed in drilling said well as ground for forfeiture. The lessors, down to the time of the completion of the Smith well, acted as if they believed that Johnston and his assigns had proceeded to develop his territory in good faith, and they neither made complaint, demanded rental, nor declared a forfeiture.

Finding these facts to be as we have indicated, it follows that, at the time of the completion of the Smith well, there was no forfeiture of the Johnston leases because of failure on his part or on the part of his assigns to comply with the terms of the same. This brings us to the further consideration of the leases, and of the duty of Johnston, and those holding under him, to the respective lessors, so far as the search for oil and gas and the development of the several separate tracts of land are concerned.

The drilling and completion of the test well within the period provided for, renders it unnecessary for us to determine what would have been the situation between the parties if the well had not in fact been drilled, and if Johnston had paid to the lessors the rental stipulated for in case of delay. That condition of affairs does not exist, the argument relating thereto was unnecessary, and the court will not further consider the provisions of the leases relating to the same.

The only remaining question is, were the Johnston leases covering the land now claimed by the Elk Fork Oil & Gas Company (under the leases made to Hill) abandoned by Johnston or his assigns, after the completion of the Smith well? Is the claim of the defendants that by virtue of the completion of the test well their title to the leases became vested for the granted term of 10 years, and as much longer as oil or gas should be found in paying quantities, without obligation on their part to operate further, well founded? We think not. We think that the parties to the contracts, when they stipulated that the lessors were to have the full equal one-eighth part of all the petroleum oil obtained or produced on the premises leased by them, and an annual compensation for the gas utilized, intended that such royalty should be paid, and the necessary search made, within a reasonable time after the execution of the leases, and that the lessee was to have the period of 10 years in which to remove the oil and gas from the land, with the understanding that, if at the expiration of that time such products should still be found in paying quantities, the term should be extended until they were removed. The oil or gas referred to was expected to be "found" on the particular land described in each of the several leases, and not on some unknown and unmentioned tract within one of the four districts in Tyler county referred to in each lease. It is set forth in the contract that the grant is made "for the purpose of drilling and operating for petroleum oil and gas," and it is distinctly stated that the premises are to be held "for the said purposes only." The only delay contracted for by Johnston was for one year after the date of the several leases, or during the time required for the drilling of the test well. After that period had elapsed it was the duty of Johnston, or of those claiming under him, to search for oil or gas, with reasonable diligence, on each tract of land leased by him. We must determine from the evidence whether or not such search was made. We find, as a matter of fact, that after the execution of the leases to Johnston in 1889, and down to the institution of the original suit by the Elk Fork Oil & Gas Company, in March, 1897, that neither Johnston, nor any of his assigns, ever entered upon any of the several tracts of land so leased to him, and now claimed by the complainants, for the purpose of searching for oil or gas. It is true that Johnston, and those representing him, did take possession of and bore for oil and gas upon many of the tracts of land leased to him in said four districts, as well as in other portions of Tyler county, and that he also expended large sums of money in the development of that section, for which he is entitled to, and we doubt not has received, the commendation of the people living therein. As to the leases on which he so operated we have nothing to do, as we are not now asked to pass upon his title thereto. It is only concerning the leases now claimed by the Elk Fork Oil & Gas Company, as to which neither Johnston, nor any one claiming under him, has ever made any search or development of any character, that we can in these proceedings pass judgment upon. The fact that Johnston, acting for himself or through others, drilled a large number of wells in the four districts of Tyler county mentioned in the leases, may show that he was en-

ergetic in his efforts to test the theories he had formed as to the location of the oil belt in that section, but it does not relieve him of the duty he owed to the lessors of the leases covering land on which he had made no search. We agree with counsel for the defendants that the testimony shows that the lessors of the leases under which the Elk Fork Oil & Gas Company claim regarded the leases given by them to William Johnston, in 1889, for the same land, as still binding upon them at the time of the completion of the well upon the Smith farm, but we are compelled to differ with said counsel in their estimate of the testimony bearing on this point, relative to the period between that date and the institution of this suit. It is quite evident that Johnston himself regarded these particular leases with distrust, at least during the years 1894, 1895, and in the early part of 1896. He not only failed to drill upon them himself, but he endeavored to secure new leases, before he would authorize others to commence operations. The lessors themselves always desired development, and they were willing at all times to renew the old or execute new leases, if thereby that desirable result could be brought about; but it is, we think, a misconception of their conduct to claim that it was an admission on their part of the validity of the leases. When we recall the declaration and conduct of Johnston and McGuire during their visit to the vicinity where the lessors resided, in June, 1895, at which time there was an effort made to secure a renewal of these leases, or of at least a part of them, it is not at all surprising that the owners of the land abandoned hope of securing development under the leases given in 1889, and sought the same in other directions. The leases given in April, 1896, to L. C. Sands, called the "Paova Leases," which covered the territory in controversy, and which were subsequently returned to the lessors, show plainly that they at that date considered that Johnston had abandoned the leases taken by him in 1889. These leases were made some time after Johnston had failed in his endeavor to secure new leases, and the lessors therein, who were also the lessors in the Johnston leases, by executing said Paova leases, in effect declared that the leases made to Johnston in 1889 had been abandoned by him, or by those who had claimed under him. The fact that all of the Paova leases contained the following clause, "subject to the Johnston lease," must be considered in connection with the circumstances surrounding the parties when they executed the same. In our judgment, the lessors intended by these words to incorporate into their contracts the fact that they had advised their lessee that the land had been theretofore leased to Johnston, and that he was to take it subject to the old lease, with the understanding that if the Johnston lease was valid he took nothing by the new grant, but that if it was invalid the conveyance was then to stand as a contract between the parties. To hold, as insisted upon by counsel for defendants, that said words were intended as an admission of the validity of the Johnston leases, would be to hold that the parties to the new leases admitted by them that the lessor had nothing to grant, and that consequently there was nothing for the lessee to take. Clearly does it appear that such was neither the belief nor the intention of the par-

ties. Under similar circumstances, learned counsel would doubtless have employed other and more apt language, but still we think the words used are sufficient to enable the court to read the contract as we have construed it, and thereby get not only near to, but exactly at, the intention of the parties. With the conclusion reached by the lessors that Johnston had abandoned the leases we fully concur, and we further find from the evidence that as to these particular leases it was his intention to do so. Both public and private interests require that such facts as are disclosed by the testimony in these cases should be held by a court of equity to constitute abandonment of the leases involved, because of nondevelopment. It should be kept in mind that Johnston in all these leases was the party who was to take the initiative. He was the actor who was to commence development and make the search on all the land described in them. This he, for reasons of his own, so far as these particular leases were concerned, failed to do, from 1889 to 1897. He now asks a court of equity, after such unreasonable delay on his part, and gross neglect of his implied duty, and after there has been a material change in the situation, brought about by the efforts of others in interest, to decree that he is entitled to the possession of the property he had abandoned. To so decree would not only be unconscionable, but it would retard the development of the country, and at the same time it would reward those who have been negligent, and punish those who have been prompt, in the discharge of their contract duties.

After Johnston caused the Smith well to be drilled it was his privilege to determine—using for that purpose the information secured by that well—in what direction and on what particular tracts of land he would make his subsequent developments, and if, in so doing, his conduct and his declarations resulted in the abandonment of the leases located in other sections, for any misfortune to him occasioned thereby he must hold his own judgment responsible, and not the judgment of this court. It was evidently not the intention of Johnston, when the numerous leases were executed to him in 1889, amounting in the aggregate to over 20,000 acres, to drill wells upon each and every separate tract; but he intended, using each separate search as an indicator, to locate, if possible, the points where oil and gas could be found, and, having done that, to abandon those leases that previous development had shown to be located in unprofitable localities. That he, and those operating under him, regarded the leases in the Elk Fork region of Tyler county as worthless, in an oil-producing sense, is, we think, fully shown by the testimony, and such conclusion on his and their part is but another illustration of the uncertainty and surprises that come to those engaged in the development of oil territory.

The construction that we have placed upon the words used in the Paova leases—"subject to the Johnston lease"—also disposes of the question and the argument concerning the words, "subject to the William Johnston lease of September, 1889," found in the lease given by James and Warren Wood to L. B. Hill.

We cite the following authorities bearing upon the questions raised in connection with the construction, forfeiture, and abandonment of

the leases we have had under consideration, and as sustaining the conclusion we have reached: *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754; *Mullan's Adm'r v. Carper*, 37 W. Va. 215, 16 S. E. 527; *Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Crawford v. Ritchey*, 27 S. E. 220; *McNish v. Stone*, 15 Pa. St. 457; *Whitcomb v. Hoyt*, 30 Pa. St. 409; *Brown v. Vandergrift*, 80 Pa. St. 142; *Duffield v. Hue*, 129 Pa. St. 94, 18 Atl. 566; *McKnight v. Gas Co.*, 146 Pa. St. 185, 23 Atl. 164; *Oil Co. v. Fretts*, 152 Pa. St. 451, 25 Atl. 732; *Barnhart v. Lockwood*, 152 Pa. St. 82, 25 Atl. 237; *Bartley v. Phillips*, 165 Pa. St. 328, 30 Atl. 842; *Cowan v. Iron Co.*, 83 Va. 547, 3 S. E. 120; *Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Oil Co. v. Kelley*, 9 Ohio Cir. Ct. 511; *Eaton v. Gas Co.*, 122 N. Y. 416, 25 N. E. 981.

It follows from what we have said that the Elk Fork Oil & Gas Company, by virtue of the leases executed to Hill, have title to the oil and gas in and under the land as described in said leases, and also that the leases executed to William Johnston in 1889, covering the same land, and now claimed by Jennings, Guffey, Glatzau, Foster, and others, are invalid because of abandonment, and that the complainants have a right to have the cloud upon their title caused thereby removed by order of this court. The receivers will be directed to settle their accounts, and report to the court as soon as possible the moneys in their hands to the credit of this consolidated cause, so that proper disposition may be made of the same, and said receivers will be discharged, and the property in their custody will be turned over to the owners thereof. The restraining order granted on the filing of the cross bill by Foster, as well as the injunction issued when the cross bill was tendered by Jennings, Guffey, and Glatzau, will be dissolved. The injunction granted on the prayer of the Elk Fork Oil & Gas Company, restraining the defendants to the original suit from taking possession and operating the leases claimed by that company as set forth in the complainants' amended bill, as also the injunction issued against Foster when the amended and supplemental bill of complainants was filed, will be made perpetual. The court will enter a decree drawn on the lines indicated by this opinion.

JACKSON, District Judge, concurring.

CISNA et al. v. MALLORY et al.

(Circuit Court, D. Washington, E. D. January 24, 1898.)

1. GRUB-STAKE CONTRACTS—ENFORCEMENT IN EQUITY.

While grub-stake contracts will be enforced by the courts, yet, in order to entitle the parties to such relief, they must prove, as in the case of other agreements, a clear and definite contract, by the terms and conditions of which, and by compliance therewith on their part, rights have become vested.

2. SAME.

Upon an application for an injunction pendente lite to establish a co-partnership and joint ownership of certain mining claims in the Klondike region, it appeared from the moving papers that the plaintiffs had agreed

with defendant, by an instrument alleged to have been lost, to furnish certain moneys to him during one year, and had furnished a portion thereof, to be used by him in prospecting for and acquiring mining claims, but there was no allegation that they had agreed to pay for property purchased by him. The defendant denied the contract as alleged, or that he ever acquired any mining property pursuant to it; and his allegation that the only mining property he had acquired in the Klondike country was bought with his own means, more than two years after the contract was entered into, was not rebutted. *Held*, that the plaintiffs' showing was insufficient to warrant equitable relief.

Suit in equity by M. A. Cisna, E. E. Lucas, E. D. Rinear, L. C. Waller, A. A. Lewis, S. J. Goodsell, Thomas McCart, and H. C. Thompson against T. H. Mallory and Horatio N. McGuire, to establish the right of complainants to the ownership of undivided interests in certain mining claims on Eldorado creek and Bonanza creek, in that part of Northwest Territory, in the dominion of Canada, known as the "Klondike Region," and for an injunction to restrain the defendant Mallory from disposing of said property. The cause was heard on an application for an injunction pendente lite.

Stoll, Stephens, Bunn & MacDonald, for complainants.

Fenton & O'Brien and Albert Allen, for defendant Mallory.

HANFORD, District Judge. The object of this suit, as set forth in the amended bill of complaint, appears to be to establish a co-partnership between the plaintiffs and the defendants, and joint ownership of certain mining claims in the Klondike region, which the defendant Mallory is alleged to have acquired, and to require the said defendant to account for gold dust and nuggets which it is alleged he has taken from said mining claims, and for an injunction to prevent the sale and disposal of said property, and to compel the defendant Mallory to execute conveyances to the plaintiffs of their respective interests. The complainants plead a written contract, and aver that pursuant to said contract they made advances of money to the defendant Mallory, to be used and expended by him in prospecting for, acquiring, and working mining property, and that while said contract was in force, and with the money so advanced, said defendant did go on a prospecting expedition into the Methow and Slate Creek districts, in this state, and went to the Klondike country, and there acquired valuable mining claims, and that he now denies the partnership, and denies that the complainants have, or are entitled to claim, any interest in said mining property. The alleged contract has not been exhibited, and the complainants aver that it has been lost or mislaid, so that they are unable to produce it. In their amended bill of complaint they set forth that, by the terms and provisions of said contract, they (the said complainants) and the defendants became mining partners, and that it was thereby agreed that the defendant Mallory should proceed to that part of the state of Washington called the "Methow Mining District," and to such other places as he might deem advisable, and prospect for, discover, locate, or otherwise acquire, work, develop, and mine, mines, mining claims, water rights, mill sites, and other property, for the use and benefit of the complainants and the defendants, in the proportions

hereinafter mentioned; the complainants and the defendant McGuire in consideration thereof furnishing and paying defendant Mallory the sum of \$150 in cash, to be used by him in the performance of said agreement, and they agreeing to furnish to him thereafter, from time to time, sufficient money or supplies and materials, not to exceed in value \$100 per month, to enable him to in all respects carry out and perform said agreement; the complainants and the defendant McGuire each contributing one-ninth of the said expenses and of any money or supplies or materials, and they each to receive one-twelfth of all mines, mining claims, water rights, mill sites, or other property discovered, located, or acquired, with the products, output, rent, or issues thereof, or any part thereof; the defendant Mallory to have and receive the remaining three-twelfths thereof; and that any mines, mining claims, mill sites, water rights, or other property so discovered, located, or acquired by the defendant Mallory, if located or taken in his name, were to be held by him for the use and benefit of the complainants and defendants as aforesaid,—and that to that end the defendant Mallory should be the trustee for complainants and the defendant McGuire. In an affidavit by the complainants Cisna, Rinear, Lewis, and Goodsell, the same contract is set forth, except that the affidavit states that, in addition to the sum of \$16.66 contributed by each of the complainants to make up the advance of \$150, it was agreed that each should contribute thereafter such further sum as might be necessary to carry out the purposes of the partnership, not exceeding in the aggregate \$1,200; that the defendant Mallory agreed to go into the hills and mountains to prospect for, discover, locate, or otherwise acquire, mines, mining claims, water rights, mill sites, and other property, for the use and benefit of said partnership, “the plaintiffs and the defendant McGuire then and there agreeing and authorizing him to purchase mines, mining claims, water rights, mill sites, or other property, for and in the name of the said partnership, for such reasonable sum as in his judgment was prudent and advantageous from a business standpoint; that said partnership as aforesaid was formed for an indefinite period, and was to continue until dissolved by consent of all parties.” The defendant Mallory has answered, denying the equity of the bill,—that is to say, he denies that there ever was any partnership between him and the complainants, and denies that the contract which he entered into with them created a partnership, or contained the terms and provisions alleged by the complainants, and denies that he ever acquired any mining property pursuant to said contract, or with money furnished or contributed by the complainants; and, in an affidavit by said defendant, he states that the only mining property which he has acquired in the Klondike country was so acquired by purchase, with his own individual means, after he had fully exonerated himself from all obligation to the complainants under his contract with them.

It is obvious that if the complainants have any right in mining claims acquired by Mallory, situated in the Klondike country, such rights must be founded upon the contract, or result as a legal consequence from the use and expenditure of the money furnished by complainants, and used in discovering, locating, or otherwise ac-

quiring the property. I consider that the contract cannot be fairly construed so as to create any right in favor of the plaintiffs to property, situated in a distant, foreign country, purchased by Mallory, with his own money, more than two years after the agreement was entered into. Some of the complainants, in their affidavits, say that the partnership created by the contract was to continue for an indefinite period, and until dissolved with the consent of all. But the amended bill contains no such averment, and even the affidavit does not assert with certainty and clearness that the contract provides for any such indefinite continuation of the partnership relation. Indeed, the affidavit shows affirmatively that the parties contemplated only an expedition for prospecting and mining, to be completed within a period of time not exceeding one year; for they say that they agreed to contribute not more than \$1,200 in the aggregate, and, according to their amended bill, they were to pay not more than \$100 per month. I must conclude that the agreement provided for payments not exceeding \$100 per month for a period not exceeding 12 months, or else that the affidavit is contradicted by the pleading. There is another apparent discrepancy between the affidavit and the amended bill of complaint. The affidavit states that the defendant Mallory was authorized to purchase mining property for the partnership, but the bill of complaint fails to state that such authority was conferred, either by the alleged contract, or by any separate agreement. I apprehend that if it should transpire that Mallory had purchased mining claims in Klondike on account of the alleged partnership, and agreed to pay therefor prices approximating the supposed value thereof, the complainants would be astonished if called upon to contribute their respective portions of the purchase money; and, if they should meet such a demand with denials of liability, their denials would not be inconsistent with their averments and representations of facts in this case, for even in the affidavit they do not say that they promised to pay for mining property to be purchased by Mallory. The defendant Mallory shows that the only mining property in which he has acquired an interest in the Klondike country was purchased by him with his own means, and there is no showing to the contrary. The complainants show affirmatively that they are ignorant as to the manner in which Mallory acquired the property, and as to all of his transactions in relation thereto. They offer no evidence that any part of the \$150 given to Mallory previous to his prospecting trip into the Methow and Slate Creek districts in this state was expended in discovering or acquiring the property which they now claim, or that Mallory acquired or discovered any interest in said property within one year from the date of their contract with him. Grub-stake contracts will be enforced by the courts, but only as other contracts; that is to say, it is not enough for parties to assert that they have rights, in order to secure legal protection, but they must be able to prove in each case a clear and definite contract, and that by the terms and conditions of such contract, and compliance therewith on their part, rights have become vested. In this case the showing is insufficient, and the application for an injunction must be denied.

BALFOUR et al. v. PARKINSON et al.

(Circuit Court, D. Washington, N. D. January 31, 1898.)

1. VENDOR'S LIEN—PURCHASE-MONEY MORTGAGE.

Where, in a contract for the sale of real estate, the parties agree that the purchaser is to have time for the payment of the whole or any part of the purchase money, and that the vendor shall have a lien upon the property as security for a deferred payment, to be evidenced by a mortgage, and a mortgage is accordingly executed by the purchaser before the conveyance of title has been consummated, the conveyance of the title, and the mortgage evidencing the vendor's lien, are in law one transaction, and the title passes from the vendor to the purchaser cum onere.

2. DEED—ESCROW—PREMATURE DELIVERY TO GRANTEE.

Where a vendor's deed, and the vendee's purchase-money mortgage and the notes secured thereby, are deposited in escrow with a third party, who delivers the deed to the vendee before the happening of the event upon which delivery was conditioned, the vendor may thereupon rely upon the delivery in escrow as a sufficient legal delivery to make the liability of the vendee on his promissory notes absolute, and to render the mortgage effective.

3. MORTGAGE—PRIOR EQUITIES—NOTICE.

One who, at the time of loaning money on mortgage, has notice that the mortgagor has not made full payment for the property, and that the deed conveying the same to him is in escrow, is put upon inquiry, and charged with knowledge of facts which he might have acquired in the exercise of ordinary diligence and prudence.

4. SAME.

Notice of a prior unrecorded mortgage is sufficient to deprive a subsequent mortgagee of priority, even though he has already advanced part of the amount secured by the later mortgage, if, when he acquires notice, he is still in a position to rescind his agreement with the mortgagor, and resume possession of the sum already advanced, without suffering any loss.

5. SAME.

In order to entitle a mortgagor to priority over a prior unrecorded mortgage, he must establish that at the time of the delivery of the mortgage to him the mortgagor had obtained possession of the property.

6. WAIVER.

In order to constitute a waiver of an existing right, the mere actions of a person, in the absence of an express agreement of surrender, must be such as to evince clearly an intention in the mind of the actor to make the surrender.

Harold Preston, for complainants.

Thomas Burke, for defendant Hopkins.

HANFORD, District Judge. This is a suit in equity by Robert Balfour, Robert Brodie Forman, and Alexander Guthrie to foreclose a mortgage executed by the defendants Parkinson and wife, covering certain real estate situated in the business part of the city of Seattle. It is unnecessary to describe with particularity the property mortgaged, but, for convenience of reference, it will be designated as lots 7, 8, 9, and 10. Said mortgage was made to secure a loan of \$60,000, which money was expended by Parkinson in the erection of a building upon lot 7. The defendant Charles Hopkins, by a cross bill, also sets up a mortgage to him covering the same property, given by Parkinson and wife, to secure part of the purchase price for said property, amounting to \$61,502.15. In his pleadings Hopkins claims that his

mortgage is a prior lien upon the whole property, but it is shown by the papers and evidence upon which he relies that he has no just claim to priority as to that part of the property which I have designated as lots 7 and 8. The real controversy in the case is as to which of the two mortgages is entitled to rank as a prior lien upon lots 9 and 10. Hopkins was the owner of the whole property, and by a contract in writing, signed by both Hopkins and Parkinson, it was mutually agreed between them that Hopkins would sell it to Parkinson, and give time for payment of part of the purchase price, and permit Parkinson to give a first mortgage upon lots 7 and 8, for an amount not exceeding \$60,000, to be used in the erection of a building upon the part which was to be so incumbered; and that, in consideration of the unpaid part of the purchase money, Parkinson would give to Hopkins his promissory notes for part of the amount, secured by a first mortgage upon lots 9 and 10; and also give promissory notes for the remaining part of the purchase money, secured by a mortgage upon said lots 9 and 10, and also by a second mortgage on lots 7 and 8. To execute this agreement, Hopkins and wife made a deed conveying the property to Parkinson, and Parkinson and wife made their promissory notes for the unpaid part of the purchase money, to be due and payable as provided in said agreement, and, as security for all of said notes, made one mortgage covering all the property, which mortgage contains a provision that the same shall be a first mortgage upon the property and premises mortgaged, except only as against a first mortgage for \$60,000, which the mortgagors were at liberty to place upon lots 7 and 8, as per said written agreement. Parkinson also executed a bond, with sureties, in favor of Hopkins, whereby he further obligated himself to erect the brick building on lot 7, as provided in the original agreement, and said deed, bond, notes, and mortgage were placed together, in escrow, with the National Bank of Commerce of the city of Seattle, to be retained in the custody of said bank until the sum of \$60,000 should be received by said bank, or placed in its control, for the use of Parkinson in the erection of the building; and when the money should be so received by the bank, or come under its control, for the uses and purposes specified, the bank should deliver said deed to Parkinson upon his demand therefor, and deliver said bond, promissory notes, and mortgage to Hopkins on his demand therefor. While the papers were in escrow, Parkinson, in carrying on negotiations for a loan, represented, to an attorney employed by the complainants to examine his title, that a deed conveying the property from Hopkins and wife to him was in the custody of said bank, to be delivered whenever said bank should receive for his use the sum of \$60,000. Said attorney visited the bank, and repeated to the cashier the representations made by Parkinson, and, upon receiving from the cashier confirmation of Parkinson's statement, requested permission to examine the deed, and, said request being granted, he did inspect and examine said deed. Afterwards, at the request of an agent of the complainants, and upon receiving from said agent a verbal promise that the entire sum of \$60,000 would be paid by the complainants to said bank, in installments, as the same should be required to pay the

cost of construction of said building, and be demanded by said bank, but before any part of said money had been actually paid into said bank, and without notice to Hopkins, the cashier delivered said deed to said attorney for the complainants, who, without making further inquiry as to the authority or right of the cashier to surrender said deed, received the same, and on the same day filed it for record, together with the mortgage to the complainants, which they have sued upon. Five days afterwards the bank received on account of said loan the sum of \$20,000, and the remaining \$40,000 was paid in installments as called for, during the progress of the building. Hopkins did not receive notice from any one and had no knowledge of the delivery of his deed until five or six days after the first payment of \$20,000 on account of said loan had been received by the bank. As soon as apprised of the recording of his deed and the mortgage to the complainants, he upbraided Parkinson and the cashier of the bank for what they had done, and he at once took from the bank the bond, notes, and mortgage, and filed the mortgage for record. Within a few days afterwards Hopkins' attorney, accompanied by the attorney who had transacted the business for the complainants, visited an agent of the complainants at Portland, Or. The evidence does not show clearly the purpose for which they called upon said agent, nor what statements or representations were made to him during the interview. The result is shown in a letter written by said agent, proposing to release from the operation of the complainants' mortgage that part of the property which Parkinson was not authorized by Hopkins to include in a first mortgage, upon certain conditions, to which letter the following response, dictated by Hopkins, was sent:

"Jan'y 10, 1893.

"Messrs. Balfour, Guthrie & Company, Portland, Oregon—Gentlemen: The proposition contained in your communication to me, dated 7 Jan'y, 1893, to release in favor of Captain Hopkins, upon certain contingencies or conditions, a portion of the water front or submerged lands referred to in the mortgage from John Parkinson and wife, has been submitted by me to Captain Hopkins, and, after being duly considered, he thinks it not worth the trouble to give the same further attention at present, and therefore declines the same."

After the building had been completed, Hopkins, in company with Parkinson, called upon the same agent at Portland, and requested a release from the complainants' mortgage of that part of the property to which Hopkins claimed a right to have a prior lien, and his request was refused. Hopkins then demanded from Parkinson additional security, and, in compliance with that demand, Parkinson and wife gave Hopkins a mortgage upon a tract of land in the state of Oregon, which mortgage has been foreclosed, and the land bid in by Hopkins, at a sale thereof, pursuant to the decree. Hopkins' mortgage in suit herein has also been foreclosed in a suit to which the complainants were not made parties, in the superior court of the state of Washington for King county, and the property sold to Hopkins under the decree in that case; and, as the purchaser at said foreclosure sale, he entered into possession of the property, and for a time received the rents and income; and, from the rents and income which he received from the new building, he has made payments to

the complainants on account of the interest accruing upon their mortgage. Hopkins has also received in cash from Parkinson the sum of \$3,500, in reduction of the principal of his debt, besides other payments on account of interest.

It is an important fact in the case that, in his application to the complainants for a loan, Parkinson only offered them as security a mortgage on lots 7 and 8. This is shown by the uncontradicted testimony of Parkinson. He also testifies that he neglected to inform the attorney who prepared the mortgage that only lots 7 and 8 were to be included. The entire property was shown to Mr. McKenzie, agent of the complainants, as the property to be mortgaged, by the broker who negotiated the loan; and, pursuant to special instructions from said agent, the attorney drafted the mortgage so as to include the whole property, and it was executed without any question being suggested as to the right of Parkinson to give the complainants a first mortgage covering the entire property. Neither of the complainants, their agent, or the attorney who examined the title and prepared the mortgage for them, had actual knowledge of the fact that, by the agreement between Hopkins and Parkinson, the former should have a first mortgage on lots 9 and 10, for part of the purchase price of the property; but they did receive information from Parkinson, before the loan was made, that he had not paid Hopkins in full for the property, and they could have obtained full information as to the agreement between Parkinson and his vendor by inquiry of Hopkins, or by examination of the escrow card and the papers deposited in the bank with the deed. There was no concealment or misrepresentation of the facts by any person authorized to speak for Hopkins, unless the cashier of the bank may be charged with suppression of information which he might have given. But he was not Hopkins' agent, except to hold the papers and deliver them according to special instructions contained in the escrow card, and the evidence shows that he answered truthfully the only questions propounded to him, and exhibited to complainants' attorney the only paper in his custody which he was requested to exhibit.

The first position taken by complainants, in the argument in their behalf, is that their mortgage is in law a first mortgage and superior lien upon the whole property, because it was delivered while the Hopkins mortgage was yet in escrow, and was spread upon the public records ahead of Hopkins' mortgage. Against this position it is to be considered that it is a well-recognized and firmly-established principle that where, in a contract for the sale of real estate, the parties agree that the purchaser is to have time for payment of the whole or any part of the purchase money, and that the vendor shall have a lien upon the property as security for a deferred payment, to be evidenced by a mortgage, and in carrying out such agreement a mortgage is executed by the purchaser, before the conveyance of title has been consummated, the conveyance of the title and the mortgage evidencing the vendor's lien are in law one transaction, and the title passes from the vendor to the purchaser cum onere. 1 Jones, Mortg. (3d Ed.) § 466; *Holmes v. Wintler*, 47 Fed. 257. Parkinson could not lawfully incumber the property contrary to his agreement with Hop-

kins, for the reason that his title, from its inception, was subject to the lien which by the agreement was reserved by Hopkins for the unpaid part of the purchase money. In so deciding, I am not laying down a rule contrary to the decision of the supreme court of this state in the case of *Smith v. Allen* (Wash.) 50 Pac. 783, cited in the argument by counsel for the complainants. In that case it was held that what is known as a vendor's lien at common law does not exist in this state, in the absence of an express agreement between the parties. In other words, that where land is conveyed by an absolute deed, and no mortgage is taken, and there is no express agreement that the vendor shall have a lien for the unpaid purchase money, the law does not of itself create a lien. The case is not at all in point as against a mortgage stipulated for in the contract of sale, and executed before the title has been conveyed by the vendor. The right of Hopkins to have immediate delivery of his mortgage became perfect at the instant of the delivery of his deed by the cashier of the bank, and from that moment the bank held the promissory notes and mortgage as agent for him, and not as agent for both parties. Assuming, as we must, that the delivery of the deed to the complainants was authorized by Parkinson, and was therefore a delivery to him, he from that time ceased to have any rights to be protected by a detention of the papers in the custody of the bank; the bank ceased to be the agent of both parties, and held the papers only as agent for Hopkins; the delivery in escrow became and was a sufficient legal delivery to make the liability of Parkinson, on his promissory notes, absolute, and to render the mortgage effective. The recording of Hopkins' mortgage was not essential to its validity, nor could the complainants, by simply filing their deed for record ahead of it, secure any right or advantage as against Hopkins. 1 Jones, Mortg. § 467; *Mann v. Young*, 1 Wash. Ter. 454-463. The equitable right of parties who contract with reference to property, without notice of the existence of an unrecorded mortgage, will be considered later. This part of the case is being considered from a mere legal standpoint, and in that aspect I conclude that, except as to lots 7 and 8, the Hopkins mortgage is entitled to rank as a first and superior lien.

The second position taken by the complainants is that they made the loan and received their mortgage relying upon the deed from Hopkins to Parkinson as meaning what it purported to be upon its face,—that is, an absolute conveyance of the whole property,—and without knowledge on their part of the existence of Hopkins' mortgage, or of the terms of his agreement with Parkinson respecting the security he was to have for the amount due him, and therefore they stand in the position of bona fide purchasers from an apparent owner of the property, and are entitled to a first lien upon the whole. In this position the complainants take upon themselves the burden of averring and proving affirmatively the payment of their money and receiving their mortgage without notice of the existence of the Hopkins mortgage; and, according to the established rules of practice in courts of equity, it is necessary to set forth in their pleading the date, parties, and contents, briefly, of their mortgage, and aver that the mortgagor was seised in fee and in possession; the consideration

must be stated, with a distinct averment that it was bona fide and truly paid; notice must be denied previous to and down to the time of paying the money and the delivery of their mortgage, and the denial must be of all circumstances from which notice can be inferred; and all of these facts must be proven. *Boone v. Chiles*, 10 Pet. 177-256. It is not sufficient to sustain the plea of a bona fide purchaser to prove that he promised or gave a guaranty of payment; only actual payment of the money prior to notice of the existing lien or of an equitable title will entitle him to hold the property adversely to the owner of such lien or equitable title. 2 *Sugd. Vend.* (8th Am. Ed.) 753; 2 *Pom. Eq. Jur.* §§ 750, 751. In this case the complainants' evidence falls short of meeting the requirements. The testimony of the witnesses in their behalf is to the effect that, up to the time of the execution of their mortgage, they had no knowledge or information whatever regarding any of the claims asserted by Hopkins in this suit, but they offer no proof of lack of notice at any time subsequent to the execution of their mortgage, and their testimony proves that the mortgage was executed, delivered, and filed for record at least five days before the first money was deposited in the bank on account of the loan; and it is affirmatively shown by the testimony, and admitted by the agent who transacted the business for the complainants, that they were apprised of the error committed by Parkinson, in mortgaging the whole property to the complainants, within a period of not more than 10 days from the day on which the first installment of the loan was deposited in the bank. At that time they could have rescinded their agreement to make the loan, and could have recovered the money then in the bank, if they had chosen to do so, so that they were then in a position where they could exercise their option to take as security for the loan such a mortgage as Parkinson could lawfully give, or withhold the loan without suffering any loss. The evidence is also insufficient because it fails to show that, at the time of delivering the mortgage to complainants, Parkinson had obtained possession of the property. *Flagg v. Mann*, Fed. Cas. No. 4,847. The evidence is also insufficient because it shows that prior to making the loan the complainants, through their agents, had notice of a positive character that Parkinson had not made full payment for the property, and that the deed conveying the property to him had been delivered in escrow. It is usual for prudent and careful business men, in depositing conveyances of title to real property in escrow, to place with such papers an escrow card, or instructions in writing, specifying clearly the conditions upon which the conveyance may be delivered absolutely to the grantee. Therefore the facts which were known to the complainants before the loan was made were sufficient to put them upon inquiry, and to charge them with knowledge of facts which they might have acquired if they had exerted themselves, to the degree of ordinary diligence and prudence, in making inquiry. Courts of equity do not permit a party to claim any benefit from his own ignorance of facts which he could have learned by exercise of ordinary prudence and diligence. In accepting the statement of Parkinson, confirmed by the cashier of the bank, that the deed was in escrow, and that it would be surren-

dered by the bank when the loan should be secured, as if that were a full disclosure of all the conditions, and in receiving the deed and assuming that a clear title to the property thereby became vested in Parkinson, without making further inquiry as to the manner in which the unpaid part of the purchase money was to be secured to Hopkins, the complainants proceeded at their peril.

In their next position, the complainants claim that Hopkins waived his right to claim a first mortgage upon any part of the property. There is no evidence of an express agreement on the part of Hopkins to waive anything, but it is said that from his conduct the law will imply an agreement to waive. It is said that when Hopkins learned of the delivery of his deed by the bank, and the execution and recording of the mortgage to the complainants, he had an option to repudiate the authority of the bank to deliver his deed, and of Parkinson to mortgage the property, and to restore to Parkinson what he had received pursuant to his contract, and thereby annul the whole transaction, or to retain what he had received, and accept his mortgage for the part of the purchase money remaining unpaid, as a second mortgage, and thereby ratify what had been done; that by receiving from the bank Parkinson's promissory notes, and the mortgage and bond, and placing the mortgage on record, and by employing an attorney to negotiate for the release of the property, except lots 7 and 8, from the operation of the complainants' mortgage, and by retaining the bond by which Parkinson was obligated to expend the money loaned by the complainants in the erection of a building, and by demanding and receiving from Parkinson additional security, and by foreclosing his mortgage without making the complainants parties to the foreclosure suit, and by making payments to the complainants on account of the interest accruing on their mortgage, he has recognized said mortgage as being prior to his, and thereby ratified the acts of the bank in delivering his deed, and of Parkinson in giving to complainants a first mortgage upon the whole property. But the acts recited are not inconsistent with his claim to the rights which he contracted for, and it does not lie in the mouth of his vendee, or others who, at the time of contracting with said vendee, were charged with knowledge of the vendor's rights under his contract, to say that he was bound either to rescind the contract or accept less than all of his rights under the contract. He does not occupy the position of one who, knowing that another is dealing with property in ignorance of his rights, keeps silent while expenditures are being made which would not have been made if he had been prompt in giving notice of his claim. In this case there is no evidence tending to prove that the complainants were misled to their prejudice by any statement, act, or omission on the part of Hopkins, after he obtained knowledge of the execution and recording of their mortgage. A waiver of an existing right, to be effectual, must be made intentionally, and, when there is no express agreement to surrender a right, the mere actions of a person, to have that effect, must be such as to evince clearly an intention in the mind of the actor to make the surrender. *Bennecke v. Insurance Co.*, 105 U. S. 355. I can find no grounds for an inference that Hopkins intended to waive his right to the security which

he contracted for, and provided for in his mortgage, or that he did any act to induce complainants to believe, or that they did believe, that he intended to make any such waiver.

It is my conclusion that all of the positions taken by the complainants are untenable. A decree will be entered foreclosing both mortgages, but protecting the rights of all parties so far as may be done, and to this end directing that, if the property be not redeemed within a period of 30 days, the same shall be sold in two parcels, subject to redemption as provided in the statutes of this state in force at the date of the mortgages. Under present conditions, sufficient may be realized at the sale to pay both mortgages in full; but, if not, the complainants may bid in lots 7 and 8, and Hopkins will have the right to redeem from them after the sale, and Hopkins may bid in the other part, subject to the right of the complainants to redeem from him.

HANCHETT v. HUMPHREYS.

(Circuit Court, D. Nevada. January 29, 1898.)

No. 643.

REPLEVIN—JUDGMENT.

In an action for claim and delivery of personal property, where the complaint demands alternative relief, and there is no finding by the jury that the property itself cannot be returned, a judgment for the plaintiff must, under Gen. St. Nev. §§ 3201, 3224, be entered in the alternative for the possession of the property or its value in case a delivery cannot be had.

Reddy, Campbell & Metson and James F. Dennis, for plaintiff.
M. A. Murphy, for defendant.

HAWLEY, District Judge (orally). This is an action for claim and delivery of personal property, in the nature of replevin. The prayer of the complaint is:

"Wherefore the plaintiff demands judgment against the defendant, first, for the recovery of the said goods and chattels, or for the sum of \$8,000, the value thereof, in case a delivery cannot be had," etc.

The verdict of the jury is as follows:

"We, the jury, in the above-entitled cause, find for the plaintiff; and we further find the value of the property in suit to be \$6,852."

At the close of the trial, the plaintiff was given time to prepare and submit a judgment to be entered herein. The form as prepared by the plaintiff is simply for a money judgment. He is not entitled to such a judgment. It is true that upon the trial one witness testified that he had the custody of a barrel of hams, which he had stored away at his house, and upon cross-examination said that the odor of these hams was not very pleasant, and for that reason he had removed them from the house, and hung them up outdoors. There were no issues submitted to the jury upon the question as to whether or not the property involved, or any part thereof, could be returned. Under the provisions of the statutes of this state (sections 3201, 3224, Gen. St. Nev.), and the decisions of the supreme

court of the state (*Lambert v. McFarland*, 2 Nev. 58; *Carson v. Applegarth*, 6 Nev. 187), the judgment in such actions must be entered in the alternative, for the possession of the property, or its value in case a delivery cannot be had. See, also, *McCue v. Tunstead*, 66 Cal. 486, 6 Pac. 316; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605; *Washburn v. Huntington*, 78 Cal. 573, 577, 21 Pac. 305; *Cooke v. Aguirre*, 86 Cal. 479, 25 Pac. 5; 20 Am. & Eng. Enc. Law, 1113, and authorities there cited. This case, in its facts, is unlike that of *Burke v. Koch*, 75 Cal. 356, 17 Pac. 228, where the court found that the defendant sold and disposed of a large portion of the property sued for, and appropriated the proceeds thereof; and, upon such finding, the court sustained a money judgment for the value of the property. Of course, it is not necessary that the judgment should be in the alternative where the goods and chattels have been previously sold by the judgment debtor. *McCarthy v. Strait* (Colo. App.) 42 Pac. 189. But no such facts are involved in this case. It will be time enough to decide the question, argued by counsel, as to whether or not plaintiff could be compelled to accept a return of the property in lieu of its value if any part of it, however small, had been lost or destroyed, when it is properly presented to the court. Upon the facts of this case, and upon the verdict of the jury, the judgment must be drawn up and entered in the alternative, as required by law.

BUCHANAN v. DENIG et al.

(Circuit Court, W. D. Pennsylvania. February 2, 1898.)

WILLS—CONSTRUCTION—TRUSTS.

Testator devised lands to his son "in special trust and confidence as trustee" of his daughter, with directions to permit her to occupy and enjoy the same for her separate use, free from the debts or control of her husband; the land at her death to descend to the issue of her body; if she left no issue, then to revert to the residuary estate. The trustee was authorized, if fully satisfied of the propriety thereof, to surrender the trust, and assign the same to the beneficiary, but this was never done. *Held*, that the children of the daughter took no interest whatever in the land until her death, and only on condition of surviving her. *Wallace v. Denig*, 25 Atl. 534, 152 Pa. St. 251, and *Wilson v. Denig*, 30 Atl. 1025, 166 Pa. St. 29, followed.

This was an action of ejectment by J. W. Buchanan against C. Denig and others. At the trial a special verdict for plaintiff was returned, subject to the opinion of the court upon a question of law reserved.

Montooth Bros. & Buchanan and J. M. Garrison, for plaintiff.
N. W. Shafer and J. A. Langfitt, for defendants.

ACHESON, Circuit Judge. Both parties claim title to the land in dispute through James S. Wallace, who acquired his title under the will of his grandfather, Barnet Gilleland, deceased. The plaintiff claims under a deed dated July 15, 1875, from the assignee in bankruptcy of James S. Wallace to B. F. Wilson, who, by deed dated July 12, 1895,

conveyed the land to the plaintiff. The defendants claim under a deed to the Woods Run Savings Fund & Loan Association, dated December 29, 1883, from the sheriff of Allegheny county, who sold the land as that of James S. Wallace on a judgment entered June 7, 1881. The question of law reserved, and upon which the case turns, is whether James S. Wallace, at the date of his bankruptcy, March 8, 1873, had an estate or interest under the will of Barnet Gilleland, deceased, in the said land, which passed by operation of law to his assignee. Barnet Gilleland died November 1, 1845, and left a will dated and executed on March 13, 1844. By the sixth paragraph of his will he devised the land in controversy as follows:

"Sixth. To my son William I hereby give and bequeath in special trust and confidence as trustee of my daughter, Lydia Wallace, the second choice (after my son James) of the above three allotments in Wilkins township; that he will permit the said daughter, Lydia, to occupy and enjoy the same for her separate use, not to be under the control or subject to the debts of her husband, but to enjoy all the rents, issues, and profits during her natural life, and at her death to descend to the issue of her body; but, if the said Lydia should die, leaving no issue, then the said estate to revert back, and be a part of my residuary estate,—the same to be in full of my daughter Lydia's part, except the bequest hereinafter made out of my residuary estate."

By the fourteenth paragraph of his will he provided as follows:

"Fourteenth. It is my desire and will that at any time my son William shall think right and proper and prudent, he may surrender any of the foregoing trusts. He may surrender and assign the same to Nancy Guthrie, Lydia Wallace, or Euphemia Marshall, or either or all of said trusts; but it is my wish that he would not do so unless fully satisfied of the propriety of that course."

Lydia Wallace, the beneficiary named in the sixth paragraph of the will, was married to James Wallace in 1842. She had by her said marriage issue two children, namely, James S. Wallace, who was born July 18, 1847, and a daughter, named Margaret, who was born in 1849, and died in infancy, in the year 1851. Lydia Wallace died in May, 1880. James S. Wallace was the only issue which survived his mother. He died in 1887. The power given to the trustee by the fourteenth paragraph of the will of Barnet Gilleland to surrender and assign the trust was never exercised.

The supreme court of Pennsylvania was called on to construe the sixth and fourteenth paragraphs of Barnet Gilleland's will in the case of *Wallace v. Denig*, 152 Pa. St. 251, 25 Atl. 534. That was an action of ejectment, brought by James Wallace, the surviving husband of Lydia Wallace, who therein claimed and sought to recover the undivided one-half of this land for his life, as statutory heir of his deceased infant daughter Margaret. He there contended that an estate in remainder was limited to the issue of Lydia Wallace by the sixth paragraph of the will of Barnet Gilleland, which became vested in James S. Wallace upon his birth, in 1847, subject to open to let in after-born children; that it opened at the birth of his sister, Margaret, in 1849, and took her in, vesting in her the remainder in fee in the undivided one-half of the land, which estate, at her death, in 1851, passed, under the intestate laws, to her father (James Wallace) for his life; and that he became entitled at the death of Lydia Wallace, in 1880, to the possession of the same. The supreme court of Pennsylvania rejected this view, deciding that James

Wallace had no interest in the land as heir of his daughter. The court held that the trust in William Gilleland was something more than a trust to protect a separate use in favor of Lydia Wallace; that the whole legal title was put in the trustee to enable him to carry out the expressed purposes of the testator; that the trustee had the power at any time before the death of Lydia to terminate and execute the entire trust by conveying to Lydia the estate in fee, and thus put an end to the interest of any one else; that the trustee further held the whole title in order to preserve the estate for Lydia, and for such issue as she might leave surviving her, and, in default of issue living at the time of her death, to carry it back to the testator's residuary estate. The court also ruled that from the whole scheme of the will it was apparent that the testator contemplated a definite failure of issue. The will of Barnet Gilleland again came before the supreme court of Pennsylvania in the case of *Wilson v. Denig*, 166 Pa. St. 29, 30 Atl. 1025, which was an action of ejectment for this land, brought by B. F. Wilson, the present plaintiff's alienor, against the present defendants. The court there adhered to its conclusions as expressed in its opinion in *Wallace v. Denig*, *supra*, and distinctly held that "during the life of his mother James S. Wallace had no estate whatever in this land, and therefore nothing passed by the sale in bankruptcy which took place during the lifetime of the mother." In each of these two cases, then, the decision of the supreme court of Pennsylvania was that under the will of Barnet Gilleland the children of Lydia Wallace took no estate or interest of any kind in the land in controversy until her death, and upon condition of surviving her.

The soundness of this conclusion is here earnestly controverted, and the plaintiff's learned counsel most ably contends that Barnet Gilleland devised to the issue of his daughter, Lydia, a remainder in fee (either legal or equitable), which was contingent at the death of the testator, but vested at the birth of issue, subject to open and let in other issue as they might subsequently come into being, and subject also to be divested by the death of the issue in the lifetime of Lydia; but that, even if the whole estate in fee, subject to Lydia's equitable life estate only, was in the trustee down to the death of Lydia, still James S. Wallace had at least a contingent interest by way of executory devise, which was subject to alienation and to execution in the lifetime of Lydia. The argument in support of these views is forcible, but not sufficiently so to induce a departure from the rulings of the supreme court of Pennsylvania. It is true that those decisions are not conclusive here. *Gibson v. Lyon*, 115 U. S. 439, 6 Sup. Ct. 129; *Barber v. Railway Co.*, 166 U. S. 83, 17 Sup. Ct. 488. They are entitled, however, to very great respect, and this court should incline to follow them. *Id.*, 69 Fed. 501. Having regard to all the provisions of the will of Barnet Gilleland, I am not prepared to affirm that the construction which the state court has given to it is unreasonable, or violates any settled legal rule. At the date of the will and at the time of the testator's death Lydia Wallace was childless. It seems to be clear enough, then, that when the will took effect the whole legal title to the devised land passed to the trustee. Now, as the ultimate disposition of the property was made to depend upon the two contingen-

cies,—first, of the birth; and, second, of the survivorship of issue,—it certainly is an admissible view that the estate which originally vested in the trustee was to remain in him in its entirety (unless he exercised his discretionary power to convey to Lydia) until the person who in the end should take was ascertained by the death of Lydia. I feel quite justified, then, in following the supreme court of Pennsylvania in holding that James S. Wallace took no estate whatever in this land until the death of his mother, in 1880, and hence that no interest therein passed to his assignee in bankruptcy. It results, therefore, that judgment must be entered in favor of the defendants non obstante veredicto.

LEHIGH VALLEY COAL CO. v. WARREK.

(Circuit Court of Appeals, Second Circuit. January 25, 1898.)

No. 29.

1. MASTER AND SERVANT—FURNISHING SAFE TOOLS—FELLOW SERVANTS.

When a servant has informed his foreman and superintendent that his tools are unsafe, it is their duty to furnish reasonably safe tools, and in so doing they are not his fellow servants, but the master's representatives.

2. SAME—ASSUMPTION OF RISKS.

When a servant has called attention to the unsafe condition of his tools, and been promised that safer ones will be promptly furnished, he is not, as matter of law, negligent for continuing to use the old ones.

3. SAME.

A servant engaged in stopping coal cars at a dump by means of blocks, which are ordinarily worn out in about three weeks' use, and who, after expiration of that time, has asked for and been promised new ones, does not assume the risk from using a defective one, where those at hand have become covered with grease and coal dust, so that defects are not easily discoverable, especially in the limited time allowed for choosing while a car is approaching.

This cause comes here on a writ of error to review a judgment of the circuit court, Eastern district of New York, in favor of defendant in error, who was plaintiff below. The action was brought to recover damages for personal injuries sustained by plaintiff while in the employ of defendant (the plaintiff in error) at its coal mines near Wilkesbarre, Pa. It was begun in the supreme court of the state, and removed to the United States circuit court by reason of diversity of citizenship. The jury rendered a verdict in favor of plaintiff for \$2,000. The facts sufficiently appear in the opinion.

C. W. Pierson, for plaintiff in error.

F. W. Catlin, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Plaintiff was assigned to check the speed of certain cars, loaded with coal, running upon a track leading from defendant's mines to a coal dump. The following summary of the evidence is taken from the brief of plaintiff in error:

"There were three appliances in use for stopping the cars. One of these was a lever, which threw a plank, situated between the rails, and hinged at one

end, against the bottom of the axle of the car. The second was a sprag, viz. a stick designed to be thrust from the outside between the spokes of a wheel. The third was a block or wedge-shaped piece of wood, which was put on the rail in front of the wheel. Plaintiff had used, and was familiar with, all three appliances. It was in using the third that he was injured. He had been doing the same work for the company at the same place for five or six months, blocking some 500 cars a day during that period. McKaa, the foreman, who employed plaintiff, testified that he did not instruct him when to use the one or the other of the three appliances, but left that to the judgment of the men. Plaintiff, however, testified that he used sprags in wet weather and blocks when it was dry; that the lever could only be used with slow cars, and McKaa had instructed him to use the block (i. e. rather than the lever) if the car was going fast, and that the car which injured him was going fast. It was not claimed that McKaa, or any one else, pointed out to the men just what blocks or sprags they should use. The men picked out their own blocks or sprags. There was a pile of blocks along the track, and plaintiff was accustomed to select his block himself from the pile. At the time of the accident there were other blocks and sprags at hand. According to plaintiff, there were no new blocks on the pile, but plaintiff's foreman testified that some of them were in good condition, and that a block which had become shaped to the wheel was preferable for use to a new one. No accident had ever been known from the use of these blocks. It is a method for stopping cars originally adopted by the men themselves, and now in general use in the collieries in that region. At first the men made their own blocks, but at this time they were ordinarily whittled out at the carpenter shop, situated about 150 or 200 feet from the breaker. When the men wanted blocks they would sometimes go to the carpenter shop in person to get them, and sometimes would fashion blocks for themselves. The docking boss, whose duties kept him within sight of plaintiff, testified that he had seen plaintiff on at least two occasions fashioning blocks for himself, chopping them out of sprags with a hatchet. This, however, was denied by plaintiff. Plaintiff testified that when he wanted new blocks he would notify McKaa, the foreman, and he would have them brought; that the carpenter always brought them; that he ordinarily got new blocks every two or three weeks; that he got the last blocks about four weeks before the accident; that on the Friday before the accident (which happened Monday morning) he notified Mr. McKaa that he wanted new blocks; that on Saturday, when Mr. Shoemaker, the outside superintendent, told him to hurry up, he replied, 'I can't, Mr. Shoemaker; I got old blocks, a little cracked and a little chipped off.' On Monday morning he had blocked five cars before he was hurt. When the sixth car was uncoupled by his companion 50 or 60 feet up the grade, and came towards him, he took a block from the pile, and put it on the rail under the wheel. The block split in two pieces, and the wheel came over his hand. The witnesses were not entirely agreed as to the appearance of the block after the accident. According to Peter Philip, a fellow laborer, who testified through an interpreter for plaintiff: 'Block was split on the bottom, about half or three-quarters of an inch. Inside it was white wood and fresh. * * * It was, in the middle, white and fresh; but from the outside, where the crack was, it was split, and kind of rotten. * * * It was black for about half or three-quarters of an inch in from the outside. On the outside it was cracked, and chipped off, and black.' According to Mr. McKaa, the foreman, the split looked like a fresh break, and from appearances had been made by the flange of the wheel. It showed the mark of the flange. The wood was in good condition, not rotten at all. To same effect, see testimony of docking boss, Kropp. The fact that blocks look old and black does not necessarily indicate that the wood is rotten, because they are used where there is a good deal of oil and coal dust, which blacken the outside, and soak into any crack in the wood."

The theory of the plaintiff was that defendant was negligent, because it furnished defective appliances to the plaintiff with which to do his work. Upon this review all contested questions of fact must be resolved in favor of plaintiff, since the jury found for him. In view of the evidence that, whenever plaintiff needed new blocks,

he applied for them to the foreman, whereupon the carpenter brought them; that, so far as plaintiff was informed, there was no stock of new ones from which he could supply himself; that plaintiff, three days before the accident, and again two days before the accident, called the attention both of the foreman and of the outside superintendent to the condition of the blocks, and asked for sound ones, and that to his request both replied "All right," and the foreman expressly promised to "give him new blocks right away."—this case is to be distinguished from those cited on the brief, where the plaintiff had a stock of new appliances at hand from which to help himself. Conceding that there was no duty of regular inspection of the tools in use imposed upon the foreman and superintendent, the defendant trusting to the daily inspection of the men who used the tools for information as to their condition of repair, nevertheless, when such information was given to them, they (the foreman and superintendent), not the plaintiff, were the proper agents to fulfill the master's duty in furnishing reasonably safe tools. Touching the furnishing of such tools, they were not fellow servants with defendant, but were the master's alter ego. So, too, when the servant has called attention to the condition of his tools, and been promised that safer ones will be furnished promptly, he is not, as matter of law, to be held negligent for continuing to use the old ones. "When a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period that would not preclude all reasonable expectation that the promise might be kept." *Hough v. Railway Co.*, 100 U. S. 225. The case made by the proof was one for the jury to pass upon.

In the course of the charge the jury were instructed substantially as follows: That the fault complained of was not the method of working the cars, but that the question was as to the safety of this particular block which was furnished to plaintiff to work with; that it was the duty of defendant to furnish him with reasonably safe things to work with; that the jury was to determine whether the block was a reasonably safe one to put there, and for them to leave there for him to use, or whether there was some defect about the block which made it unfit to use; that, if the jury were satisfied on the evidence that the block was defective,—was not a reasonably safe one for plaintiff to use,—and that defendant knew it, or ought, by reasonable diligence in looking after things, to have known it, and that the defect in the block caused plaintiff's injury,—then they might return a verdict for plaintiff, unless they should find that he was in fault somehow in bringing this upon himself. Further on in the charge the judge instructed the jury as follows:

"If you do not find on the evidence that he was guilty of any negligence himself that contributed to this, and find the block was bad, and the defendant ought to have known it, and that caused the injury, then your verdict should be for the plaintiff. * * * If, as I said before, you can see a defect in this block so it wasn't fit to use, that the defendant must or ought to have known of, and they didn't see it, and that that defect, by its being left there to be used, caused this injury to the plaintiff, then return a verdict for the

plaintiff, unless you see that by his own fault in using the block he brought it on himself."

Defendant excepted to this part of the charge upon the theory that "it excluded the elements of assumption of risk by plaintiff, and his duty to satisfy himself of the safety of the blocks he undertook to use"; that it "lost sight altogether of the real question in the case, viz. whether there were any blocks or appliances accessible to plaintiff which were safe"; that the charge "imposed upon defendant the duty of constant inspection and removal of blocks as they became worn or defective"; that the "duty of selecting such as were best adapted for their purpose and rejecting the worn-out and defective rested with the men themselves"; that defendant's "duty was performed when it furnished new blocks when the men called for them"; that all plaintiff had to do when he wanted fresh ones "was to get them, or ask that they be sent." As to imposing any burden of inspection and removal, the objection is unsound, in view of the testimony that plaintiff had reported that the blocks he was using were old, cracked, and a little chipped off, and had been promised new blocks "right away." The jury were warranted in finding that plaintiff did "all he had to do" when he asked that fresh blocks be sent, and that defendant failed to perform its duty in neglecting to furnish new blocks after they had been twice asked for. The argument assumes that the plaintiff had a pile of tools to choose from, some visibly sound, others visibly unsound; and that he is responsible for the selection he made. The evidence does not warrant any such assumption. Soiled and blackened with use, whatever cracks there might be filled with grease and coal dust, the entire outfit of blocks was in a condition which would make it difficult, if not impossible, to distinguish the sound from the unsound. A block with a deep crack might still be tough enough to stand service for a week or two more, while another with a slight one might break asunder under the wheels of the very next car. The outfit of blocks from which plaintiff had to select, their imperfections to some extent thus disguised, had, according to his testimony, been in use four weeks. Ordinarily, he got new blocks every two or three weeks,—from six to ten of them at a time. He had been working there five or six months, blocking some 500 cars a day. Assuming, as defendant contends, that there was no regular time for furnishing new blocks, defendant waiting for the men's request, and they being, in fact, the inspectors of the tools they used, it does not appear that defendant ever disputed the proposition which plaintiff's past requests implied, viz. that after two or three weeks of use the blocks would get in such a condition of disrepair that new ones were necessary. It certainly is not to be assumed that the company furnished new blocks every two or three weeks, although the old ones were still in perfectly sound condition. The evidence warranted a finding that the character of the work called for an outfit of several blocks, scattered along the track, to be seized and used as occasion required. In this respect the case differs from those where a brakeman is furnished with his individual coupling hook, which he has constant opportunity to inspect. The testimony

further warrants the finding that from two to three weeks was the expected life of a block; that at the end of that time some of them might be able to do service for a considerably longer time, but others were in such condition that they were liable to break in the hand of the user; and that they were so coated and discolored with grease and coal dust as to make it extremely difficult to determine which were sound and which unsound, so that the user, compelled by the nature of his employment to choose quickly, or perhaps pick up the one nearest at hand, without opportunity of choice, was exposed to the risk of using an unsafe appliance. Under these circumstances the exception to the charge was unsound.

Defendant contends that the court erred in refusing certain of defendant's requests to charge. As no argument is presented in support of this contention, it may be briefly disposed of. The requests set out on the brief are:

Second request: "If plaintiff was supplied with a number of tools from which he was free to choose, and if he selected one that he knew, or with reasonable care might have known, to be worn out, he was guilty of negligence, and cannot recover."

The court had sufficiently covered this point by instructing the jury that they were to inquire whether the plaintiff was imprudent in doing what he did in taking this block and using it,—whether he "was in fault, under all the circumstances, of what he had to do with, and what he was expected to do, was he in fault in taking this block and using it"? And, further, that he could not recover if "his carelessness in taking this and using it under all the circumstances brought it on himself."

"Fifth request: Where a servant enters upon an employment from its nature necessarily hazardous, he assumes the usual risk and perils of the service, and also those risks which are apparent to ordinary observation."

The court had already covered this point more tersely in the statement:

"You see all the dangers of working there he undertook to stand against; but he didn't agree to work with defective tools."

It seems unnecessary to enumerate in detail the remaining requests. The charge sufficiently covered the case, as may be seen by referring to the excerpts already quoted supra.

Defendant also excepted to the admission of evidence that before the accident plaintiff usually got blocks every two or three weeks. This branch of the case has already been discussed supra. The judgment is affirmed.

LEHIGH & H. R. RY. CO. v. MARCHANT.

(Circuit Court of Appeals, Second Circuit. January 25, 1898.)

No. 25.

1. NEGLIGENCE—PERSONAL INJURIES—DAMAGES.

A passenger was thrown from his berth in a sleeping car by a collision between trains, suffering a slight physical injury. Afterwards serious nervous injuries developed, which plaintiff claimed practically ruined his active life. There was some evidence that plaintiff suffered a severe fright,

and a medical expert testified that his present condition might have resulted from the fright. Defendant requested a charge that if plaintiff suffered a fright, but sustained no bodily injury whatever, he was entitled only to nominal damages. The court declined this request, but charged that, if the severe injuries were not the result of the fall and shock, plaintiff could only recover the trifling damages involved in the fall, and the consequent mental suffering, if any. The jury were also charged that, if the fall and shock did not produce the plaintiff's existing condition, and if that condition was due to other causes than the shock and injury which he received from the accident, he was only entitled to trifling damages. *Held*, that the request was, in substance, covered by the charge, and there was no error in refusing it.

2. SAME—EVIDENCE—MEDICAL EXPERTS.

A medical expert, in answer to a question as to what would be the probable future course of the disease with which plaintiff was suffering, said he thought he never would recover, "so far as to be capable of any sort of persistent occupation." *Held*, that the quoted part of the answer was not objectionable, as being a speculative opinion based upon an opinion.

This is a writ of error to review a judgment of the circuit court for the Southern district of New York, in an action at law brought by William E. Marchant, hereinafter called the plaintiff, against the Lehigh & Hudson River Railway Company, to recover damages for personal injuries occasioned by the negligence of the defendant, a railroad company and a common carrier of passengers. The jury returned a verdict in favor of the plaintiff for \$25,000, and judgment was entered upon the verdict.

Austin Fox, for plaintiff in error.

Artemus B. Smith, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Between 3 and 4 o'clock in the morning of September 20, 1893, while the plaintiff was being carried as a passenger on one of the trains of the defendant, and was occupying a berth in a stateroom of one of its sleeping cars, the train came into collision with another train of the defendant, through its negligence. The plaintiff was thrown from his sleeping berth upon the floor of the sleeping car, fell upon his back upon a pair of shoes which lay on the floor, and sustained an injury, "which, according to his testimony, though not specially severe at the time, developed into so grave an injury to the spinal cord that it practically ruined" his active life. No question was made by the defendant upon the trial in regard to its negligence, nor in regard to its liability for some slight and unimportant injury which might have been received from the fall, but the nature, magnitude, and permanence of the ill effects which were claimed to have resulted from the collision were stoutly denied by the defendant, and to this subject the conflicting testimony was directed.

Upon cross-examination the plaintiff was asked, "Now, this accident: Were you badly frightened by it?" to which he replied, "Yes, sir." Upon cross-examination of the defendant's medical expert, who thought that the plaintiff was not suffering from an injury to the spinal cord, but from an injury in the brain, answers were made to cross-questions as follows:

"Q. To what sort of an injury in the brain do you attribute his present condition? A. Some emotional shock, or something of that kind. Q. Are there a variety of emotional shocks that might produce this trouble? A. Yes, sir. Q. Would a sudden fear of sufficient extent produce it? A. Yes, sir. Q. Might any great sudden nervous shock produce it? A. Yes, sir. Q. Might a shock to a passenger in a car, brought suddenly up with a terrific crash and a sudden shock, produce it? A. Yes, sir."

This was the whole testimony about fright or its effects. The defendant asked the court to charge the jury as follows:

"If the jury find as a fact that although the plaintiff suffered a fright, yet sustained no bodily injury whatever, then the plaintiff is entitled to no more than nominal damages."

The court declined to give this request, to which refusal exception was duly taken. By this request the court was asked to charge that the plaintiff could not recover substantial damages, whatever his condition at the trial, if, as a matter of fact, he sustained no bodily injury at the time of the collision, although he suffered a fright. The court declined to give this request, to which refusal exception was duly taken. An examination of the record shows that in the testimony and by the charge the case was made to turn upon the fact and the consequences of bodily injuries received at the time of the collision. These injuries were admitted to have been apparently slight at the time of the collision, but it was claimed by the plaintiff that grave consequences ensued from them. The defendant urged that the extent of the injuries was exaggerated, or possibly simulated, or that they must have been produced by other causes than the slight apparent injuries at the time of the accident. The court charged:

"If, upon the whole testimony, there is not a fair preponderance of evidence, sufficient to satisfy you that the injuries of which he complains were the result of the fall and shock which he received when thrown from his berth, then he is only entitled to recover, as I said before, for the trifling damages which are involved in the fall, and the pain and mental suffering, if there was any, consequent upon the fall."

The jury were also told that if the fall and the shock did not produce the plaintiff's existing condition, and if that condition was due to other causes than the shock and the injury which he received from the accident, then he was only entitled to recover comparatively trifling damages. The jury were thus informed that the suit was brought to recover damages for serious physical consequences which were claimed to have resulted from the injuries to the bodily, and not to the mental, system, which were received at the time of the collision, and, if the serious consequences did not result from these bodily injuries, the plaintiff's case had no importance.

But the defendant urges that by the request it was intended to press upon the attention of the court the principle which has been enunciated in some recent decisions, that, although physical ills resulted from the fright, a plaintiff cannot recover damages for such physical ills so resulting from fright caused by a negligent act, if no bodily injury was received at the time; and that the attention of the jury was not sharply directed to this point, and that they might have supposed that the plaintiff was entitled to damages resulting from any physical ills which grew out of the collision, whether they were caused by fright alone or by in-

jury to the bodily system. We may assume that the doctrine which is said to have been declared in *Mitchell v. Railway Co.*, 151 N. Y. 107, 45 N. E. 354, *Ewing v. Railway Co.*, 147 Pa. St. 40, 23 Atl. 340, and in other cases, must have been presented to the trial judge, and that there was no misunderstanding as to the intent of the request; but it is also true that he expressly told the jury that, if the fall and the shock did not produce the plaintiff's existing condition, and if that condition was due to other causes than the shock and the injury which the plaintiff received from the accident, then he was only entitled to recover comparatively trifling damages; that is to say, unless there was a direct causal connection between the existing condition and the trifling injuries which immediately followed the fall, there could be no recovery for the serious injuries existing at the time of the trial. We think that the request, as intended to be made, was covered by the charge. We do not intend, as an appellate court, to express an opinion as to the soundness of the doctrine which was sanctioned in the cases cited *supra*. Dr. Charles Phelps, a medical expert, was examined in behalf of the plaintiff, and a part of the examination was as follows:

"Q. From your medical knowledge and experience, and from your examination of the plaintiff's case and his present condition, can you state what, in your opinion, with reasonable certainty, will be the probable course in the future of the disease with which he is now suffering? A. Yes; I think I can form an intelligent opinion. Q. Please state your opinion. A. I think he will never recover, so far as to be capable of any sort of persistent occupation. Whether this disease will progress until it becomes a fatal disorder, within a reasonable length of time, say a few years, or not, I cannot say, and I have no opinion, because its course is variable. Q. As to the fatal termination of it, you have no opinion? A. As to the time of its termination, I could not state an opinion.' The counsel for the defendant thereupon moved to strike out the testimony of Dr. Phelps that, in his opinion, the plaintiff will never recover sufficiently to be able to follow any persistent occupation, insisting that the said testimony was speculative and conjectural, and too remote. The motion was denied, and the defendant's counsel excepted."

The refusal is made one of the subjects of error. It is not denied that the question was proper, but it is urged that the portion of the answer which was objected to was a speculation of the witness as to the possible effect of the probable course of the disease on the plaintiff's ability to "stand any sort of persistent occupation," and was an opinion upon an opinion. We do not so understand the character of the answer. The witness was asked the probable future course of the plaintiff's disease. He replied that he thought that the plaintiff would never recover, but, in order to state his opinion with the proper limitations and to place clearly before them his opinion in regard to the extent of nonrecovery, he added, "so far as to be capable of any sort of persistent occupation." His opinion was, and it was proper that he should make it clear, that the plaintiff would not be confined to his bed, or would not suffer constant or increasing pain, and would not be deprived of all comfort or enjoyment in life, but would be unable to enter into any business which called for persistency or which required a steady pursuit. The naked answer, "I think that he will never recover," would not have clearly put before the jury the expert's opinion in regard to the future extent or character of the disease, and therefore it was proper for him to give his opinion with exactness. The answer

was not liable to the charge of being a second speculative opinion based upon a first opinion. The judgment of the circuit court is affirmed, with costs.

HAYDEN v. CHEMICAL NAT. BANK OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. January 25, 1898.)

No. 48.

1. NATIONAL BANKS—INSOLVENCY—PAYMENTS.

Rev. St. § 5242, declaring void payments made by a national bank after the commission of an act of bankruptcy, or in contemplation thereof, with a view to prevent the lawful application of its assets, means an act of bankruptcy or insolvency in the legal sense of a failure to pay current obligations in the ordinary course, and does not invalidate payments made in the usual course of business before commission of any such act, and not in contemplation thereof, though the bank, if wound up at the time, would in fact be unable to meet all its obligations.

2. SAME—REMITTANCES—WHEN TITLE PASSES.

When a national bank indebted to another bank makes remittances to it by mail in the ordinary course of business, title thereto passes when the letter is placed in the mails; so that, if made in good faith, not after an act of insolvency, or in contemplation thereof, and innocently received by the creditor, the latter may apply them to cancel the indebtedness, though the remitting bank in fact fails before they are received.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by Kent K. Hayden, as receiver of the Capital National Bank of Lincoln, Neb., against the Chemical National Bank of New York, to recover payments alleged to have been made by the former to the latter in contemplation of insolvency. The circuit court, after a hearing on the merits, dismissed the bill (80 Fed. 587), and the complainant has appealed.

Edw. W. Paige, for appellant.

George H. Yeaman, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The Capital National Bank of Lincoln, Neb., at the close of business hours, January 22, 1893, stopped business, and the next morning, before the bank opened, an officer under the comptroller of the currency, because of its insolvency, took control of its affairs, and possession of its assets. Its obligations had considerably exceeded its resources since July, 1891, and false entries to conceal its real financial condition had been made from time to time upon its books. To what extent its directors were aware of these entries, or of its situation, does not appear; but until January 22d, and throughout that day, it met all its obligations, and carried on its business as usual. On the 18th day of January, 1893, it was indebted to the amount of \$84,486 to the Chemical National Bank, with which bank it had kept an account at New York City, upon overdrafts in excess of its deposits and remittances. On that day, at St. Joseph,

Mo., the Schuster-Hax National Bank remitted by mail a draft for \$2,000 to the Chemical Bank for the credit of the Capital Bank. January 19th, at South Omaha, Neb., the Packers' National Bank remitted by mail a draft for \$5,000 to the Chemical Bank for the credit of the Capital Bank, and the Capital Bank itself remitted by mail, at Lincoln, \$815.29 and \$2,935.60, to the Chemical Bank. January 20th the Capital Bank remitted by mail, at Lincoln, \$735, to the Chemical Bank, and at some earlier date or on that day it remitted by mail, at Lincoln, to the Chemical Bank, \$833.64. The \$2,935.60, \$815.29, and \$735 were remittances of checks on New York banks for collection and deposit. These various remittances, as they were received by the Chemical Bank, viz. January 23d and January 24th, were credited on its books to the Capital Bank, and, with credit items received by the Chemical Bank from other sources applicable to the account, reduced the debit balance against the Capital Bank to \$13,317.94.

This action was brought by the receiver of the Capital Bank to recover of the Chemical Bank the remittances thus received by it on and after January 18th. The court below held that the title to the remittances passed to the defendant at the time they were severally mailed to it, and, as they had been transmitted in the usual course of business, before the Capital Bank had committed or contemplated committing any act of insolvency, and were received innocently by the defendant, the defendant was entitled to apply them upon the balance of account owing to it by the Capital Bank.

There is no evidence in the record showing or tending to show that the condition of the Capital Bank had materially changed recently, or that it was in a situation of greater financial stress after January 18th than it was January 1st, or had been previously. So far as appears, its officers expected, down to the time when its doors were closed, that it would go on with its business in the usual way in the future, as it had for the last year. Whether the failure was precipitated by a discovery of the real state of affairs by the bank examiner, or by the directors, and, if so, when the discovery was made, does not appear. There is not the slightest evidence that the defendant was aware of or suspected the real situation. It had at times refused to permit the Capital Bank to increase its overdrafts, but, as late as January 19th and 20th, notwithstanding the state of the accounts, it paid drafts of the Capital Bank.

Treating the remittances as payments, made at the time they were mailed, the case presents the question whether payments made in the ordinary course of business by a national banking association, which is doing business as usual, to a creditor who received them innocently, are void if it turns out that the association at the time had become in such sense insolvent that its debts were greatly in excess of its assets, and its officers knew or should have known the fact, and knew or should have known that probably at no very distant day it would be obliged to suspend. If they are void, creditors of national banks, whether ordinary customers, depositors, or other banks who acquire their drafts, or advance them funds in expectation of remittances, are on a very precarious footing, and cannot safely have any dealings with them.

If such payments are void, it is because of the effect which must be

attributed to section 5242 of the Revised Statutes of the United States. That section declares that all transfers of the securities of a national banking association, and all payments of money "made after the commission of an act of bankruptcy or in contemplation thereof, made with a view of preventing the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be wholly null and void." The section does not invalidate every payment made by a national bank, except of its circulating notes, after it becomes insolvent, or even after its managers become aware of its insolvency. If it had been intended to do so, that intention could have been readily declared in short and plain terms.

Insolvency, in legal definition, does not mean that condition in which a business concern is placed when it finds that upon the settlement and winding up of its affairs it will be unable to pay its debts in full; it means a present inability to pay current obligations as they mature. *Thompson v. Thompson*, 4 Cush. 127; *Vennard v. McConnell*, 11 Allen, 555; *Wager v. Hall*, 16 Wall. 599. An act of insolvency takes place when a business concern or a bank has failed to pay some of its obligations, made an assignment for the benefit of creditors, suspended business, or done any of those things which indicate to creditors that a debtor has become insolvent. A bank or a business concern may be considered to be acting in contemplation of insolvency when, in making some disposition of its assets, it is actuated by its knowledge of its insolvency.

The statute undoubtedly makes a payment void when it is intended on the part of the bank to prefer one creditor to another, or defeat the distribution of its assets in the manner prescribed by law, notwithstanding the creditor receiving it does so with no suspicion of the purpose of the bank in making it. In all the adjudged cases, however, in which this construction has been given to the statute, an act of insolvency preceded or accompanied the transaction, which was set aside. *Bank v. Colby*, 21 Wall. 609; *Case v. Bank*, 2 Woods, 23, Fed. Cas. No. 2,489; *Roberts v. Hill*, 23 Blatchf. 312, 23 Fed. 311; *Bank v. Butler*, 129 U. S. 223, 9 Sup. Ct. 281.

The Capital Bank had not committed an act of insolvency. Assuming that its managers knew that its liabilities greatly exceeded its resources, and that it would presently be unable to meet its obligations, and have to suspend, there is no evidence that the payments in controversy were influenced by that knowledge. A payment to a depositor, or other creditor, in the usual course of the bank's business as a going concern, and not preparatory in any sense to the anticipated insolvency of the bank, is not, we think, within the condemnation of the statute. An act done by a corporation in the ordinary and usual course of business, uninfluenced by the state of its affairs, cannot be said to have been done in contemplation of insolvency. *Dutcher v. Bank*, 59 N. Y. 5. See, also, *Hayes v. Beardsley*, 136 N. Y. 299, 32 N. E. 855; *Stone v. Jenison* (Mich.) 70 N. W. 149. We are therefore of the opinion that the payments were valid if the remittances belonged to the defendant from the time they were in the course of transmission to it by mail.

It is the custom of banks generally in transmitting commercial paper to their correspondents, whether for collection or as credit items, to send them by mail. The remittances here were mailed by senders who intended that they should be the property of the defendant, and be applied by it as credit items upon the account of the Capital Bank. By mailing a letter, the sender abandons his dominion over it, and places it at the disposal of the person to whom it is addressed. His act unequivocally manifests that purpose. The import of the act is the same when the letter contains a remittance. It is placed at the disposal of the person to whom it is sent, and he is at liberty to appropriate the remittance in any way consistent with the understanding of the parties, express, or implied from their business dealings, existing when the letter was mailed. In *Canterberry v. Bank*, 64 N. W. 311, the supreme court of Wisconsin decided that a bank which, at its customer's request, mailed its own draft to another bank, to be used for the customer's credit, could not, by intercepting the draft in the mail upon the discovery of the customer's insolvency, defeat the title of the bank to which it was sent. The court declared that the mailing of the letter inclosing the draft was, in legal effect, a delivery of the draft to the bank to which the letter was addressed. In *Johnson v. Sharp*, 31 Ohio, 611, it was decided that the mailing of an assignment by the assignor named in the instrument to the assignee named therein invested the assignee with title to the property conveyed by the instrument from the time of the deposit in the post office as against subsequent attaching creditors of the assignee. The court said: "By that act the assignor ceased to have control of it, and, having placed it in the mail for the assignee, who, by previous conduct, has consented to accept the trust, the possession of the carrier must be regarded as the possession of the assignee." The same proposition was decided by the supreme court of Pennsylvania in *McKinney v. Rhoads*, 5 Watts, 343, and by the court of appeals of South Carolina in *Dargan v. Richardson*, 1 Cheves, 197; *Kirkham v. Bank*, 2 Cold. 397. See, also, *Mitchell v. Byrne*, 6 Rich. Law, 171; 1 Daniel, Neg. Inst. § 67.

The mailing of the remittances to the defendant did not of itself and unconditionally entitle the Capital Bank to be credited with their amount. They were not sent at the request of the defendant, and the circumstances are inconsistent with any understanding that they were sent at its risk. The fact that they became its property when mailed does not necessarily imply that it was to account for their value if they were lost, or if nothing was ever realized from them. If a letter miscarries, is abstracted or destroyed, or from any other cause fails to reach its proper destination, the loss of its contents will fall upon the party who has assumed the risk of its transmission. If, by the course of business, or the arrangement between the two banks, the remittances were not to be credited until they were received by the defendant, the risk of loss in transit rested upon the Capital Bank; and, if it did, it does not prove that the remittances were not the property of the defendant when they were deposited in the mail.

For these reasons we conclude that the decree below was right, and it is therefore affirmed, with costs.

UNITED STATES v. RUSSELL.

(Circuit Court of Appeals, Second Circuit. January 25, 1898.)

No. 28.

CUSTOMS DUTIES—IMPORTATIONS FOR TEMPORARY USE—FAILURE TO RE-EXPORT—RATE OF DUTIES.

Theatrical costumes admitted free, under bond, for temporary use, pursuant to paragraph 596 of the act of 1894, are subject, if not re-exported at the end of the bonded period, to the duties prevailing at the time of importation, though a new law, imposing different rates, has gone into effect in the meantime. 78 Fed. 808, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an appeal by Lillian Russell from a decision of the board of general appraisers affirming the action of the collector as to the rate of duty on certain theatrical costumes admitted free, under bond, for temporary use, and not re-exported. The circuit court reversed the decision of the board (78 Fed. 808), and the United States have appealed.

Henry C. Platt, for the United States.

Albert Comstock, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Lillian Russell imported into the port of New York on October 27, 1894, a large quantity of woollen theatrical costumes, which were duly entered at the custom house, and examined by the appraiser, and were appraised. Paragraph 596 of the tariff act of August 28, 1894, which places in the free list implements of occupation, is as follows:

"Professional books, implements, instruments, and tools of trade, occupation, or employment, in the actual possession at the time of persons arriving in the United States; but this exemption shall not be construed to include * * * nor shall it be construed to include theatrical scenery, properties, and apparel, but such articles brought by proprietors or managers of theatrical exhibitions arriving from abroad for temporary use by them in such exhibitions and not for any other person and not for sale and which have been used by them abroad shall be admitted free of duty under such regulations as the secretary of the treasury may prescribe; but bonds shall be given for the payment to the United States of such duties as may be imposed by law upon any and all such articles as shall not be exported within six months after such importation: provided, that the secretary of the treasury may in his discretion extend such period for a further term of six months in case application shall be made therefor."

On October 29, 1894, the importer gave a bond, with sureties, to the United States, conditioned as follows:

"Now, therefore, the condition of this obligation is such that if the said Lillian Russell shall well and truly observe and comply with the provisions of said paragraph 596, and export the said theatrical effects without the limits of the United States within six months from this date, or, in the event of her failure to export the said effects, pay the proper duties which the collector of customs of New York may assess upon the same, within the time prescribed by law for the collection of duties on imported merchandise, then this obligation to be void; otherwise to remain in full force and virtue."

The articles were delivered to the importer without the exaction of any duty, and thereafter remained in her possession. At the expiration of the first six months after the importation, the goods not having been exported, the secretary of the treasury, upon the application of the importer, extended the period within which the goods could be exported without payment of duties for another six months. At the expiration of the second period, the goods still remaining in this country, the collector demanded payment of the duties which he had liquidated on May 3, 1895. Under the tariff act of 1894, the new duties upon woolen goods did not go into effect until January 1, 1895. The collector liquidated the duties due upon the articles in question at the higher rate of duty which was imposed by the act of 1890 at the date of their importation. The importer protested on November 1, 1895, against this assessment, upon the ground that the goods had not become dutiable until after January 1, 1895, and therefore were dutiable under the new rate in the woolen schedule of the act of 1894. The board of appraisers sustained the collector, upon the ground that the protest was not lodged with the collector until more than 10 days after the liquidation. The circuit court reversed the decision of the board, upon the ground that the merchandise did not become subject to any duty, and that the collector had no authority to make a liquidation until the expiration of the second six months. The theory of the importer is, not only that these theatrical properties were exempt from duty in case they are exported within the six months allowed by the statute, or within the additional term of six months, if such extension shall be allowed by the secretary of the treasury, but that at the expiration of such allowed period or periods the duties must be in accordance with the statute in force at that time, and that, if the duties had been lowered, the importer need pay only at the diminished rates; if they have been increased, the United States must receive the enlarged duty. We do not so understand the intent of paragraph 596. It provided that the implements of one's occupation should be free from duty, but that this exemption should not include theatrical properties, which, however, could be admitted without payment of duty, and none need be paid if the properties should be exported within a specified time. If they remained in the country beyond such time, they must pay the duties which were imposed upon similar goods at the time of the importation. The statute did not intend to provide one rate of duties for the importer who imported his theatrical properties for permanent use, and to impose a possible different rate upon the theatrical proprietor who professes to import his properties for temporary use, but retains them in the country permanently. The paragraph admits free of duty theatrical properties brought in by proprietors of theatrical exhibitions for temporary use, but it imposes a duty upon such properties imported for permanent use, or which, brought in for temporary use, remain here longer than 12 months, and requires a bond for the payment of the duties upon the latter class. The amount of duties is to be liquidated in accordance with the laws which existed at the time of the importation. It follows that, before the expiration of the time prescribed by the statute or allowed by the secretary of the

treasury, the collector had the right both to appraise and to liquidate; that is, to ascertain the value of the goods, and state the amount of the duties which might subsequently be due. The decision of the circuit court is reversed.

SCHIEFFELIN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 25, 1898.)

No. 31.

CUSTOMS DUTIES—CLASSIFICATION—BOOKS FOR GRATUITOUS PRIVATE CIRCULATION.

Books published by an individual for gratuitous private circulation were entitled to free entry, under paragraph 410 of the act of 1894, though such distribution was intended to promote the sale of an article manufactured by the publisher.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an appeal by Schieffelin & Co. from a decision of the board of general appraisers in respect to the assessment of duty on certain books imported by them. The circuit court affirmed the decision of the board, and the importers have appealed.

Stephen G. Clarke, for appellants.

Henry C. Platt, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The question in this case is whether the importations in controversy were exempt from duty, under that provision of the tariff act of August 28, 1894 (paragraph 410), providing that "books * * * and scientific books * * * devoted to original scientific research, and publications of individuals for gratuitous private circulation," should be entitled to free entry.

The importations were books, the publication of an individual, treating of various subjects relating to Norway, its fishermen and fisheries, its customs, to Moller's Cod-Liver Oil, and containing some matter of scientific research original with the author. It was published, not for general circulation or for sale, but for gratuitous distribution to such selected persons, principally physicians and others who might become interested in Moller's Cod-Liver Oil, as should be designated by the publisher or his friends. The publisher doubtless expected by its distribution to promote the sale of his cod-liver oil, by enlightening those who might read it in regard to the valuable properties of that article.

This circumstance, however, is not material. The books were imported for gratuitous private circulation, and, if this was done in the effort to accomplish some ulterior object of interest to the publisher, the statute does not condemn it, or make it in any sense a test of the dutiable character of the books.

We observe that one of the protests upon some of the importations states as the ground for objection to the collector's classification that they are "scientific books, devoted to original scientific research," while the protest upon some of the other importations states as the ground of objection that the books are "the publication of an individual, for gratuitous private circulation." The first of these protests is not well founded. The books were not devoted to original scientific research. It may be that a book is entitled to free entry under the statute if it is one principally devoted to topics of original scientific research, although incidentally it treats other topics; but a book like the importations is not within that catalogue. That was not its primary or principal theme. The board of general appraisers and the circuit court, in their decisions, seem to have considered this protest only, and to have overlooked the other protest. The importations covered by the other protest were entitled to free entry.

The decisions of the circuit court and of the board of general appraisers are accordingly reversed.

PHILADELPHIA CREAMERY SUPPLY CO., Limited, et al. v. DAVIS & RANKIN BLDG. & MFG. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 22, 1898.)

No. 400.

1. PATENTS — LIMITATION OF CLAIMS — CENTRIFUGAL PROCESS FOR CREAMING MILK.

In the process of creaming milk described in the Houston and Thomson patent, No. 239,659 (assigned to Theo. Bergner), the cream is thrown from the spinning vessel by centrifugal force, while the skim milk is removed from the same vessel by the action of a pump. The specification and drawings suggest no way for removing the skim milk otherwise than by the pump. If claims 5, 6, and 7 be valid at all, they must necessarily be limited to the process described in the patent, in which case appellees do not infringe.

2. SAME—ANTICIPATION.

If the eighth claim is to be distinguished from either of the others, and is to cover an intermittent process whereby the skim milk gradually fills the spinning vessel until all the cream is expelled from a given batch of milk, when the spinning of the vessel stops and the skim milk flows out by gravity, then such claim is anticipated in the prior art.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Chas. H. Aldrich & Ephraim Banning, for appellants.

W. E. Simonds, R. S. Taylor, and Peirce & Fisher, for appellees.

George Hoadly and William Houston Kenyon also filed brief in behalf of United States Butter-Extractor Co. and others.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

· SHOWALTER, Circuit Judge. This appeal concerns the validity and infringement of claims 5, 6, 7, and 8 of letters patent of the United States, numbered 239,659, issued April 5, 1881, pursuant to

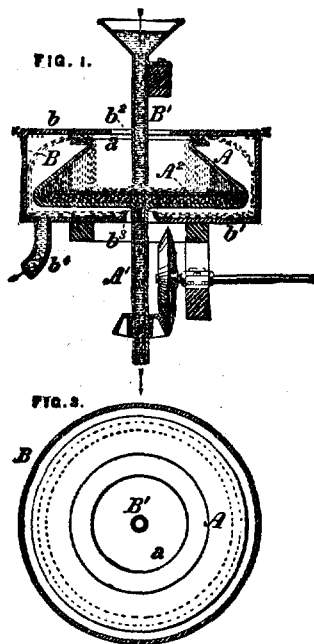
an application filed October 29, 1877, by Edward J. Houston and Elihu Thomson. The "invention relates to machines of the class in which the separation of the lighter and heavier constituents of liquids or semifluids is effected by the action of centrifugal force." The first three of the claims read, respectively:

"(5) The process of creaming milk mechanically, skimming off the cream mechanically, and removing the skimmed milk mechanically, by centrifugal force.

"(6) The process of creaming milk mechanically, skimming off the cream mechanically, and augmenting the volume of the charge, so as to remove both the cream and the skimmed milk separately, by centrifugal force.

"(7) The process of creaming milk mechanically, skimming off the cream mechanically, and supplying fresh milk under a regulated feed, so as to drive off the cream and skimmed milk separately, while maintaining incipient and progressive separations of the supply into accretions of cream and skimmed milk."

Two of the four diagrams of this patent are shown below, the apparatus illustrated by the other two being inoperative. Fig. 1 is a vertical central section; Fig. 3, a horizontal section, through the line x x, of Fig. 1.



The specification contains the following matter:

"To carry out our invention, we provide a separating vessel, A, which is swelled outward towards its base, in form substantially of either a frustum of a cone or segment of a sphere; and it is secured firmly upon a tubular vertical axis or shaft, A¹, to which rapid rotation is imparted by gearing or belts in the ordinary manner. The periphery or body of the vessel, A, is solid or imperforate throughout; and the vessel is provided with a central opening or mouth, a, at top, and a central opening in its bottom, corresponding in di-

ameter with the bore of the shaft, A¹. A horizontal deflecting plate, A², is secured within the vessel, A, a short distance above its bottom, the diameter of said plate being such that the whole width of the annular space between its periphery and the body of the vessel may be about equal to the distance between the plate and the bottom of the vessel. A tight cylindrical case, B, concentrically incloses the separating vessel, A, said case being closed at its ends by a cap, b, and bottom plate, b¹, respectively, and being either secured to a fixed support or rotating with the vessel, as may be preferred. In the instance of a fixed case, as shown in Figs. 1 and 3, a central opening, b², is formed in the cap, b, the diameter of which opening must be less than that of the mouth, a, of the separating vessel, so as to prevent the escape of liquid; and a smaller central opening, surrounded by an upturned flange or rim, b³, is formed in the bottom plate, b¹, for the free passage of the shaft, A¹. A discharge tube, b⁴, is connected to any convenient portion of the bottom plate, b¹, and serves to lead off the lighter separated ingredients. The liquid to be treated is fed to the separating vessel through a central supply tube, B¹, passing through the opening, b², in the cap, b, of the case and through the mouth, a, of the separating vessel, and terminating a short distance above the deflecting plate, A². * * * In the operation of our improvements, the liquid to be treated is fed to the separating vessel, A, in a continuous stream, graduated in quantity, as required, through the supply tube, B¹, and is received upon the deflecting plate, A², the interposition of which prevents its passage directly to the opening of the lower tubular shaft. Under the influence of the centrifugal force developed by the rapid rotation of the vessel, A, the denser ingredients or constituents of the supplied liquid accumulate at and towards the greatest diameter of the vessel, A, as shown by the heavy dots in the drawings; while the lighter ingredients or constituents, arranging themselves nearer the axis of rotation, as shown by the light dots, are discharged around the mouth, a, of the vessel into the case, B, from which they are withdrawn into a suitable receptacle through the discharge tube, b⁴. * * * The denser ingredients or constituents pass under the deflecting plate, A², into the tubular shaft, A¹, from which they are removed from time to time, as required, by a pump. We thus provide a separator having a single source of supply and two distinct discharges, and susceptible of continuous operation, without interference of the supplied liquid with the separated products. * * * It will be obvious that, in the operation of our invention, stoppages of the apparatus for the insertion and removal of material, as in ordinary centrifugal machines, are unnecessary, and the operation of separation may be continuously carried on until any desired quantity of liquid has been treated. Our improvements * * * are particularly adaptable to cases in which, from the nature of the materials dealt with, centrifugal machines of the ordinary type cannot be employed; for example, in the separation of two mingled liquids of different densities, one from the other, as in creaming milk."

Assuming that milk is fed into such a machine as is shown in Fig. 1, to be separated into cream and skim milk, then if the vertical line of division downward from the letter A, between the spaces marked, respectively, by shaded and lighter dotted lines, be extended through the plate, A², to the base of the spinning vessel, A, the space in the spinning vessel to the right of such vertical line will indicate the section of the zone of skim milk, while the space in lighter lines to the left of said vertical line will show the section of the zone of cream pouring out at the top over the edge of the spinning vessel, and resting at the bottom on plate, A². It is possible, on the one hand, that the pressure of the cream zone against the skim milk might force the latter underneath the plate, A², beyond the line here indicated; but, on the other hand, this tendency would be counteracted by the greater density of that portion of the skim milk which passes below the plate, A², as compared with that portion

which remains above said plate. These considerations, however, do not affect the case. The pump, it will be noticed, must be continuously used to detach the skim milk under the plate, A^2 , from the zone where the centrifugal force holds it while the cream is thrown over the upper edge of the spinning vessel. If such means of removal be not used, the skim milk will mingle again with the cream, and a volume of the mingled fluid equal to the quantity of milk coming into the vessel will be ejected over the mouth, a , of the spinning vessel. In other words, the continuous use of the pump to get the proper percentage of the skim milk out of the vessel is necessary or functional in continuously separating the cream, and causing it to be thrown out at the apex, a , of the vessel, A . While the pump is in operation, the cream is separated from the milk by centrifugal force, and thrown from the containing vessel by centrifugal force. The skim milk, however, is not removed from the vessel by centrifugal force, but by the external air pressure from above, when the air has been withdrawn from the space under the plate, A^2 ; that is to say, by the pump.

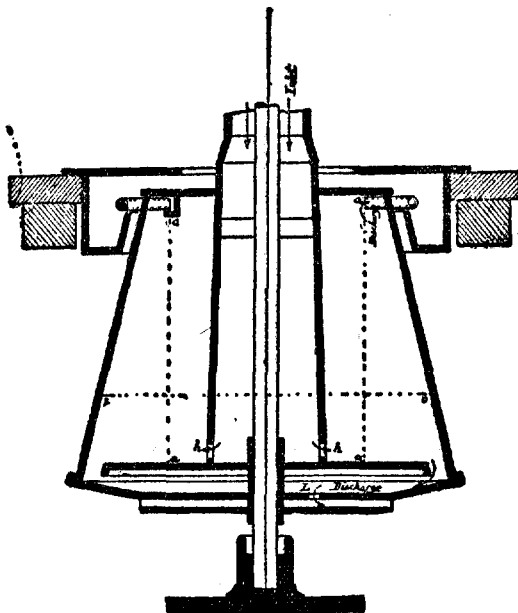
If the inclosing cylinder, B , of Fig. 1, had been attached to shaft, A^1 , so that it also would spin with the vessel, A , and if the opening between the upper edge of the mouth, a , and the plate, b , had been hooded and so adjusted in size as to let out by the centrifugal force only the skim milk, the cream might have been ejected also by centrifugal force through the opening, b^2 , and over the interior edge of the plate, b , into some compartment prepared to receive it. Or, if the hollow shaft, A^1 , had been enlarged into a cylinder whose interior diameter extended slightly beyond the vertical line above herein mentioned as separating a section of the skim milk zone from the cream zone, then, possibly, the skim milk zone might have been kept uniform in volume by the expulsion of the increment of skim milk over the edge of said cylinder. Or, again, if a circular opening of proper dimensions concentric with the shaft, A^1 , had been made in the bottom of the vessel, A , underneath the plate, A^2 , and coincident with the line of division between the cream zone and the skim milk zone, and the exterior vessel, B , had been made with a suitable compartment connecting with said circular opening, the skim milk might have been ejected by centrifugal force out of the vessel, A , into such compartment while the cream was also being ejected at the apex, a . In any one of these supposed cases the cream would have been separated from the skim milk by centrifugal force, the cream would have been removed by centrifugal force, the skim milk would have been removed by centrifugal force, and the process would have been continuous under a regulated feed of full milk.

While the application for the patent in suit was pending in the patent office, a subsequent application for another patent showed a separator which acted on the principles outlined in the last paragraph above. The invention of this second application need not be here described further than that the spinning vessel contained openings properly placed with reference to the two zones, and properly sized and hooded to keep separate the cream from the skim milk,

the overflow of the one liquid being ejected at the one opening, and that of the other at the other, the apparatus while in operation having a continuous and regulated feed of full milk. To this second application were appended the claims marked 5, 6, and 7, above herein quoted. On the suggestion of the patent office, said claims were also appended to the patent in suit; and afterwards, upon interference proceedings, they were awarded to Houston and Thomson, as being covered by the invention of the patent in suit which was prior in time. With this action of the patent office we are not in accord. The skim milk could not be removed from the Houston and Thomson vessel, A, by centrifugal force. Their specification does not show even by implication or suggestion any possible modification of the vessel, A, whereby this could have been done. The pump is necessary to the continuous separation as planned by them. Their process may have been valid and patentable, but it was not the process of the patent from which the three claims were taken, and which is now used by these appellees. If we put upon the claims a construction which will make them applicable to the process shown by the patent in suit, then appellees do not infringe. Appellants can have no monopoly of the art in general of separating the cream and skim milk from a continuously increasing batch of full milk. Their monopoly is limited by the process to which the milk was to be subjected, as disclosed in their patent.

The ninth claim of the patent in suit, which claim is not here in controversy, reads as follows: "The process of creaming milk by centrifugal force, and feeding in skimmed milk, new milk, or milk and water, to drive off the cream." The eighth claim of the patent, which is in controversy here, reads as follows: "The process of creaming milk and skimming off the cream by the action of centrifugal force." These two claims were also taken from another contemporaneous application, which disclosed a spinning bowl wherein, after a given batch of milk had been separated into cream and skim milk, the feed was changed to skim milk or water until all the cream had been ejected over the upper rim, when the machine stopped. Now, if the words of the eighth claim can be made to identify this intermittent process as distinguished from the continuous process proposed in the specification of the patent in suit, or from the continuous process as previously outlined in this opinion, then, as we understand the record, appellees do not infringe. They do not practice the intermittent process. Moreover, the intermittent process was in the prior art, not as specifically applicable to milk, but to any mixture of two liquids of different densities. If the pump be not used, then the heavier component of any liquid mixture fed into the vessel, A, will separate itself from the lighter, and, if the feed be kept up, the lighter will eventually all be thrown out at the top. If the spinning of the vessel, A, be then stopped, the denser liquid will flow out by gravity through the hollow shaft, A¹. But this process is not proposed or suggested in the specification. It is found quite as distinctly in the prior art as in the patent in suit. Neither Gellé nor Cadiat names the creaming of milk as a separation to be attained by his apparatus. Each had specifically in view

the clarification of a liquid by separating a portion made denser by impurities from a remainder which is clarified. But the process in the case of each was the separation by centrifugal force of a denser from a lighter liquid. A form of centrifugal separator as proposed by Cadiat is here shown.



The mixed liquid is fed into the machine through the upper inlet, as marked by the arrows. Passing through the openings *h* under the influence of centrifugal force while the vessel is spinning, the liquid will arrange itself around a hollow cylinder, a vertical central section of which is indicated by the dotted lines *a a, a a*. The lighter liquid will pass out at the two upper openings. After the lighter liquid has all been discharged, the feeding of the machine is stopped, and it gradually ceases spinning, when the heavier liquid runs out at the lower discharge, *L*. The specification of the patent in suit concedes, as in the prior art, machines in which the separation of the lighter and heavier constituents of liquids or semifluids is effected by the action of centrifugal force. The separation of two liquids of different specific gravities by centrifugal force and the ejection of the lighter from the spinning vessel, was no longer in the realm of invention when Houston and Thomson devised their apparatus. To get the increment of heavier liquid continuously out of the spinning vessel while the operation went on was still a problem. Houston and Thomson did this by air pressure from above, due to the withdrawal, by a pump, of the air underneath the plate, *A*². The inventor whose process has been followed by these appellees cut an opening of suitable dimensions, properly hooded and

located, through the wall of the spinning vessel, and suffered the excess of skim milk to be thrown out by centrifugal force.

If we limit the fifth, sixth, and seventh claims to the process described in the specification of the patent in suit, then these appellees do not infringe. We are unable to give to the eighth claim any meaning which will distinguish it from either of the others, and at the same time from the process of centrifugal separation as practiced in the prior art; that is to say, if the eighth claim is to cover the intermittent process above explained, that process is as clearly apparent in the prior art as in the patent in suit. The decree is affirmed.

TIMONEY v. BUCK.

(Circuit Court of Appeals, Second Circuit. January 7, 1893.)

No. 34.

1. PATENTS—VALIDITY AND CONSTRUCTION—BRICK-MOLD SANDING MACHINE.

The Buck patent, No. 499,206, for improvements in brick-mold sanding machines, was not anticipated by a prior patent to the same inventor, and its first claim discloses patentable novelty. 78 Fed. 487, affirmed.

2. SAME—AGREEMENT TO ASSIGN.

An agreement to assign future patents in consideration of the assignee's paying the expense of taking them out, is abandoned, as to a particular patent subsequently allowed, by his refusal, after investigation, to pay such expenses on the ground that the patent will be worthless; and after a subsequent assignment of the patent to another he is estopped from claiming any interest therein. 78 Fed. 487, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by Frances C. Buck against Frank Timoney for alleged infringement of patent No. 499,206, granted June 13, 1893, to James A. Buck, for improvements in brick-mold sanding machines. The circuit court, after a hearing on the merits, entered a decree for complainant for an injunction and an accounting on the first claim of the patent. See 78 Fed. 487, where a full statement of the facts will be found in the opinion of the circuit court. The defendant has appealed.

Walter E. Ward, for appellant.

Geo. A. Mosher, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We agree with the court below that the patent in suit is not anticipated by the patent to Buck, that the combination of the first claim is not destitute of patentable novelty, and that the claim is infringed by the defendant's machine. These issues are fully discussed in the opinion of Judge Coxe, who decided the case in the circuit court, and it seems unnecessary to add anything to the views expressed by him.

The defense founded upon the equitable title of the Newtons to the patent is without merit. It rests upon an agreement between

them and Buck, inartificially drawn, made between them when several applications were pending in the patent office for patents upon Buck's inventions, including one for the patent in suit. The agreement contained this clause: "All patents owned or that may be obtained in the future to be jointly owned by them [the Newtons] and Buck jointly. Said A. H. Newton Bros. to pay all the expenses of obtaining the same." It is obvious from the subsequent action of the parties that they understood this agreement to mean that the expenses of obtaining the patents should be advanced by the Newtons from time to time as they were needed during the pendency of the applications. When Buck called upon the Newtons to advance the expenses accruing upon the application of the patent in suit, they declined to do so without further investigation into the probable value of the patent. Thereupon they did investigate, and came to the conclusion that the patent would be worthless, and so informed Buck, telling him that they would have nothing to do with obtaining it. Thereafter Buck proceeded alone, and the patent was granted to him. The Newtons paid no part of the expenses, never offered to do so, and, so far as appears, never claimed to have any interest in the patent until the present suit was brought. What took place was, in effect, an abandonment of the agreement so far as it related to the patent in suit. Having led Buck to assume that they did not intend to participate with him, and were content that he should proceed as though alone interested, and Buck having acted in reliance upon that understanding, the Newtons are estopped from claiming any interest in the patent. The decree is affirmed, with costs.

THOMSON-HOUSTON ELECTRIC CO. v. UNION RY. CO.

(Circuit Court, S. D. New York. February 7, 1898.)

1. PATENTS—COMBINATIONS—OPERATIVENESS.

A combination claim will not be held invalid as inoperative merely for want of a device necessary to make it operative automatically, if it be otherwise operative.

2. SAME—DELAY IN FILING DISCLAIMERS.

Delay in filing disclaimers as to claims found invalid by the circuit court of appeals on appeal from an order granting a temporary injunction held excusable on the ground that the patent owner might reasonably decline to finally relinquish the claims until it had opportunity to apply to the supreme court for a review on certiorari, which application would be useless on an appeal from an order.

3. SAME—CONTACT DEVICES FOR ELECTRIC RAILWAYS.

The Van Depoele patent, No. 495,443, for an improvement in traveling contacts for electric railways, covers, in claims 2 and 4, only the combination of the car and conductor, with an under-running trolley capable of swinging freely on a vertical axis, and thus adapted to curves and irregularities in the conductor; and these claims are not invalid, either for inoperativeness or by reason of being previously patented to the same inventor.

This was a suit in equity by the Thomson-Houston Electric Company against the Union Railway Company for alleged infringement of letters patent No. 495,443, granted April 11, 1893, to the administrators of Charles J. Van Depoele, for an improvement in traveling

contacts for electric railways. The cause was heard upon motion for a preliminary injunction under claims 2 and 4 of the patent.

F. H. Betts and F. P. Fish, for the motion.

W. C. Witter and Charles E. Mitchell, opposed.

LACOMBE, Circuit Judge. The circumstance that these two claims were not expressly declared upon in the Winchester Ave. Ry. Co. Case, decided by Judge Townsend (71 Fed. 192), is not controlling. In Westinghouse Air-Brake Co. v. New York Air-Brake Co., 65 Fed. 99, a preliminary injunction was granted by this court on patent No. 360,070, although it had not been previously adjudicated, on the ground that in the earlier litigation it had been "discussed at great length, and its meritoriousness clearly recognized." And that injunction was sustained in the court of appeals. 16 C. C. A. 371, 69 Fed. 715. It is perfectly plain from an examination of the opinion of Judge Townsend and the voluminous record upon which it was based that the very combination covered by claims 2 and 4, viz. the overhead conductor and the trailing arm hinged and pivoted to the car so as to bridge the space between it and the conductor, with a contact device at its upper end, capable of being pressed upwardly into engagement with the conductor, was fully considered by him, and held to be a most meritorious invention, and Van Depoele its inventor. It is thought that the decision of the court of appeals in this circuit in the Hoosick Ry. Co. Case, 82 Fed. 461, has not affected the weight of the Winchester Ave. Ry. Co. decision so far as it deals with the questions of invention and priority. The court of appeals held that claims 6, 7, 8, 12, and 16 of the patent here sued on were invalid, because the particular combination or combinations which those claims covered had been already patented by Van Depoele in his earlier patent No. 424,695; and this was all that it held. The complainant therefore comes into this court with the presumption arising from those judicial conclusions in the Winchester Ave. Ry. Co. Case, which the court of appeals did not disturb.

The two claims now declared on are as follows:

"(2) The combination of a car, an overhead conductor above the car, a contact device, making underneath contact with the conductor, and an arm carried by the car, and carrying the contact device, and pivoted so as to swing freely around a vertical axis."

"(4) The combination of a car, an overhead conductor above the car, a contact device, making underneath contact with the conductor, and an arm on the car, movable on both a vertical and a transverse axis, and carrying the contact device."

In the Hoosick Ry. Co. Case double patenting was found, because each of the claims therein considered contained in some form of words a reference to a "spring" or "weight" or "weighted spring" or "tension spring" or "spring device," one of whose two functions was to centralize the depressed end of the trolley, and the other was to give the upward pressure to the contact end.

The two claims above quoted contain no words which can be tortured into any such reference. Manifestly, they were intended to cover, and do cover, only the combination of the car and conductor,

with an under-running trolley capable of swinging freely on a vertical axis, and thus adapted to curves and irregularities in the conductor. And Judge Townsend held that Van Depoele was the first to make practicable the electrical propulsion of an electric railway by "a long, rigid arm upwardly pressed, and capable of universal movement." The defendant contends that the weighted spring, which is the only means for imparting upward pressure disclosed in the patent, must be read into those claims, for the reason that without it the claims would cover "inoperative and useless" combinations. It seems unnecessary to discuss the authorities cited by complainant in opposition to this contention. *Deering v. Harvester Works*, 155 U. S. 286, 15 Sup. Ct. 118; *Taylor v. Spindle Co.*, 22 C. C. A. 203, 75 Fed. 301; *Holloway v. Dow*, 54 Fed. 511. Although an additional device may have to be added to make the combination operative automatically, it is none the less operative without such addition. A boy seated on the roof of the car could impart the upward pressure, not as economically nor as well as the weighted spring would, but quite sufficiently to insure the operation of the combination expressed in the claim. It must be concluded, then, that claims 2 and 4 do not cover a spring or weight or tension device, and it is conceded that they contain no switching device. In the earlier patent no claim is to be found which does not contain either the spring or weight or the switching device. It would seem, then, that these claims certainly are not obnoxious to the criticism of the court of appeals, and that no "double patenting" is shown; and since the meritoriousness of the invention and Van Depoele's priority was found by Judge Townsend in the *Winchester Ave. Ry. Co. Case*, complainant should be entitled to hold what it has established after long and expensive litigation, unless the case presented here is changed by evidence not before the court in that case. I cannot see that the *Hunter* and *Deligny* patents, which are the only new ones, are any more of an anticipation than were those introduced in the *Winchester Ave. Ry. Co. Case*.

It is further contended that complainant has unreasonably neglected and delayed to enter a disclaimer of claims 6, 7, 8, 12, and 16 of the patent in suit, which were held void by the court of appeals. That decision, however, was rendered upon an appeal from an order, and complainant is naturally averse to finally relinquishing these claims until it may have had an opportunity to apply to the supreme court for a certiorari,—an application which it is useless for it to make, when only a preliminary order is involved. There seems to be good ground for delaying disclaimer.

The argument that by its disclaimer of claim 9 complainant has disclaimed the entire invention of the patent, which is therefore wholly void, is unfortified by authority and unpersuasive.

Infringement cannot be seriously disputed. Defendant's device is practically a duplication of that used by Van Depoele in New Orleans in 1885. Complainant may take order for injunction pendente lite, but, when issued, its operation may be stayed for 30 days, to give defendant an opportunity to review this decision at this term of the court of appeals.

WIRT v. FARRELLY et al.

(Circuit Court, S. D. New York. February 9, 1898.)

1. PATENTS—ANTICIPATION.

A patent cannot, as an anticipation, properly have implied into it, from necessity, more than it fairly shows, to make it represent an operative structure. What is required and not so shown is left for later inventors.

2. SAME—FOUNTAIN PENHOLDERS.

The Stone patent, No. 260,134, for a fountain penholder wherein the ink is drawn to the nibs of the pen by capillary attraction between a feed plate and the pen, held not anticipated, valid, and infringed, as to claims 2 and 4.

This was a suit in equity by Paul E. Wirt against Stephen Farrelly and others for alleged infringement of a patent for a fountain pen.

Walter S. Logan, for plaintiff.

George S. Prindle, for defendants.

WHEELER, District Judge. This suit is brought upon patent No. 260,134, dated June 27, 1882, and granted to Marvin C. Stone, for a fountain penholder wherein the ink is drawn to the nibs of the pen by capillary attraction between a feed plate or plates and the pen. The claims in question are:

"(2) In a fountain pen, the combination of the body wherein a column of ink is sustained mainly by atmospheric pressure, a writing pen of ordinary form at the lower end of said body, one or more feeders with surfaces lying adjacent to the pen, and extending from the ink supply downward to the point of the pen, and an air admission to the lower end of the reservoir, substantially as shown, whereby an automatic and constant feeding of the ink from the reservoir to the point of the pen is secured by capillary action."

"(4) In a fountain pen, the combination of a reservoir wherein the ink is sustained by atmospheric pressure, a writing pen, a feed plate lying adjacent to said pen, with a thin passage between the two for the feed of the ink from the reservoir, and an air admission at the foot of the reservoir, distinct from the passage through which the ink descends to the pen."

The patent was before this court, and sustained as an anticipation, in *Sackett v. Smith*, 42 Fed. 846, and as a foundation of recovery, and was held valid, in *Wirt v. Hicks*, 45 Fed. 256. Several anticipations besides those claimed in the latter case have been set up here, most of them, however, as showing some form of capillary feed, but not "the capillary feed" between a plate and the pen, of which Stone was there found and held to be the first inventor. That nearest to this invention, and the only one seeming to require further notice, is patent No. 16,299, dated December 23, 1856, and granted to A. F. Warren, for a fountain pen, in which the pen itself was to be held between two plates, the upper ends of which went up through a plug with grooved passages at its sides, in the lower end of the ink cylinder, and the lower ends down to the nibs of the pen; and what was done under that patent. If there was to be by the terms of the patent, or was when the pens were made, a passage through the plug between the plates down to and along the pen for the flow of ink, that arrangement would seem to have been a full anticipation of these claims. The specification of the patent says:

"A represents a hollow cylinder which forms the ink fountain or reservoir. This fountain may be constructed of glass or metal, and is made of a suitable length and diameter, so as to form a convenient handle or holder. B represents a tube, which is fitted on the upper part of the cylinder, A, and is allowed to slide freely thereon. This tube has a rod, C, attached to the inner side of its upper end, the rod, C, extending downward within the cylinder, A. The rod, C, passes through a stopper, a, in the upper end of the cylinder, A. To the lower end of the rod, C, two plates, b, c, are attached. These plates pass through a plug, D, which is fitted within the cylinder, A, said plug being grooved longitudinally at its periphery, as shown at d, Fig. 2, to allow the ink to pass through. E represents the pen, which is fitted between the two plates, b, c, the upper end of the pen passing a suitable distance into the plug, D. The plate, b, is at the upper side of the pen, and the plate, c, is at the under side. The two plates serve to support the pen in the plug, D, and also serve as feeders to conduct the ink to the nibs of the pen, the two plates extending down to within a short distance of the nibs. The plug and plates are connected together, and as the pen is fitted between the plates and into the plug, and the plates attached to the rod, C, it will be seen that by drawing the tube, B, upward, the pen will be drawn within the cylinder, A, as shown in Fig. 2. A cap, F, is fitted on the upper end of the tube, B, and this cap, when the pen is drawn within the cylinder, A, is fitted over the lower end of the cylinder, to prevent the ink from escaping therefrom. The cylinder, A, may be filled with ink by drawing the pen within it, and inverting the cylinder, or holding its lower end upward, and pouring the ink into it. The pen may then be shoved outward till the lower end of the plug is flush with the lower end of the cylinder, and the implement is ready for use, as shown in Fig. 1."

The drawings show the plates attached to the rod above the plug, with no other attachment of the rod to the plug; and, as the plug was to be moved by the rod, the plates must be attached firmly to the plug. There could be no passage for ink through the plug but between the plates, and none such is there shown or mentioned; and, if there was one it would be stopped up by the insertion of the pen between the plates firmly enough to be held by them. The grooved passages at the periphery of the plug are both mentioned and shown for the flow of the ink; and, as the plates are described as feeders for conducting the ink to the nibs of the pen, they would have to take it along their edges from the lower side of the plug at the ends of the passages. These passages are suggested, in argument, to have been intended for the flow of ink inward only, to fill the pen; and an operative structure by a passage for ink to the pen, somehow between the plates, is said to have been implied. The passages shown would, however, be as good for the ink either way as for the other; and, not being limited to either, would not imply any, from necessity, for the other. A patent cannot, as an anticipation, properly have implied into it, from necessity, more than it fairly shows, to make it represent an operative structure. What is required, and not so shown, is left for later inventors. *Dashiell v. Grosvenor*, 162 U. S. 425, 16 Sup. Ct. 805; *Universal Winding Co. v. Willimantic Linen Co.*, 82 Fed. 228. This patent does not expressly or by necessary implication seem fairly to show a passage between a plate and a pen for capillary flow of ink to the nibs of the pen, which is the gist of Stone's invention.

Warren appears to have made pens for sale, but not successfully; and none of them have been produced. A witness who assisted him has testified that some of them had a passage for the ink through the plug, and, later, that he did not know whether, when completed, they did or not.

This falls short of proving that they did, and far short of proving beyond a reasonable doubt that they did, as is necessary to defeat a patent.

The patent in suit describes the upper end of the ink reservoir as "closely filled with a mass of sponge or other porous, absorbent material" for preventing accidental discharge of the ink, and assisting "in sustaining the same in the holder," but says: "The column of ink will, however, be sustained in the reservoir, when the latter is held upright, by atmospheric pressure, aided, perhaps, by a slight capillary attraction without the presence of the sponge." Two other claims include the porous material; these do not in express terms, but are said in argument on the question of infringement to do so by implication, which would avoid infringement. As the specification describes the invention both with and without the porous material, it might well be claimed both ways, however it might be otherwise. Upon these considerations, these claims appear again to be valid, and the defendants to infringe. Decree for plaintiff.

FENTON METALLIC MFG. CO. v. CHASE et al.

(Circuit Court, S. D. New York. February 9, 1898.)

PATENTS—BOOKCASES.

The Hoffman patent, No. 450,124, for improvements in skeleton-frame, roller-shelf bookcases, with hand holes or re-entrant recesses, to facilitate lifting the books from the shelves, is void for want of invention. 73 Fed. 831, affirmed.

This was a suit in equity by the Fenton Metallic Manufacturing Company against Samuel W. Chase, the St. Louis Art Metal Company, and others, for alleged infringement of a patent for an improvement in bookcases. The patent was heretofore held invalid on defendants' motion to vacate a default order for a preliminary injunction. 73 Fed. 831. The cause is now on final hearing.

Edwin H. Brown, for plaintiff.

Paul Bakewell, for defendant.

WHEELER, District Judge. This suit is brought upon two claims of patent No. 450,124, dated April 7, 1891, and granted to Horace J. Hoffman, assignor, to the plaintiff, for storage cases for heavy books, placed horizontally. They are for:

(1) In a storage-case for books, etc., the combination of a supporting rack or shelf composed of metallic strips, and having a re-entrant bend or recess in its front edge, and rollers journaled in said rack, and projecting above and in front of the same on each side of said bend or recess, substantially as described.

(2) In a bookshelf, the combination of a supporting frame, a series of horizontal rollers, the front roller in two separated sections, the intermediate part of the frame being carried back to permit the admission of the hand between said roller sections, substantially as described.

This case was before this court, held by Judge Lacombe, on a motion to dissolve an injunction, and the patent was then much consid-

ered. 73 Fed. 831. Not much more has been made to appear now, and little more seems necessary to be said. The hand recess was well known before Hoffman's supposed invention, and its use is the same in one form as in another of such a bookcase. Rollers were known for relieving the books and their supports from friction; and so were rollers at each side of room for handling the books. Rollers at each side of the hand recess in front of and above the frame may be new in that exact position; but they operate there as such rollers had done before, and no differently because of any relation to the hand recess formed of the frame. There does not seem to be any new working combination in either of these claims. Bill dismissed.

LEITER v. RONALDS.

(Circuit Court, S. D. New York. February 5, 1898.)

SHIPPING—CHARTER OF YACHT—OPTION TO EXTEND—CONSIDERATION.

Under a charter of a steam yacht for two months, at a fixed sum paid, fully equipped for a voyage to Galveston, with an option to the hirer of extending the charter at pro rata rates by giving 15 days' notice, the original consideration, together with the promise to pay pro rata rates, is a sufficient consideration for an extension thereof by exercising the option; so that if, through lack of equipment and unseaworthiness at the beginning of the original voyage, the yacht breaks down during the extended period, to the charterer's injury, he may recover therefor.

This was an action at law by Joseph Leiter against George L. Ronalds to recover damages alleged to have resulted from the breach by defendant of his obligations under a charter of a steam yacht.

Robert H. Griffin, for plaintiff.

Elijah G. Boardman, for defendant.

WHEELER, District Judge. This cause has now been heard on demurrer to the complaint, which alleges that the plaintiff, by charter, hired the defendant's steam yacht for two months from January 9, 1896, at \$3,000 paid, fully equipped for a voyage to Galveston, insured to cover the term of the charter, or any extension thereof, with an option to the hirer of extending the charter, at pro rata rates, by giving fifteen days' notice prior to the expiration of the two months; that notice was so given, extending the charter to include, upon the same terms and warranty, the port of Tampico; that the yacht was not tight, staunch, and strong, and fitted for such service, but that the propeller shafts and hangers were inadequate, and the deck and hull sprung, whereby, while the plaintiff was proceeding with it southerly to the port of Tampico, a propeller shaft broke, and with the propeller fell into the sea, causing leakage, and \$5,441.97 expenses and damages to the plaintiff, not covered by adequate insurance. The defendant's counsel argues in support of the demurrer that the express guaranties only covered the safe voyage to Galveston and return, and would be without consideration for any voyage beyond, where the loss occurred, if so agreed to. But the price paid for the original voyage, and the

agreement to pay that for the extension, were a sufficient consideration for the whole of both; and as the breach accrued at the beginning of the original voyage, and the damage in the extended voyage, they would support the agreement as covering the damage. And the owner of a vessel, chartering her, "is bound to see that she is seaworthy, and suitable for the service in which she is to be employed. If there be defects, known or not known, he is not excused. He is obliged to keep her in proper repair, unless prevented by perils of the sea, or unavoidable accident. Such is the implied contract where the contrary does not appear." *Work v. Leathers*, 97 U. S. 379. The extension of the charter to include the port of Tampico would, even if by parol, and separate, seem to include this obligation, which would cover these damages, accruing, as alleged, without fault of the plaintiff or the officers or crew of the yacht, and "owing entirely to its inherent and structural defects, and unfitness for the services required of it, unseaworthiness, and lack of proper equipment." Some considerations urged in behalf of the defendant, as to how the contract of extension would be understood by the parties, might be material on trial, but cannot be here, where the allegations of the complaint have to be taken as admitted to be true. Upon the facts so here admitted, the complaint appears to set forth a good cause of action. The defendant may, however, withdraw the demurrer, and answer over by the next rule day. Demurrer overruled, with leave to defendant to answer over by next rule day.

THE BARNSTABLE.

HALL et al. v. THE BARNSTABLE.

TURRET STEAM SHIPPING CO., Limited, v. BOSTON FRUIT CO.

(District Court, D. Massachusetts. January 25, 1898.)

No. 760.

1. SHIPPING—CHARTER PARTIES—RISK OF COLLISION—LIENS.

In the absence of more definite provisions, a declaration in the charter party that the owner "shall pay for the insurance on the vessel" casts on him, as between owner and charterers, the risk of a collision lien becoming attached to her through her negligent navigation, though her master, officers, and crew are appointed by the charterers, and they are vested with complete possession, so that her navigation is their business.

2. SAME—PUBLIC POLICY.

Public policy does not forbid the owner from contracting with the charterer to be liable for damages to other vessels caused by negligent navigation of the chartered ship, while in charge of a master and crew appointed and controlled by the charterer.

3. PAROL EVIDENCE—CHARTER PARTY.

Parol evidence by an experienced broker, who negotiated a charter containing a provision that the owner should "pay all insurance on the vessel," that he told the owner he was liable for insurance of all kinds, including insurance against collisions, unless he wanted to take the risk and not insure, is admissible to explain the intentions of the parties.

This was a libel in rem by A. G. Hall and others against the steamship Barnstable to recover damages resulting from a collision. The

Turret Steam Shipping Company, Limited, claimant and owner of the Barnstable, filed a petition against the Boston Fruit Company, her charterer, to enforce an alleged ultimate liability of the latter, on the ground that it was responsible for the ship's navigation.

Carver & Blodgett, for libelants.

Convers & Kirlin, for the Barnstable.

Russell & Russell, for Boston Fruit Co.

BROWN, District Judge. In the controversy between the owner and charterer it is assumed that the Barnstable is liable in rem for a total loss of the fishing schooner Fortuna in a collision caused by the fault of those in charge of the navigation of the Barnstable. It is agreed that the master, officers, engineers, firemen, and crew of the steamer had been appointed by the charterer, and were paid by the charterer pursuant to the charter party. It is also agreed that "the collision was caused by the negligence of master, mates, or crew at the time in charge of the navigation of the steamship." The result sought by the owner is thus stated upon the brief supporting the petition upon which the charterer has been cited in by the owner:

"A decree should be entered for the libelants against the Barnstable and the Boston Fruit Company [the charterer] for the damages sustained; but the decree should provide that the damages be collected in the first instance from the charterer, and that only the amount not so collectible be paid by the ship; and the decree should further provide for a recovery over against the charterer, in favor of the shipowner, of any amount it may have to pay; and the shipowner should recover costs."

Without dwelling upon the grounds for doubting the right of the owner, who has appeared as claimant in a proceeding in rem, to proceed by petition against the charterer in this, a cause of collision, and merely recording a doubt of the propriety of the practice, in view of admiralty rule 15, and of the express limitation of rule 59, we will examine only those questions that have been argued.

I am of the opinion that the owner has satisfactorily sustained its contention that the charter party vested the possession, command, and control of the vessel in the Boston Fruit Company and its servants, and that the navigation of the vessel was the charterer's business. The main question, therefore, is, were the relations between the owner and the charterer such as to impose upon the charterer the obligation to indemnify the owner, in case the vessel, as the instrument of damage, should be subjected to a lien through the negligence of those appointed by the charterer to manage her navigation? The owner contends that this right to indemnity rests upon the general principles of the law of bailments. The case of *Bouker v. Smith*, 40 Fed. 839, and *Id.*, 1 C. C. A. 481, 49 Fed. 954, is cited in support of the proposition that a charterer of a hired ship must pay for its loss through his fault. This rule, it is argued, must also require the charterer to pay for its damage received by collision, and if the collision, instead of injuring the hired vessel, gives rise to a lien upon her for damage to another vessel, the charterer must logically be bound to discharge the lien; that the rule requiring the return of the vessel undamaged must

also require its return without impairment to or lien upon the title. *The Alert*, 40 Fed. 836; *The Centurion*, 57 Fed. 412.

The charterer denies its liability to indemnify the owner, contending that the general principles of the law of bailments are inapplicable, since by the charter party the owner and charterer have entered into special contractual relations, which preclude the owner from calling upon the charterer for indemnity for risks, and which cast the loss ultimately upon the owner. No case has been cited as a precedent, and the lack of legal precedents, considered in connection with the testimony of witnesses of long experience that a claim like the present, by an owner against a charterer, is unknown in the shipping business, raises an inquiry whether the hazards to which vessels are exposed, and the peculiar law that renders the vessel liable, regardless of ownership or control, have not led owners and charterers to a different usage from that prevailing in the hiring of chattels not by their nature exposed to special hazards, and not the subject of liens imposed by the hirer and valid against the owner. If the rules in ordinary bailments have been considered by owners and charterers practical rules applicable to their business, it is remarkable that no instance can be cited in which they have been practically applied. The parties are presumed to contract with reference to existing rules of law and known usages, and, in my opinion, we are required, in order to arrive at a proper construction of the charter party, to give weight to those elements that do not exist in ordinary bailments.

In the case of *French Republic v. World's Columbian Exposition*, 83 Fed. 109, it was said:

"The rules relating to bailments, such as the varying degrees of care required of bailees for hire, bailees for accommodation of bailor, and bailees for mutual advantage, do not, satisfactorily to one's sense of the fitness of things, exactly point out the law applicable to the case under consideration. The relation is in many respects different in character, and in the just expectations entertained by mankind, from the ordinary private transactions that constitute the usual bailment."

The presumption that a hired chattel will be restored uninjured, and without impairment to the value of the title, forms a part of the understanding of the parties in ordinary bailments. If a like presumption of fact exist in an ordinary case of hiring a vessel, it must be weaker in the degree that the just expectation of loss is stronger. The weaker the presumption of a safe return, the greater the risk that was in the contemplation of the parties at the time of contracting, the stronger the inference that the contract is affected in all its provisions by the risk, and that it provides therefor.

As to the special risk in question, the owner contends that the contract is silent. The charterer contends that the contract speaks expressly. Bearing in mind the importance of the question of risk of loss, and the fact that nowhere does the contract provide in terms that the owner shall be indemnified by the charterer, or relieved from the risk of loss to which merely by the relation of owner he is exposed, and seeking for direct expressions of the intention of the parties as it existed at the time of contracting, we find the stipulation. "(22) *The owner shall pay for the insurance on the vessel.*" Insurance has

been described as "a fixed sum as the price of risk." The parties were contracting with express reference to risks capable of estimate in money. In construing the charter party, we should not be confused by the fact that a large loss has occurred. What is now a loss was at the time of contracting merely a risk,—the risk (as a commercial consideration) a mere money charge. This express assumption by the owner of the cost of indemnity I regard as a most unequivocal expression of an intention to assume, and to relieve the charterer from, all risks that would be covered by "the insurance on the vessel," for which the owner was to pay. Upon the opposite view, an owner who, for a valuable consideration, has agreed to bear the cost of indemnity, may throw that cost upon the charterer, provided the risk existing at the execution of the contract subsequently matures into loss. This is entirely inconsistent with the owner's contention that this clause, commonly employed in charters of various kinds, is used in accordance with a common scheme of dividing the "fixed charges" between the owner and charterer.

If, as argued upon the petitioner's brief, insurance is to be regarded as a fixed charge appertaining to the vessel, according to a general practice to have vessels insured, and there is a general scheme to distribute the fixed charges, the owner assuming some, the charterer others, then it must follow that both should share in all benefits accruing from the payment of the fixed charges upon the vessel. Counsel for the owner contends that the fundamental fallacy in the respondent's argument lies in the assumption that, because the charter shows that the owner wants insurance against his own risks, he also means to insure the charterer's risks, and to assume them. In reply to this criticism, it may be said that the owner's argument involves the fallacy of a shifting of premises, and of treating the insurance—First, as relating to the vessel, and to the joint enterprise of owner and charterer; and, secondly, as relating merely to the respective individual risks of owner and charterer; and that the argument involves also an assumption that the risk of a lien upon the vessel, as an offending res, is not an owner's risk, that should be insured against by the owner through a policy that might be described as "insurance on the vessel." The fact that a charterer may be liable in personam to third persons does not change the owner's risk that one injured may elect to proceed in rem.

As a guide to construction, I adopt the view suggested by the counsel for the owner, that the parties, in forming their contract, regarded themselves as embarking in a joint enterprise, to which, for their joint benefit, certain sums must be contributed for fixed charges or necessary expenses. These expenses were necessarily incurred, that the ship might work to the profit of both owner and charterer. Among these fixed charges was "insurance on the vessel." The owner's brief, and the evidence of a general usage to insure, lead to this view. The assumption of any one of the fixed charges by either party is an agreement to relieve the other of that expense, and not to call upon him to pay that charge. The agreement of the owner "to pay for the insurance upon the vessel" is an express agreement to assume, and not to

call upon the charterer to pay, this expense. "To pay for the insurance upon the vessel" is to pay a sum for a purpose,—to reduce an indefinite risk of future loss to a mere present definite expense. The owner, therefore, contracts upon the basis of a known and definite expense. The price which the charterer pays the owner is full consideration for the expense assumed by the owner for insurance as well as for the use of the vessel. This is the legal effect of the charter party. In substance, therefore, the contract price paid by the charterer includes full repayment to the owner of the price of insurance. As the charterer in this way has already borne the expense of insuring the vessel, has paid to the owner the price of risk, or cost of indemnity, according to the terms of the contract, the owner cannot call upon the charterer to pay it again. Especially would it be a violation of clear intention to compel the charterer to pay the cost of indemnity when, through actual loss, that cost has become greatest. The charterer having contracted on the basis of risk, and having satisfied the owner for his risk by a money payment, has, so far as the owner is concerned, stopped the running of the risk against himself. If the owner has observed the terms of his agreement, he has obtained, by the consideration that the charterer has paid him, his indemnity against loss. The charterer has paid him what the contract makes the equivalent of the present loss. Upon every legal and equitable consideration, therefore, the charterer is relieved.

The remaining question is, what is included in the phrase "insurance on the vessel"? The phrase seems broad enough to include insurance of every kind that, in the expectation of the parties, properly appertained to their joint enterprise. Upon the owner's brief it is claimed:

"If the fruit company intended that the insurance clause should have the effect of giving it the benefit of the owner's insurance, presumably it would have adopted the following or an equivalent form of words: 'The owners * * * shall pay for the insurance on the vessel against all risks, including protection and indemnity and freight and demurrage club protection, giving charterers full benefit of same as if they were for the time being owners of the ship.'"

This, a form in practical use, is itself an example of the use of the term "the insurance on the vessel," as comprehending risks of every character, since the subsequent part of the sentence is a mere specification of what is comprehended in the previous general language. There is also testimony from the claimant's witness Gourlie tending to show that such a clause would ordinarily be held to include three-quarters of a collision risk, including running down.

Furthermore, it has been proved by the charterer, and is not disputed, that the actual understanding of the owner, at the execution of the contract, was that the phrase included insurance against risks of all kinds. William H. Bennett, who as broker negotiated the charter for the owner and charterer, testifies as follows:

"I have had a good deal of experience in various insurance claims; * * * so much so that I clearly expressed to the owner that he would have to pay for all insurance on the vessel, in any way, shape, and manner, against stranding, collisions, and everything, as is usually done in all vessels, unless he wanted to take the risk, and not insure."

The owner objects, on the ground that this evidence is incompetent. In my opinion, however, the evidence was admissible. It did not vary, add to, or contradict the writing, but only interpreted and made certain its terms. *Loneragan v. Buford*, 148 U. S. 581, 588, 13 Sup. Ct. 684. "If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case, and of statements made by any party to the document, as to his intentions in reference to the matter to which the document relates." 7 Am. & Eng. Enc. Law, 93.

Many other provisions of the contract have been urged by counsel for the charterer in proof of the owner's intention to assume the insurable risks pertaining to the vessel. That the owner assumed the risk of damage to his vessel, and could not call upon the charterer to repair her or indemnify him for such loss, is very clear. There are express agreements that lead to this conclusion, without recourse to the provision concerning insurance. He is to maintain her in a state of repair, and the hire is to abate during time lost by collision.

There is great force in the argument that, since the vessel if damaged by this collision would have immediately been at the expense of the owner for repairs, with an abatement of price during the time lost in repairs, the parties contemplated faults in navigation, and that there was a general intent to assume the risk of all consequences of collision, and no intent to make a distinction between receiving and inflicting damage. It is clear upon the face of the charter party that the owner assumed one consequence of a collision caused by the fault of the charterer's servants, and agreed to bear the expense of insuring against it; and it is fair to infer that he also contemplated the other consequence of the same fault as a proper subject for insurance. As the whole risk was insurable, evidence of a custom to insure only three-quarters does not, in my opinion, affect materially the question of intention. In considering this question, I do not lose sight of the doctrine of the case of *Insurance Co. v. Sherwood*, 14 How. 364, cited upon the owner's brief. Though the loss in the present case was the result of a collision, with the added element of the negligence of the charterer's servants, yet the owner was liable to loss from such causes, and could insure against it. As the contracting parties both understood that the vessel was to be under the charge of a master, who, though appointed by the charterer, was to be satisfactory to the owner; as the possible liability of the charterer to third persons for the master's fault would rest, not upon the charterer's personal fault, but merely upon an imputed responsibility; as the charterer's and owner's business both required that the vessel should be set in motion, and thereby become exposed to the danger of a lien as an offending res,—I see no reason, arising from public policy, why the owner and charterer should not agree between themselves as to which should bear the expense of indemnity against such an anticipated loss. When the joint business of two persons requires the agency of a third, who is to have a large sphere of independent action not under the personal supervision of either, I see no reason why they should not, in fixing the terms of their agreement, contemplate that this third person,

through negligence, might cause a loss; estimate the risk at the cost of insuring against it, and fix the contract price accordingly. It is conclusively settled in this country and in England that a policy of insurance, taken out by the owner of a ship or goods, covers a loss by perils of the sea or the perils insured against, although occasioned by the negligence of the master or crew, or other persons employed by himself. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312-323, 6 Sup. Ct. 750, 1176; *Insurance Co. v. Adams*, 123 U. S. 67, 72, 8 Sup. Ct. 68; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 438, 9 Sup. Ct. 469; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 415, 10 Sup. Ct. 365. If indemnity insurance is lawful and proper, there should arise, in construing the charter party, no presumption that the parties did not intend it.

In *Insurance Co. v. Adams*, 123 U. S. 67, 72, 8 Sup. Ct. 68, the court quotes *Insurance Co. v. Insley*, 7 Pa. St. 223, 230:

"Public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means; for though the maxim, 'respondeat superior,' is applicable to the responsibility of a master for the acts of his servants, yet the insured, so long as he acts with fidelity, is answerable neither for his servants nor for himself."

These principles are equally applicable in construing the contract between the owner and charterer. As in this country liability attaches by law to the vessel as an offending res, regardless of the relations of the owner and those in control, it is natural that the parties should consider the vessel as so liable, and contract on that basis.

From the language of the charter party, and from the evidence that the phrase "insurance on the vessel" was used with an actual intention to cover what, according to its literal terms, it was capable of covering,—running down risks as well risks of direct injury,—I am satisfied that the intention of the parties was that the owner should bear the risks of that primary liability to which his relation as owner exposed him, and that, according to the legal effect of the charter party, he has received compensation for his risk from the charterer. Having received full compensation for risks, he has likewise received full compensation for all that, at the time of contracting, was potentially within the risk for which he has been paid.

The petition of the Turret Steam Shipping Company, Limited, against the Boston Fruit Company, is therefore dismissed, with costs. Upon the main case, a decree may be entered for the libelants against the vessel for the sum of \$19,475, with interest from January 1, 1897, and for their costs.

THE NIAGARA.

STAHL et al. v. THE NIAGARA.

JOHNSON et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. January 23, 1898.)

Nos. 18 and 19.

1. COLLISION—STEAMER—EXCESSIVE SPEED IN FOG.

From 9 to 10 knots an hour in a dense fog is excessive speed for a steamer not in an unfrequented part of the ocean.

2. SAME—DEFECTIVE EQUIPMENT—MECHANICAL FOG HORN.

Failure of a sailing vessel, which tested a mechanical fog horn before sailing for Cuba, to test the same, after a long stay at Havana, before starting on the return voyage, or at any time until shortly before collision, when it was found to be out of condition, so that a mouth horn had to be used, *held* to show such a defect in the equipment of the vessel as to place her in fault for collision with a steamer which failed to hear the mouth horn.

3. SAME—HARTER ACT.

Failure to have a mechanical fog horn in good condition for use at the commencement of a voyage shows want of due diligence in equipping the vessel, and is not a fault in her management, so as to excuse the owners from liability under the Harter act.

77 Fed. 329, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

On the morning of November 8, 1895, the bark Hales, owned by John B. Stahl and others, collided with the steamer Niagara, owned by the New York & Cuba Mail Steamship Company, and was entirely lost, with her cargo. The owners of the bark libeled the steamer to recover damages to the bark and her freight. The captain and crew joined in this libel to recover the value of their personal effects, which were also entirely lost. Lawrence Johnson and others, the owners of the cargo on board the bark, filed another libel against the steamer to recover the value of the cargo. The Niagara was very slightly injured. The alleged faults of the steamer were in proceeding at an immoderate rate of speed in a fog, in not giving signals with her steam whistle, in not maintaining a sufficient lookout, in not coming to a stop before the collision, and in not avoiding the bark. The faults of the bark which were alleged in the answer were in not sounding fog signals, in not attending to the whistles of the Niagara, in having no lookout in attendance upon his duties, in not being sufficiently manned, and in failing to have and use an efficient mechanical fog horn. The district court found that each vessel was in fault, and upon the libel of the owners of the cargo a decree was given in their favor for \$27,140.57, its full value, and in the action brought by the owners and crew of the bark a decree was entered in favor of the officers and crew, except the master, for the value of their effects, which amounted to \$425.28. The losses of the owners and master of the bark were extinguished by the set-off which the Niagara was entitled to in respect to the cargo, because half the value of the cargo exceeded the one-half value of the bark,—her whole value being about \$16,000,—her freight moneys, and the effects of her owners lost therewith. The crew were not found to have been privy to the bark's fault. The owners of the bark appealed from the decree holding her at fault, and the claimant of the steamer appealed from both decrees. If the facts found by the district court should be found by the appellate court to be true, no criticism was made upon the provisions of the decrees in regard to the distribution of the damages.

Wilhelmus Mynderse, for appellants Stahl and others.

Harrington Putnam, for appellant New York & Cuba Mail S. S. Co.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts). The district judge found the following facts, in the accuracy of which we concur: At about 7:30 a. m. of November 8, 1895, the steamship Niagara, bound from New York to Havana, came in collision, during a dense fog, off the coast of Virginia, with the bark Hales, bound north from Havana. The wind was from the northwest, light and baffling, and the bark, under nearly all sail, was making very little headway on a course northeast by north, bound from Havana to Philadelphia. The steamer was on a course of south by west one-half west, making from 9 to 10 knots. The bark was struck by the steamer's stem on the port bow forward of the knighthead, and sank in a few minutes. Five of her crew were drowned, including the wheelman and the second mate, who was in charge of the watch on deck. The captain, who was also on deck, the lookout, and one seaman and the first officer, who were below, were saved. The steamer's foremast was carried away, but no other serious damage was sustained by her. On the bark no fog signal was heard from the steamer; on the steamer none was heard from the bark until she was very near. The first notice of her presence was the sight of her top-gallant yards not far off, and about right ahead, while her hull was not yet visible. The evidence leaves no doubt that the steamer's fog whistle was regularly and properly sounded. But it was 25 or 30 feet higher than the deck of the bark, and the failure to hear it on the bark may have been because the sound was reflected upwards by the denser medium of fog below the level of her whistles (The Lepanto, 21 Fed. 656, 657); and this explanation is rendered probable by the fact, testified to by the captain, that the rushing sound of the steamer's water was heard by him before she was visible, though he heard no fog whistle.

1. The speed of the steamer was from 9 to 10 knots, or nearly her full speed, and the fog was dense. Though the steamer was a little off the straightest route, she was not in an unfrequented part of the ocean, and no precedents warrant holding nearly full speed of from 8 to 10 knots to be the "moderate speed" that the statute requires. I must, therefore, hold the steamer liable.

2. Upon the testimony of the several witnesses from the bark, I am not warranted in finding that no fog signals were given by her. The failure to hear them on the steamer till the vessels were near may be reasonably explained by the steamer's speed of nearly 1,000 feet per minute, and the fact that the bark's signal was from a mouth horn instead of by a mechanical fog horn. This horn was heard probably just after the bark's top-gallant yards had been seen, from half a minute to a minute before the collision. As soon as the yards were seen, and before her horn was heard, signals were given to stop the engine, and hard a-port, when the steamer was probably from 400 to 600 feet distant. At the steamer's speed of 9 to 10 knots, she would have been some 2,000 feet distant, more or less, at the previous signal from the bark, if there was the ordinary interval of from one to two minutes between the signals; and at that distance the bark's horn quite nat-

urally might not be heard. The testimony is explicit that the lookout took no part in the last trimming of the yards, though he did in previous trimming; and his own testimony that the mouth horn was blown is confirmed by many other witnesses.

3. I have carefully considered the evidence and the arguments adduced by the libellant's counsel to show that the steamer had sufficient notice of the presence of the bark, by seeing her top-gallant yards, and by hearing at least one blast of the horn, to have avoided the collision, either by keeping on her course, or by reversing her engines instantly. The circumstances relied on seem to me, however, insufficient as against the evidence of the steamer's witnesses. The different estimates of time are most uncertain. The change of three points by the steamer, if it was so much, would be made in traveling 600 or 700 feet, and perhaps in less distance. The mate who was in charge testifies that he rang the bell to stop as soon as the top-gallant yard was seen, ordered hard a-port, and almost immediately rang to reverse; and the engine was beginning to reverse when collision came. All the testimony indicates that the vessels were not over 700 feet apart, if so much, when the steamer became aware of the bark's presence, and not over half that distance when the steamer's presence was known to the bark.

These findings of fact, which cannot be successfully attacked, ascribe to each vessel a violation of an important statutory rule, without adequate excuse, which produced a consequent liability. The Pennsylvania, 19 Wall. 125. If a violation was excusable, the burden was upon the offending vessel to present a sufficient justification. The claimant of the Niagara undertakes to excuse her rapid speed by the suggestion that she was out of the customary track of sailing vessels, and especially out of the way of coasting vessels. This suggestion, whatever might be its value if it was adequately supported by the facts, is sufficiently answered by the court finding that "she was not in an unfrequented part of the ocean," a fact which is evident in the history of the voyage on the night of November 7th.

The libellants signally fail in furnishing any excuse for the bark's failure to have an efficient mechanical fog horn. She left Philadelphia for Havana on August 22, 1895, with an efficient Norwegian mechanical horn on board, which had been casually tried in Philadelphia by the first mate and one of the owners, who had previously also been the captain of the vessel. The occasion for this examination was a conversation as to the respective merits of the horns made under the Norwegian and United States patents, when the horn was taken and tried by one of the participants in the conversation. The vessel reached Havana in September, remained there 43 days, sailed for Philadelphia on October 27th, and there is no evidence that the horn was tried until the night of November 7th, when it was found unfit for use. Under these circumstances it cannot be found that the vessel had, when she left Havana, the efficient mechanism which it was the duty of the owners to furnish as a necessary part of her equipment. The district judge furthermore properly held that any material omission in the proper equipment at the commencement of the voyage is chargeable

against the owners, "to whomsoever they may have delegated the duty of furnishing the proper equipment or supply." No provision in the "Harter Act" of February 13, 1893 (27 Stat. 445) diminishes the obligation of the owners of a vessel which transports property from or between ports of this country and foreign ports to exercise due diligence to properly equip and outfit their vessel. The primary duty rests upon them, and any omission by the captain to discharge it cannot be called an error in the management of the vessel. The libelants cite *The Trave*, 35 U. S. App. 321, 15 C. C. A. 485, and 68 Fed. 390, as an authority that the nonefficiency of the horn which had been theretofore provided was sufficiently excused. The facts in the two cases radically differ from each other. In *The Trave*, an efficient mechanical horn had been provided by the *Edwin B. Taylor*, one of the colliding vessels, at the commencement of the voyage, and had been in necessary and continued use during the voyage, until by such use, and not from want of proper attention and care on the part of the navigators, its efficiency had become seriously impaired. The decision as to the liability of the *Taylor* was founded upon that state of facts. In this case there is no evidence that at the commencement of the voyage from Havana the vessel had an efficient instrument, except that a casual examination before she left Philadelphia indicated its efficiency at that time. The value of universal and thorough compliance with the statutory requirement, and the importance of the requirement itself, forbid that such slender testimony should be regarded as sufficient to satisfy the demands of the rule.

The claimant makes the point that the crew of the bark were themselves privy to some of the alleged errors in her navigation, and therefore that the decree in their favor for the value of their effects should not have been entered, but that the *Niagara* should have had the benefit of the set-off which she had against the owners of the bark, but the crew were not privy to the only fault which can properly be found against the *Hales*. The decrees of the district court are affirmed, with-out costs in this court.

THE MAVERICK.
AMERICAN MFG. CO. v. THE MAVERICK.
HALL et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

Nos. 35, 36.

1. COLLISION—SAIL WITH STEAMER AND TOW.

The fact of having a tow upon a hawser does not absolve a steamer from the duty of keeping clear of an approaching sail. 75 Fed. 845, affirmed.

2. SAME—LIGHTS.

The fact that the light of a schooner, seen on the port bow of a steamer, did not change its bearing, *held* to have been sufficient notice that the schooner was approaching on a crossing course, so that the failure of the steamer to change her course or stop placed her in fault. 75 Fed. 845, affirmed.

3. SAME—CHANGE OF COURSE IN EXTREMIS.

Alleged error of a schooner meeting a steamer, in going to port instead of to starboard, *held* no ground of liability, where the change was made only after the steamer's failure to alter her course had produced extreme danger of collision.

Appeal from the District Court of the United States for the Eastern District of New York.

These were two libels in rem for collision, filed, respectively, by the American Manufacturing Company and by John W. Hall and others against the steamship *Maverick* (the Standard Oil Company, claimant). The circuit court rendered a decree for the libelants (75 Fed. 845), and the claimant has appealed.

Harrington Putnam, for appellant.

Lawrence Kneeland, for appellee American Mfg. Co.

George B. Adams, for appellee Hall.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. In any view of the facts warranted by the evidence in the record, the steamship was guilty of fault contributing to the collision; and we are satisfied that she was solely in fault.

The collision took place just after dusk, in a bright night, off the coast of New Jersey, about 10 miles east of Barnegat. The libellant's schooner, the *Lister*, was bound from New York to Wilmington, and for two or three hours her course had been S. by W. $\frac{1}{2}$ W. She was proceeding under full sail, with a fair breeze, at a speed of about five knots an hour. The steamship *Maverick* was bound from Philadelphia to Portland. She was on a course N. E., was towing on a hawser of 185 fathoms a barge 254 feet long, with sails set, and was making a speed of about six knots an hour. According to the answer of her owner:

"While the *Maverick* was steering the aforesaid course, the red light of the *Ettie H. Lister* was made about a mile from the *Maverick*, and judged to bear about two or three points on the steamer's port bow. Although it was kept under close observation, no green light was shown; and the

steamer kept her course, supposing the schooner would do the same, as she had the wind free. After an interval of about two or three minutes the red light disappeared, and nothing could be seen of any light of the schooner, although the master used his night glasses. Directly afterwards the red light came in view, bearing about as before; and it was presumed that the schooner would keep her course, and pass safely, red to red. After the schooner had again kept on about a minute, red to red, her red light was shut out again; and by the loom of the sails, which were then seen, she appeared suddenly to change to the eastward, swinging across the bow of the Maverick. The steamer's helm was at once put hard a-starboard, and her engines stopped; two blasts of her whistles blown as a signal to the barge, also, to starboard; but a collision could not be avoided. Although the Maverick answered her helm, and swung to head north by compass, her bow struck the starboard quarter of the schooner at an angle of six or seven points, causing the schooner soon after to sink."

The proofs show very satisfactorily that the schooner did not change her course, after the vessels discovered one another, until they were very close together. Those navigating her saw the steamship's towing lights, and then both her side lights, when she was a long distance away. According to their testimony, when the steamship was a mile and a half, or more, away, both her side lights were seen; then her green light disappeared; after which her red light continued to bear a little upon the schooner's starboard bow, about $2\frac{1}{2}$ points, until very shortly before the collision, when it disappeared and the green light was shown; and thereupon the schooner, hoping to escape collision by assisting the steamship to go under her stern, put her helm hard a-starboard. The wheelsman of the schooner locates the bearing of the steamship's light nearer the stem of the bow, and we are inclined to agree with him, and conclude that it bore somewhere between one and two points on the schooner's starboard bow.

The testimony for the steamship accords with the statements in her answer that she approached the schooner without changing her course until the latter went across her bow, and that the schooner was so near at that time that the steamship put her helm hard a-starboard and reversed her engines. Thus, the case is one where the two vessels were approaching each other for more than a mile, without any change in their relative bearings, on a course by which the red light of the steamship was a little on the schooner's starboard bow, and the green light of the schooner should have shown on the steamship's port bow, until the vessels were so near together that both found it necessary to make a sudden and extreme change of course in the attempt to avoid collision.

As it was the duty of the steamship to keep out of the way of the schooner, notwithstanding she was incumbered by a tow (*New York & B. Transp. Co. v. Philadelphia & S. Steam Nav. Co.*, 22 How. 461),—a duty that required her, in ample time, to take such steps as to prevent the two vessels coming into dangerous proximity to one another,—she can only escape responsibility by showing that she was misled by some fault on the part of the schooner which justified her in assuming that the vessels would pass each other without risk. Her theory is that the schooner showed to her a red light during the period of the approach, until within a few seconds of the collision; and she

had therefore a right to assume, until that time, that the vessels would pass each other safely. The steamship's lookout testifies that he discovered the schooner six or seven minutes before the collision, and at that time saw her red light bearing about three points on the steamship's port bow; that the light was visible and continued in the same bearing for about two minutes, when it disappeared and no light was visible; that in about a minute the red light was shown again for about two minutes, bearing about the same as before; then, that the light disappeared, and he saw the loom of the schooner's sails a couple of lengths of the ship away, a little on the port bow, when the schooner went right across the steamship's bow. The master of the steamship testifies that he first saw the red light of the schooner bearing three points on the steamship's port bow; that after a minute or two it disappeared for a minute or two, and he then saw it again for a minute or two, bearing as before; that he could then see the schooner's sails, and put away his glasses; that he saw her trying to cross the steamship's bow, and he ordered his wheel hard a-starboard. The other testimony from those on board the steamship is to the purport that the red light of the schooner was intermittently shown, always bearing about three points on the steamship's port bow, and that no green light was ever visible from the schooner.

It is obvious, in view of the course of the two vessels, that the red light, if shown at all, should have constantly broadened on the steamship's port bow. The testimony for the steamship could only be true if the course of the schooner had been approximately S. E. by S., instead of S. by W. $\frac{1}{2}$ W.

It will not serve any useful purpose to recapitulate or analyze the testimony introduced in behalf of the steamship for the purpose of showing that the green light of the schooner was not in suitable condition, or burning, while the vessels were approaching. We are satisfied, notwithstanding the somewhat singular story of the schooner's lookout, that it was burning properly, but was extinguished by the shock of the collision. The theory for the steamship involves the hypothesis, not only that the green light did not show, but also that the red light of the schooner was so adjusted that it crossed her starboard bow, and thus misled the steamship. There is no testimony showing that the red light was not properly set and screened, and the contention to the contrary rests wholly upon conjecture. The learned district judge who decided the cause in the court below made the following observations:

"There is a fact proved by the steamship's witnesses which shows her to have had notice that the schooner, which the captain of the steamship supposed to be on a parallel course, was in fact approaching on a crossing course. This fact is that the light which those on the steamship say they saw on the schooner did not change its bearing. This fact is testified to by several witnesses for the steamship, and, indeed, it is alleged in the answer. It gave sufficient notice to the master that the schooner was approaching on a crossing course. The master says he noticed the fact, but never thought about it, and made no change in his course or speed. This was a great fault."

In this observation we concur. It is a familiar proposition that if, while two vessels are approaching, there is no appreciable change in

the bearing of a light from the other vessel, there is risk of collision; and the result of nautical experience has been formulated as a rule of navigation in article 16 of the act of 1890 to prevent collisions at sea (26 Stat. 326). Under the circumstances, the steamship should have checked her speed or stopped before the red light of the schooner finally disappeared. It is doubtful whether, if this had been done, the schooner would have escaped collision with the tow, unless the schooner had also altered her own course; but it would have afforded a chance of escape.

In going to port as and when she did, if the schooner committed any fault, it was a fault in extremis. The mate, who was in charge of the schooner's navigation, was an experienced seaman. He expected, as he had a right to do, until the contrary became manifest, that the steamship would change her course so as to pass on his starboard side, and not keep on across his bow. He had paid little attention to the steamship's tow, and had not apprehended danger until the vessels were so near together that risk of collision was imminent. When he was called on to decide what to do to escape, he acted upon a sudden judgment, exercised in the teeth of peril. As it turned out, his effort to cross the steamship's bow was perhaps the safer maneuver, as otherwise his vessel might not have cleared the tow. However this may be, if he made a mistake it was an excusable error, upon the principle that "when one ship has, by wrong maneuvers, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been maneuvered with perfect skill and presence of mind."

We are unable to resist the conclusion that the collision was caused by inexcusable negligence on the part of the steamship in approaching too near the schooner before making the necessary maneuver to pass her safely. Her exculpation necessitated proving that the schooner showed a red light, when in fact she was showing a green light, and a theory of collision which is inexplicable, except by subjecting conjecture for testimony, and violent presumption for all the reasonable probabilities of the case.

The decrees are affirmed, with interest and costs.

THE MOUNT HOPE.

GARFIELD & PROCTOR COAL CO. v. McLEAN.

(Circuit Court of Appeals, First Circuit. January 26, 1898.)

No. 213.

1. COLLISION—SCHOONER WITH TOW—SPEED IN FOG.

About four miles an hour, against a heavy sea, in much frequented waters, during a fog, held not immoderate speed for a schooner capable of much greater speed, which was able, by reason of being well under control, to avoid actual collision with a tow of unusual length.

2. SAME—LONG TOWS AT SEA—INEFFICIENT MEANS OF COMMUNICATION.

It is negligent navigation for a tug and tows, extending nearly two-thirds of a mile, to go to sea without providing some efficient means of communication from one to the other in emergencies.

Appeal from the District Court of the United States for the District of New Hampshire.

This was a libel in rem by the Garfield & Proctor Coal Company against the schooner Mount Hope, to recover for the loss of a barge, which was cut adrift through fear of collision with the schooner. The district court dismissed the libel (79 Fed. 119), and the libellant has appealed.

Charles T. Russell, for appellant.

Eugene P. Carver (Edward E. Blodgett, on brief), for appellee.

Before PUTNAM, Circuit Judge, and WEBB and BROWN, District Judges.

PUTNAM, Circuit Judge. This case arose out of a series of marine disasters, occurring on September 19, 1896, in Vineyard Sound and near its mouth, as the result of which the barge Fantee was lost; and the schooner Mount Hope was libeled in the court below as legally responsible therefor. The libel was dismissed, and the owner of the barge appealed. The essential portions of the case, substantially as set out by the appellant, are as follows:

The barge Fantee, formerly a bark, was of 580 tons burden, and was equipped with only a leg of mutton mainsail, foresail, and jib. She was employed in the coal-carrying trade, and depended upon towage for her motive power. She was taken in tow at Boston for Norfolk, September 18, 1896, by the tug Orion, and towed to Vineyard Haven, arriving about 1 o'clock a. m., September 19th. The towboat that morning, after arrival, proceeded to make up a tow of three barges, the Lone Star, Macaulay, and Fantee, in the usual manner in such commerce, the Lone Star following the tug with about 150 fathoms of hawser, the Macaulay the Lone Star with about the same length, and the Fantee the Macaulay in similar manner. This made a tow of nearly two-thirds of a mile in length. The tow proceeded on its voyage between 6 and 7 o'clock a. m. on the 19th. At that time the wind was southeast, but it was not foggy. Later in the morning a fog set in, with a strong breeze from the southwest. The tow had slowed down to 3 or 3½ knots an hour. The Mount Hope, a large four-masted schooner, of 989 tons net, was bound to Baltimore. She started from her anchorage at Nobska that morning. At 10 o'clock she found it was getting thick. The wind was canting to the south and west, and the schooner was then on the port tack, heading about northwest. Soon after she came around to the starboard tack, which headed her south by west. She neared the tow, and the Orion heard a faint blast of a fog horn abaft

the starboard beam, but never saw the schooner. The master of the Lone Star heard one blast on the starboard side. The schooner was then about abeam of the Lone Star, and still on the starboard tack. The tow was then heading southwest. The schooner was first seen by the second barge, the Macaulay, off her starboard bow, heading across her bows, and about 125 fathoms away. The whistle was blown on the barge, and her wheel was put hard a-starboard, so that she sheered as much as her hawser would allow, when the schooner tacked, and came close alongside, and then dropped astern. In the meantime, aboard the Fantee, a fog horn was heard on the starboard, and suddenly the schooner loomed up. The hawser had been cut, and the Fantee fell off to head to the northward and westward, which brought the schooner, when first seen from her deck, off her port bow. The schooner crossed from port to starboard within 20 feet of the port bow of the Fantee, and then disappeared in the fog. The Fantee was thus adrift, and with no motive power, except the three small sails intended for use only to steady her. The master let go the starboard anchor, expecting the return of the towboat. He remained at anchor until about half-past 3 o'clock that afternoon. The fog cleared between 12 and 1 o'clock. The master was right in the channel, he had no lee, the glass was falling very low, and, in the exercise of his discretion, he hove up anchor, made what sail he could, and ran before the wind, making for Quick's Hole, in Vineyard Sound. He opened the land to the westward, got into a swift current, and let go both anchors about 5 o'clock. The barge remained at anchor about an hour, tailing on the beach, when the chains were parted by the heavy sea, and she went ashore, the crew being rescued. She broke up during the night, and became a total loss.

This statement must be modified and supplemented in a few particulars. The schooner and all the barges were light. It is not satisfactorily shown that the Mount Hope was under a speed at the critical period of over four knots through the water. This is the testimony of her master and of her executive officer, and, as she was then almost head on, against a heavy sea, as all agree, we think the probabilities are so much with their evidence that it is not overcome. It is apparent that, as she was seen from the Macaulay at a distance of 125 fathoms, the fog was not absolutely dense; and, on the whole, it has not been shown that she was not, under the circumstances, justified in keeping on sail enough to make the maneuvers which she accomplished at the most critical moment. It is claimed that her actual speed was accelerated by the current, but as it also set forward the tug and her tow by substantially the same degree, and, on the courses of the various vessels, in substantially the same direction, this acceleration had no practical effect on the case.

What sail the schooner was carrying is shown by the evidence of her master, as follows:

"Q. What sails did you set? A. We had the spanker, mizzen, main, foresail, forestaysail, jib, flying jib, jib topsail, and the spanker topsail. Q. In other words, you had all sails set except the staysails between the masts, and the spanker and gaff topsails? A. We had the fore, main, and mizzen topsails, three staysails, and balloon jib furled. Q. What sails had you clewed up? A. All three staysails, mizzen, main, and fore topsails, and balloon jib."

The appellant claims that the topsails were not taken in by reason of the fog, but this is an error. The record shows they were taken in twice that forenoon, the last time on that account. The officers of the schooner testify that they exchanged signals with the tug, and heard signals from all the barges, some time before either was visible; but the record does not raise the question whether for this reason the

schooner should not have tacked sooner than she did. The master of the barge testifies that, when he came to anchor, he expected the tug to return for him. She did not return, because she did not know for several hours that she had lost any part of her tow. The master of the barge does not claim to have given any signals to the tug, except by whistling, till he dropped his anchor, which covered a very short period of time, and by afterwards ringing his bell. It does not appear that the barge had any gun, as required by the regulations for distress signals, or that she had provided any efficient means for informing the tug in an emergency.

It is contended by the appellant that the loss of the barge was the proximate result of immoderate speed on the part of the Mount Hope. The judge of the district court found, in substance, that she was not at the time sailing at an immoderate speed, and that, if she were, such speed was not the proximate cause of the final loss of the barge. The appellant relies on *The Chattahoochee*, decided by us, and reported in 21 C. C. A. 162, 74 Fed. 899. But the circumstances of the present case differ essentially. There the sailing vessel found in fault was making five or six knots, and, what was more material to our decision, she was under all the speed she was capable of, and could easily have shortened sail when she struck the fog, and yet have kept her steerage way, and all the way necessary for all maneuvers which could reasonably have been anticipated. None of these things appear in the case at bar; and, indeed, the Mount Hope was so well in hand that the maneuvers which she did accomplish would have cleared any single vessel, and even any tow of a moderate length. In *The Chattahoochee* we cited all the decisions which, under circumstances of the kind at bar, apply to sailing vessels under the regulations of 1885, and none of them would justify us in condemning the Mount Hope as in fault.

But this appeal has another aspect of more importance. Here was a tow extending nearly two-thirds of a mile, and therefore of very great length, even for tows of this character. In *The Berkshire*, 21 C. C. A. 169, 74 Fed. 906, 910, we held that it was beyond our province to condemn tows of this class generally; but in *The Gladiator*, 25 C. C. A. 32, 79 Fed. 445, while affirming what we thus said, we remarked that we must hold them to extreme care. It was clearly a violation of this requirement for a tug and tow, covering so great a distance, to go to sea without some efficient means of communication from one to the other in emergencies, and the continued separation of the barge from the steamer in this case is to be attributed to the disregard of this reasonable precaution. These conclusions render it unnecessary to consider any other question raised on this appeal. The decree of the district court is affirmed, and the costs of this court are adjudged to the appellee.

HATCHER'S ADM'X v. WADLEY et al.

(Circuit Court, W. D. Virginia. November 11, 1897.)

1. REMOVAL OF CAUSES—FILING RECORD.

When an order is made by a state court for removal of a cause to the circuit court for the Western district of Virginia, the removing party must file the record in the latter court on the first day of the ensuing session, whether it be held at Lynchburg, Danville, Abingdon, or Harrisonburg.

2. SAME—LACHES.

A delay in filing the record in the federal court for 12 terms after entry of the order of the state court for removal is inexcusable laches, and the federal court will not then permit it to be filed by an order nunc pro tunc.

8. SAME—FILING RECORD.

It is the duty of the removing party, and not of the clerk of the state court, to transmit the record to the federal court.

This was an action at law by Hatcher's administratrix against H. G. Wadley and Nannie S. Wadley. The suit was commenced in the state court, and was removed to this court by the defendants. It has now been heard on a motion to remand because the record was not filed in time.

W. B. Kegley, for plaintiff.

F. S. & J. C. Blair, for defendants.

PAUL, District Judge. The facts are that the petition for removal was filed in the state court, and the order for removal entered therein, on February 11, 1896. A copy of the record was duly ordered by counsel for the defendants. It was duly made by the clerk of the state court, and was ready for delivery on or before March 31, 1896. It was paid for by counsel for the defendants on June 25, 1896. It was not transmitted to this court until October 13, 1897, when it was presented by counsel for the defendants.

The following certificate of the clerk of the state court is presented by the plaintiffs:

"Virginia. In the Clerk's Office of Wythe Circuit Court.

"I, Joseph C. Cassell, deputy clerk of Wythe circuit court, at the request of counsel for the plaintiff in the case of Mrs. A. B. Hatcher vs. H. G. Wadley et al., hereby certify that after the order removing the said cause from the circuit court of Wythe county to the circuit court of the United States for the Western district of Virginia I made off a transcript of the record according to law for the defendants; that the said transcript was completed before the 31st day of March, 1896, as shown by the date of the bill attached to the same, and was paid for on the 25th day of June, 1896. I further certify that no one applied for the said transcript, neither defendants nor their counsel, until the 12th day of October, 1897, when the same was applied for by F. S. Blair, counsel for the defendants, and was delivered to him. I further certify that the same was ready for delivery at any time after the 31st day of March, 1896, and that I was not requested by any one to send the same to the clerk of the circuit court of the United States.

"Given under my hand this, the 12th day of October, 1897.

"[Signed] Jos. C. Cassell, Deputy Clerk of Wythe Circuit Court."

And the following certificate of the said clerk of the said state court is presented by the defendants:

"Wytheville, Va., Oct. 12th, 1897.

"I, Joseph C. Cassell, deputy clerk of the circuit court of Wythe county, Va., do hereby certify that in the case of A. B. Hatcher, Adm'x, etc., v. H. G. Wadley et al., in equity, on the 11th February, 1896, the defendants, by their counsel, filed their petition for removal and bond in this office with me, and ordered a copy of the record thereof; that I made out said record, and have kept it in my office until to-day; that the reason I have kept it until to-day is that I was not aware that it was my duty to send it to the clerk of the United States court at Abingdon, as the order of this court did not so direct, or I would have done so.

"[Signed]

Jos. C. Cassell, D. C."

And the following affidavit of counsel for defendants is also presented by the defendants:

"Virginia, Wythe County, to wit: This day personally appeared before me the undersigned, a notary public in and for said county, F. S. Blair, who made oath that he, as attorney for H. G. and N. S. Wadley, filed their petition and bond for removal of the equity cause of A. B. Hatcher, Adm'x, v. H. G. and N. S. Wadley from the circuit court of Wythe county, Virginia, to the United States circuit court at Abingdon; that during the February term, 1896, to wit, on the 11th February, 1896, the first term after said suit was brought, and the first term at which any order of removal could be obtained, or at which any defense could be made or issue joined therein, he filed said petition for removal and bond; that by an order of said state court on the 11th February, 1896, an order of removal was entered as 'within the time prescribed by law,' and defendants at once ordered the clerk of said court to make out a copy of record according to law; that they paid said clerk for said record, and they and their counsel understood that the clerk of the state court would make out said record, and certify it to the clerk of the United States circuit court at Abingdon, and did not know until the notice to remand was served on their counsel that the clerk had not certified it on to the last-named court; that it was no fault of defendants or their counsel that such was not done, as the clerk of the state court was presumed to know and do his duty; that no delay has been sought by defendants or their counsel in this matter, but the failure to certify the record has proceeded solely from the inadvertence of the clerk of the state court, who has furnished defendants with his official certificate that he did not know it was his duty to transmit the record; that at each term of the state court since the removal when this cause has been called the response has been, 'Removed to United States court,' and complainant, and no doubt defendants, believed the record had been forwarded by the clerk, until very recently; that the said clerk has sent said record to the clerk of the court, and it is now lodged therein.

"Given under my hand this 13 October, 1897.

"[Signed]

Robt. W. Blair, N. P."

The provision of the statute providing for the removal of causes from the state courts to the circuit courts of the United States is as follows:

"That whenever any party entitled to remove any suit * * * may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond with good and sufficient surety for his or their entering in such circuit court on the first day of its then next session a copy of the record in such suit and paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearance and entering special bail in such suit if special bail was originally requisite therein.

"It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit.

"And the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it been originally commenced in the said circuit court." Act March 3, 1875, § 3 (18 Stat. 470).

While this statute is positive in its requirements that the record of the suit pending in the state court shall be filed in the United States circuit court on the first day of its then next session, it has been frequently held that where, through accident or mistake, the record has not been filed on the first day of the then next session of the circuit court, an order nunc pro tunc may be entered allowing the record to be filed, notwithstanding that the time fixed by the statute for filing has been allowed to pass. The supreme court has said:

"It is true, by reason of the fault of the clerk of the state court he was unable to file his transcript of the record in the circuit court on the first day of the term, but he did so on the second, and had the cause regularly docketed, after which a trial was had, all parties appearing." Removal Cases, 100 U. S. 475.

In *Lucker v. Assurance Co.*, 66 Fed. 162, the court said:

"But while the act of congress requires security that the transcript shall be filed on the first day of the term, it nowhere appears that this court is to be deprived of its jurisdiction if it be filed at a later date in the term."

In this case it appears that counsel was mistaken in supposing that the next session of the circuit court was to be held in April, whereas it was really held in February preceding. This mistake arose out of the peculiar arrangement of the district of South Carolina into certain divisions.

Woolridge v. McKenna, 8 Fed. 650, is another case relied on by the defendants in their contention that this court should now allow the record to be filed nunc pro tunc. In that case, it appears, the record was presented in the circuit court of the United States on the second day of its then next term, instead of on the first day, as required by the statute. The court held that it would be a harsh and unreasonable construction to hold that the omission to file the transcript of the record on the first day of the term should defeat the provision of the statute allowing removal of causes from the state courts to the circuit court of the United States.

Another case relied on by the defendants is that of *Pierce v. Corrigan*, 77 Fed. 657. In this case the circumstances were very similar to those in the case of *Lucker v. Assurance Co.*, as stated above, and the court held that, as counsel had been mistaken as to the terms of the court in which the record should be filed on the first day of the then next session thereof, the record might be filed at a later term.

None of these decisions sustains the contention of the defendants that they have a right to file the record in this case at this late term of the court, nor that it is the duty of the court to allow it to be done. While the cases cited hold that it is within the sound discretion of the court to allow the record to be filed at a time subsequent to the first day of the then next session of the court, under proper circumstances, yet this discretion must be exercised with a due regard to the requirement of the statute. In this district the circuit court is held at four

places, to wit, at Lynchburg on the first Tuesdays after the second Mondays in March and September, at Danville on the first Tuesdays after the second Mondays in April and November, at Abingdon on the first Tuesdays after the first Mondays in May and October, at Harrisonburg on the first Tuesdays after the first Mondays in June and December. There are no divisions by statute of the counties and cities in this district assigning any of them to any of the places in particular at which the court is held. The district judge has authority to assign the different counties and cities in the district to the terms of the court held at these several places for convenience in the matter of selecting and summoning jurors, summoning witnesses, committing prisoners or admitting them to bail, and the like; but this arrangement of the counties and cities for these purposes does not affect the statutory requirements as to filing the record in cases of removal of suits from the state courts to the circuit courts of the United States. In this district it is the duty of the party removing a case to have the record filed in this court on the first day of the then next session of the court, whether the court be held at Lynchburg, Danville, Abingdon, or Harrisonburg. The filing of the record at any of these places does not necessarily require that the case shall be tried at such place of holding the court, but the case can be transferred for trial to such place of holding the court as may be most convenient for the parties; and such, in fact, is the practice.

The order of removal in this case was entered on February 11, 1896. The record was made up and was ready for the defendants on the 31st of March, 1896. It is shown by the certificate of the clerk of the state court that the defendants did not pay him for copying the record until June 25, 1896. Between the date March 31, 1896, when the record was ready for the defendants, and the date June 25, 1896, when the defendants paid the clerk of the state court for copying the record, there were three regular terms held of this court, to wit, at Danville in April, at Abingdon in May, and at Harrisonburg in June; the last-mentioned being held on the first Tuesday after the first Monday in June, 1896. Since the date when the clerk of the state court completed the copying of the record, and had it ready for delivery to the defendants, to wit, March 31, 1896, there have been twelve separate regular terms of this court held in this district, the present term at Abingdon being the thirteenth. The defendants claim that it is the duty of the clerk of the state court to transmit the transcript of the record to the clerk of the circuit court of the United States, but the statute does not impose this duty upon him. It requires a bond of the party removing the cause "for his or their entering in such circuit court on the first day of its then next session a copy of such record." Twelve terms of the circuit court having been held since a copy of the record in the state court was made by the clerk of that court, and was ready for transmission to this court, the record cannot now be filed at this, the thirteenth, term of the court thereafter. Such laches is inexcusable on the part of the defendants. The case must be remanded to the state court, with costs to the plaintiff.

AMERICAN LOAN & TRUST CO. v. CENTRAL VERMONT R. CO. et al.

(Circuit Court, D. Vermont. February 12, 1898.)

RECEIVERSHIPS—INDEPENDENT FORECLOSURE SUIT—LEAVE OF COURT.

An independent suit to foreclose a mortgage on property in the hands of receivers cannot be maintained, except by leave of court obtained in that cause. Such leave will not be denied arbitrarily, but only for legal unfitness for the purposes when and where sought.

This was a bill in equity by the American Loan & Trust Company against the Vermont Central Railroad Company and others for foreclosure of a mortgage.

Moorfield Story and Michael H. Cardozo, for plaintiff.

Benjamin F. Fifield and Charles M. Wilds, for defendants.

WHEELER, District Judge. This is a bill for foreclosure and sale brought against the mortgagors and receivers of the property in another cause. The receivers have pleaded their receivership, and other defendants have demurred. The plea and demurrer have now been argued. The possession of property by receivers under the appointment and order of a court in a cause is the possession of and for the court in that cause. No suit or proceeding touching the property can be maintained but in that court in that cause, or by leave of court obtained in that cause. This result follows from the nature and scope of the proceedings, is necessary for the purposes for which receivers are appointed, and is elementary. The statute which allows suits against a receiver, "in respect of any act or transaction of his in carrying on the business connected with such property," does not change this as to suits affecting the property itself. 25 Stat. 436, c. 866, § 3. The plea and demurrers to this bill as brought to institute an independent cause, without leave of court, although in the same court, must accordingly be sustained. Parties having claims upon the property have a right to prosecute them by suit which is said to be liable to be abridged, if leave of court must be had for that purpose. The leave is, however, necessary only for the orderly administration of justice, and is not to be denied arbitrarily, but only for legal unfitness for the purposes when and where sought. The right remains, and leave is to be granted according to the right and the proper adaptation of the proceedings. The plaintiff here has the right to proper proceedings for foreclosure of its mortgage upon the property. They may be properly had by intervention by bill or petition like this, for that purpose, in the original cause. It is therefore entitled to leave for that purpose. Plea and demurrers sustained, with leave to plaintiff to file bill in original cause.

LILIENTHAL v. DRUCKLIEB et al.

(Circuit Court, S. D. New York. February 11, 1898.)

1. FRAUDULENT CONVEYANCES.

A sale, though fraudulent and void as to creditors, is binding on the parties to it.

2. CREDITORS' BILL—GOOD WILL OF BUSINESS.

A creditors' bill extends to nothing which the creditors cannot reach, and hence does not require a finding by the master of the value of the good will of a business, which cannot be levied upon in satisfaction of their claims.

This was a creditors' suit by Clotilde Lilienthal against Charles A. Drucklieb and Julius C. Drucklieb. The cause was heard on exceptions to the master's report.

William H. Blymyer, for plaintiff.

Louis O. Van Doren and Henry B. Twombly, for defendants.

WHEELER, District Judge. This cause has been before considered by this court, and the liability of the defendants for property of Maurice Lilienthal, acquired in fraud of the rights of his creditors, adjudged and decreed. *Lilienthal v. Drucklieb*, 80 Fed. 562. It has now been heard on exceptions to the report of the master, to whom it was sent to ascertain the amount so received and retained away from the creditors. The property consisted of goods and dues of a store in New York in charge of Charles A. Drucklieb, as agent of Lilienthal, who lived in Paris. A large part of the goods was sold at once, and the avails were deposited in this court at the suit of creditors, and withdrawn on stipulation and order of court thereupon, by Charles A. Drucklieb. The defendants insist that what went to other creditors before this suit was well accounted for, and that more so went than the master has found and allowed. That they should not here be charged with what another creditor had previously obtained on account of the same fraud seems quite clear; but the question as to how much so went to other creditors, and how much was retained, has been determined by the master upon conflicting, and more or less convincing and doubtful, evidence, and his findings upon such evidence should not be disturbed without good cause, such as might set aside a verdict. No such cause appears here; on the contrary, the finding seems to be well warranted by the evidence. Charles A. Drucklieb claims that he was to receive 2 per cent. commissions on all sales as agent for Lilienthal, and not less than \$4,000 for the year from March, 1888; and that, having received only \$150 per month for but a part of the year, he should be allowed to retain the balance, \$2,380, out of the avails of these goods. The master does not find the agreement, and if it existed it would be superseded by the sale which, although fraudulent and void as to creditors, would be binding upon the parties to it. The plaintiff has excepted to the report because a value of the good will has not been found and stated. As this is a creditors' bill, however, it extends to nothing that they could not reach, and the good will could not be levied upon in satisfaction of

their debts. Besides this, the master states that no value of any good will was by any evidence made to appear. The plaintiff has excepted to the failure of the master to charge the defendants for some plushes. The question as to that rested upon the weight of, and inferences to be drawn from, evidence more or less indirect, and no good reason for disturbing the master's finding upon it appears.

The interlocutory decree was against both defendants for property received by both or either. The master's report says that, in the proceedings before him, "no evidence was introduced to show any liability as against Julius Drucklieb," and that he considered only the account of the defendant Charles A. Drucklieb. The plaintiff has excepted to this course of the master, but it seems to have been proper in stating the proceedings before him. The liability depends upon the decree, which, although interlocutory, stands, unless it is changed, as it may be, if deemed erroneous, in making up the final decree. This question has been reargued, however, upon this exception, and reconsidered. That no substantial part of the property itself came to the hands of Julius C. Drucklieb is clear, for he did not come in till after it had been sold and the money paid into court. While the money was in court he went to Europe to see Lilienthal about settling the matter, and, according to testimony of Charles A. before the master, that was so far the business of his journey that his expenses were charged to this property; and, according to his testimony in the case, Charles A. had no property but this that came from Lilienthal to put into the business, and yet he put in money after the commencement of the business till it was largely increased, which would be at about the time he was receiving the money with which he is charged by the master; and Julius C. became acquainted with one Herzig, in Paris, who had been engaged in this business with Lilienthal there, and continued in it with these defendants afterwards, and was then treating with Lilienthal about his property and business here. That Julius C. did not know anything about the dealings of his brother with Lilienthal at that time is not, under the circumstances, fairly credible. The letters of Charles A. to Herzig, at the time Julius C. was going to see Lilienthal, about the business all three were engaged in with him, show well that the position of Julius C. in the new firm here was being used to conceal the avails of the property of Lilienthal from his creditors. If the avails of this property had gone into the new firm as the share of Charles A. without the knowledge of Julius C., their presence in the assets of the firm would not seem to make the latter liable for them to the creditors. The shares of each in the new firm, with dates, could doubtless have been easily and exactly shown; but the testimony of Julius C. in the case left this wholly in doubt, and he does not appear to have testified at all before the master. Upon the whole, the decree against both appears to be correct, and should stand. Exception of plaintiff to report as to several liabilities dismissed, all others overruled, report accepted and confirmed, and decree on report against both defendants.

BLUTHENTHAL et al. v. SOUTHERN RY. CO.

(Circuit Court, N. D. Georgia. November 13, 1898.)

CARRIERS—DUTY TO CARRY LAWFUL GOODS—INTOXICATING LIQUORS—INJUNCTION.

A railroad company will be enjoined from refusing to carry from another state into South Carolina intoxicating liquors in original packages, consisting of bottles packed in wooden cases, when tendered in car-load lots, with a release of liability for waste or breakage not resulting from its own negligence.

Application for Mandatory Injunction.

This was a bill filed by Bluthenthal & Bickart, residents and citizens of the Northern district of Georgia, against the Southern Railway Company, a corporation of Virginia, and a resident and citizen of Virginia. Bluthenthal & Bickart were engaged in interstate commerce in the state of South Carolina and other states, and they were engaged several months prior to the filing of their bill in shipping goods consisting of whiskeys, brandies, wines, beer, and similar articles, in original packages, into South Carolina, and there selling the same through their agents. In view of the dispensary law of South Carolina, they were compelled to sell such goods in original packages in that state, and to ship the goods into the state in original packages. Beginning on or about August 1, 1897, they commenced making these shipments into South Carolina, and the Southern Railway Company received such shipments, and continued to receive them until on or about September 11, 1897. Such shipments were received by the company with a release of liability signed by Bluthenthal & Bickart. On September 11, 1897, Bluthenthal & Bickart were notified by the railway company that it would refuse to accept further shipments of original packages. On the day following, a shipment of original packages of liquors was tendered to the railway company, and by it refused, although freight charges were offered in advance, and Bluthenthal & Bickart agreed to sign any release which the railway company would require. The agent of the railway company exhibited to Bluthenthal & Bickart a circular issued by the company, which read as follows:

"Southern Railway Company. General Freight Department. Transportation of Interstate Commerce Shipments of Spirituous and Malt Liquors to Points Within the State of South Carolina. Notice to Shippers and Connecting Lines.

"Counsel having decided that spirituous and malt liquors in bottles, when not packed in cases or casks, are not in proper shipping condition, and that the usual form of release will not relieve the company from liability in case of damage by wreckage, notice is hereby given that on and after September 16, 1897, shipments of spirituous and malt liquors in glass, loose, not packed in cases, casks, or kegs, will not be accepted by this company for transportation.

"Issued September 9, 1897.

H. F. Smith, General Freight Agent.

"Effective September 16, 1897.

"Approved: J. H. Culp, Traffic Manager."

It was charged that the reason given by the railway company was not the real reason of their refusal, but charged that this railroad, with other railroads running into South Carolina, had entered into a conspiracy with the authorities of South Carolina by which the roads agreed to refuse to transport the goods of orators and others engaged in similar business into the state of South Carolina in original packages. It was further charged that the state of South Carolina was engaged in the business of buying and selling spirituous and malt liquors, and wished to prohibit all other persons from engaging in such business in that state. It was stated in their bill that the points to which they wished to ship the original packages in South Carolina were reached only by the Southern Railway Company, and that it was necessary for them to replenish their agencies at said places, and that irreparable damage would result

unless the railway company was compelled to accept the shipments. They offered and tendered said company shipments of original packages packed in wooden boxes, which tenders of shipment were refused.

Glenn, Slaton & Phillips, for complainants.

Dorsey, Brewster & Howell, for defendants.

Before PARDEE, Circuit Judge, and NEWMAN, District Judge.

PER CURIAM. This cause came on to be heard upon application for injunction pendente lite, was submitted upon affidavits, and argued, whereupon this court, being of opinion that the business of complainants of transporting liquors into the state of South Carolina for sale there under the lawful police regulations of that state is a legitimate business, which is entitled to be protected, and that the Southern Railway Company, as a common carrier, is required to receive and transport the goods of the complainant when tendered in such packages as will constitute reasonable and safe condition for shipment, and being of opinion, under the evidence submitted, that wines and liquors in bottles, packed in wooden cases, and tendered in car-load lots, as described in the complainants' bill and amendments thereto, are in reasonable and proper condition for shipment, and that the defendant company should receive and transport the same: It is ordered, that an injunction pendente lite issue, enjoining the defendant company from refusing to receive and transport car-load lots of the complainants' goods, packed and protected as set forth in complainants' bill, when accompanied with a waiver releasing the carrier from all waste and breakage not the result of the negligence of the defendant company or its agents.

MINNESOTA TRIBUNE CO. v. ASSOCIATED PRESS.

(Circuit Court of Appeals, Eighth Circuit. January 31, 1898.)

No. 906.

DECREE ON APPEAL—MODIFICATION AFTER END OF TERM.

A motion to modify an order of affirmance will be denied, when the motion is filed long after the term at which the order was entered.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This was a bill by the Minnesota Tribune Company against the Associated Press to specifically enforce the provisions of a contract. The circuit court dismissed the bill after a hearing on the merits (77 Fed. 354), and the complainant appealed. Heretofore, on November 22, 1897, this court filed an opinion sustaining the rulings below, and directing an affirmance of the decree. 83 Fed. 350. The complainant has now moved to modify the order of affirmance, so as to direct the dismissal of the bill, without prejudice to the complainant's right to sue at law.

Munn & Thygeson, for appellant.

W. D. Cornish and Emanuel Cohen, for appellee.

Before BREWER, Circuit Justice, THAYER, Circuit Judge, and RINER, District Judge.

PER CURIAM. The motion filed in this case on January 17, 1898, to modify the order of affirmance herein so as to direct the dismissal of the bill without prejudice to the complainant's right to sue at law, is denied for two reasons: First, because the majority of the court are of opinion that the decree of the circuit court dismissing the cause of action on its merits was right; and, second, because the motion to modify the order of affirmance in this court was not filed until long after the term had lapsed at which the order of affirmance was entered.

BUHL v. STEPHENS et al.

(Circuit Court, D. Indiana. February 8, 1898.)

No. 9,319.

1. STATUTE OF FRAUDS—AGREEMENT TO BE PERFORMED WITHIN ONE YEAR.

An agreement by which a licensee of a process is given exclusive rights for one year, with the option to then surrender his claim, or to continue his exclusive rights for the further term of sixteen years, is a contract "not to be performed within one year from the making thereof," and hence unenforceable under the statute of frauds, unless in writing.

2. LICENSE—ELECTION NOT TO TERMINATE.

Where a license for the exclusive use of a process allows the licensee within one year to elect to either abandon or continue it, his suit pending the year to restrain violation of it by the licensor constitutes a final election, and renders the agreement mutually obligatory.

3. STATUTE OF FRAUDS—CONFLICT OF LAWS—LAW OF FORUM.

A statutory prohibition in a given state against actions upon oral agreements not to be performed within one year relates to the remedy and procedure, and is, therefore, applicable to an action in that state, although brought upon a contract valid and enforceable under the laws of the state where it was made and was to be performed.

4. PLEADING—STATUTE OF FRAUDS.

In a suit in equity to enjoin the violation of a contract, an answer denying the making of the contract is sufficient to let in the defense of the statute of frauds.

5. FEDERAL COURTS—STATUTE OF FRAUDS—EFFECT OF STATE STATUTE.

The statute of frauds of a state is applicable to a suit in equity brought in a federal court of that state.

6. EQUITY JURISDICTION—BILL TO RESTRAIN VIOLATION OF LICENSE.

Where an exclusive licensee of a process seeks relief for alleged violation thereof by the licensor, the suit is properly one of equitable cognizance, both because an action at law would not afford such certain, complete, and beneficial relief, and because it would be impossible at law to accurately determine how much the complainant would lose from inability to secure his exclusive rights.

A. W. Hatch and Tanner & Whitla, for complainant.

Ryan & Thompson and Elliott & Elliott, for defendants.

BAKER, District Judge. This is a suit in equity, brought on February 24, 1896, by Frank H. Buhl, a citizen of the state of Pennsylvania, against John Stephens and the Midland Steel Company, cit-

izens of the state of Indiana, for a perpetual injunction enjoining and restraining the defendants from violating a parol license for a process for the manufacture of polished steel plates. It is alleged in the bill of complaint that on December 31, 1895, an oral agreement was entered into by the defendant John Stephens, the inventor of the process, with the complainant, Frank H. Buhl, "whereby it was agreed that your orator should have the sole and exclusive right to manufacture and sell the product made by defendant's process; your orator to have one year in which to develop said process, at the end of which time he should surrender his claim to the exclusive license to use said process, and thereby terminate said contract, or, should he elect to continue to use the process, pay said Stephens a royalty of five dollars per ton, based on a selling price of the product of five cents per pound, the royalty to increase or decrease in proportion as the selling price of the product should increase or decrease, your orator agreeing to manufacture not less than one hundred and fifty tons per month, or, in any event, to pay royalty on that amount, and to keep account books open to the inspection of said Stephens, showing the amount of product manufactured and sold; and, further, that the process should be kept secret, and confined exclusively to your orator and Stephens." The bill was put at issue, and referred to the master to take the proofs, and report his findings to the court. In his report he finds "that the defendant Stephens did enter into the contract with the complainant, Buhl, as alleged in the bill of complaint; and that the contract, according to Buhl's evidence, which is not denied by Stephens, was to continue for the life of the patent,—a term of seventeen years." The master finds that the complainant has made a case entitling him to the relief prayed for, unless his right to such relief is barred by the statute of frauds of this state, which provides that "no action shall be brought upon any agreement that is not to be performed within one year from the making thereof, unless the promise, contract, or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." Horner's Ann. St. 1897, § 4904. The agreement was made in the state of Pennsylvania, where it was to be performed, between the complainant and defendant Stephens, who were each at the time citizens of that state. The agreement is valid, and is provable by parol testimony by the law of that state, where there is no statute rendering parol contracts not to be performed within a year invalid or nonenforceable. The master finds that the oral agreement sued upon is not enforceable, and recommends that the bill should be dismissed. The complainant excepts to the master's report for error (1) in finding that the agreement was one not to be performed within one year from the making thereof; (2) in finding that the statute of frauds of the state of Indiana is a bar to the maintenance of the suit.

On the hearing upon the exceptions, counsel for the defendants pressed upon the court various grounds upon which it was contended that the suit was not maintainable. It was urged that there was a

plain, adequate, and complete remedy at law for the recovery of damages for the breach of the agreement, and hence that the court could not entertain the present suit. An action at law would not afford relief so certain, complete, and beneficial to the complainant as would a decree for the specific performance of the contract. The value of the process cannot be accurately ascertained in an action at law. Hence it would be impossible, with any approach to accuracy, to determine how much the complainant would lose from inability to secure the exclusive use of the process. For these reasons the suit must be held to be properly one of equitable cognizance. *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. 970, 977; *Binney v. Annan*, 107 Mass. 94; *Adams v. Messinger*, 147 Mass. 185, 17 N. E. 491.

It was also contended that specific performance could not be enforced, because there was no proof of a certain, complete, and definite agreement, and because there was no mutuality in the agreement, and it was inequitable, as it was optional with the complainant for the period of one year whether or not it should be carried into effect. This suit was brought within two months after the agreement had been made, and ten months before the expiration of the option. The complainant had one year in which to develop the process, at the end of which time he was at liberty to accept or reject the agreement. It is manifest that the option was reserved for the benefit of the complainant. The defendant Stephens was in no way interested in the proposed development of the process during the year. However much the process may have been developed and perfected, he was to receive no advantage therefrom. He had parted with the exclusive use of the process, and it was to his advantage to have the option determined at once. The bringing of the suit constitutes an affirmation of the agreement, and a waiver of the complainant's right to await the expiration of the year before electing to become bound by the agreement beyond his power of revocation. The agreement does not lack mutuality because the complainant had the right until the end of the year to terminate it. He was not bound to await the expiration of the year, but whenever within that time he elected to accept the license upon the stipulated terms, the agreement became mutually obligatory. *Johnston v. Trippe*, 33 Fed. 530, 536. The agreement rests upon a sufficient consideration, and is not inequitable or unequal in its terms. The agreement was, as has been said, for the sale of the exclusive use of a process for the manufacture of polished steel plates. No limitation of the term for which the license was to run is fixed by the contract set out in the bill of complaint. But the master finds that it was to continue in force for the period of 17 years. During this term the complainant was bound to pay for the right to such exclusive use not less than \$750 per month.

It was contended by counsel for complainant that the statute of frauds did not apply, because the agreement does not appear from its terms to be incapable of performance within the year. The true construction of the clause of the statute of frauds which requires a memorandum in writing of "any agreement which is not to be per-

formed within one year from the making thereof" is elaborately considered in *Warner v. Railway Co.*, 164 U. S. 418, 17 Sup. Ct. 147. It is there held that this clause of the statute only applies to agreements which, according to the true intention of the parties as shown by the terms of their contract, cannot be fully performed within a year, and not to an agreement which may be fully performed within the year, although the time of performance is uncertain, and may probably extend, and may have been expected by the parties to extend, and does in fact extend, beyond the year. Tested by this rule, it is plain that the present agreement falls within the condemnation of the statute. The agreement, by its terms, as found by the master,—and, in my opinion, correctly,—cannot be fully performed until the expiration of the period of 17 years. It is incapable of full performance, according to the true intent of the parties as disclosed by the agreement, within one year from the making thereof. The case of *Packet Co. v. Sickles*, 5 Wall. 580, 595, is decisive of this question. As has been said, the agreement was entered into and was to be performed in the state of Pennsylvania, and was by the law of that state valid, and provable by parol testimony. If the statute of frauds of the state where the contract was made and to be performed enters into and forms a part of the obligation of the contract, as distinguished from the remedy for the enforcement of it, the agreement in suit would be enforceable here. The general rule of the law, with some exceptions, not necessary to be stated here, is that a contract valid by the law of the place where made and to be performed is valid everywhere. Counsel for complainant earnestly contend that, the oral agreement being valid, and provable by oral testimony by the law of Pennsylvania, is valid and provable by the like testimony here, notwithstanding the statute of frauds of this state forbids the maintenance of a suit upon such oral agreement. It may be considered as settled that whatever relates to the remedy, and constitutes a part of the procedure, is determined by the law of the forum; but whatever goes to the substance of the obligation, and affects the rights of the parties growing out of the contract itself, or inhering in it, is governed by the *lex loci contractus*. The provision of our statute is copied from the fifth clause of the fourth section of the English statute of frauds (29 Car. II. c. 3), and in the case of *Leroux v. Brown*, 12 C. B. 801, where the precise question now involved arose, it was held, upon great consideration, that this clause of the statute affected the remedy only. A recovery was denied in an action upon an oral contract not to be performed within a year, which was made in France, where it was capable of proof by parol evidence. The doctrine established by this case has been uniformly adhered to by the English courts, and has been followed or cited with approbation by many American courts, and it has met with the general approval of text writers. The case of *Leroux v. Brown*, *supra*, has been criticised somewhat on, the distinction there drawn between the fourth and seventeenth sections of the statute, to the point that the former section related to the remedy and the latter to the obligation or validity of the contract. This distinction has not met with general

approval, and it has been held in some of the later cases that both sections relate to the remedy. *Leroux v. Brown* is cited with approval by the supreme court in *Pritchard v. Norton*, 106 U. S. 124, 134, 1 Sup. Ct. 102. The language of the statute clearly imports that the agreement precedes the written memorandum, and may exist as a complete and valid agreement, independent of the writing. The memorandum is merely the evidence by means of which the agreement is to be established, and may be made at any time after the completion of the agreement. Any letter, telegram, or admission in an answer to a bill in equity stating the terms of the agreement is sufficient to satisfy the requirements of the statute. It cannot well be contended that a recital of the terms of a prior oral agreement constitutes the agreement itself. The statute relates simply to the nature or quality of the evidence necessary to establish the agreement, and does not touch the obligation or validity of the agreement when admitted or properly proved. *Heaton v. Eldridge* (Ohio) 46 N. E. 638, and cases there cited. The statute of frauds is as binding upon a court of equity as upon a court of law, and accordingly equity will not relieve against the simple moral wrong of refusing to perform an agreement which the statute forbids the court to enforce. 8 Am. & Eng. Enc. Law (1st Ed.) p. 737, and cases cited in note 5.

The denial in the answer of the defendants of the making of the contract on which the complainant bases his suit is as effective for letting in the defense of the statute of frauds as if the existence of the statute had been specifically pleaded, and the benefit of it claimed. *May v. Sloan*, 101 U. S. 231; *Dunphy v. Ryan*, 116 U. S. 491, 6 Sup. Ct. 486; *Buttemere v. Hayes*, 5 Mees. & W. 456. Under section 34 of the judiciary act of September 24, 1789, it has been uniformly held that the statute of frauds as well as the statute of limitations of the state are applicable to the courts of the United States in actions at law. *Packet Co. v. Sickles*, *supra*; *Warner v. Railway Co.*, *supra*; *Leffingwell v. Warren*, 2 Black, 599. It has been held, in the absence of any legislation by congress on the subject, that the statute of limitations of the state where the suit was brought is applicable to suits in equity in the courts of the United States. *Lewis v. Marshall*, 5 Pet. 470. It has also been held that the statute of frauds of the state where the suit is brought is applicable to a suit in equity in a court of the United States. *Randall v. Howard*, 2 Black, 585; *May v. Sloan*, *supra*. This rests upon the familiar maxim, "Acquitas sequitur legem." It would certainly be an anomaly if a parol agreement were to be held invalid because not provable on the law side of the court for want of a written note or memorandum, while it is to be held valid and provable by parol testimony on the equity side of the same court. In my judgment, no such anomaly exists. On the whole, the court is of opinion that the agreement set out in the bill of complaint is not provable by parol, and therefore the exceptions to the master's report will be overruled. The bill is dismissed for want of equity at complainant's cost.

POPE et al. v. HOOPES et al.

(Circuit Court, D. New Jersey. January 3, 1898.)

1. CONTRACTS—REFORMATION.

In a suit for reformation of a written contract, the complainant must make out a perfectly clear case, free from doubt.

2. SAME—FAILURE TO CALL IMPORTANT WITNESS.

In such a case, where the testimony is conflicting, the failure of complainant to call as a witness a disinterested person, who was present and took part in the original negotiations, weighs against his claim.

3. EQUITY JURISDICTION—MISTAKE DUE TO NEGLIGENCE.

Against mistake in framing an agreement, caused merely by the negligent conduct of the complaining party, equity will not relieve.

4. SAME—SPECIFIC PERFORMANCE—DECREE.

In a suit for specific performance, the court will not make a decree which would compel the defendant to convey, while leaving the complainant free to reject the deed tendered in compliance with the decree.

5. SAME—EXTENSION OF OPTION.

Where one who holds an option under a contract for the purchase of lands has refused to purchase them upon the agreed terms, the court cannot, in his suit for specific performance, extend the agreed time within which he was to elect whether or not to exercise the option.

This was a suit in equity by Elmer E. Pope and Calvin N. Dodson against William G. Hoopes and others for reformation of a contract and for specific performance thereof.

Harry P. Camden and Chauncy H. Beasley, for complainants.
D. J. Pancoast, for defendants.

KIRKPATRICK, District Judge. In October, 1894, Elmer E. Pope and Calvin N. Dodson, the complainants, entered into an agreement in writing with the defendants, in and by which they leased from the defendants a certain piece of ground in Atlantic City, N. J., for the period of two years, at a rental of \$500 for the first year, and \$600 for the second year, which in the agreement was described as lying on the northerly side of the Board Walk and westerly of Connecticut avenue, and had a frontage of 50 feet on the Board Walk, and of 340 feet on Connecticut avenue. The agreement also provided that the parties of the first part thereto (the defendants herein) would sell to the complainants herein, the parties of the second part, the following described lots of land, situate in said Atlantic City, bounded and described as follows:

"Beginning at a point in the westerly line of Connecticut avenue, five hundred feet south, to the southerly line of Connecticut avenue, and running thence, first, westerly and parallel with Oriental avenue, fifty feet; thence, second, southerly, at right angles to Oriental avenue, between parallel lines, of the width of fifty feet, with the westerly line of Connecticut avenue, for the easterly boundary of the same, to the exterior line of the riparian commissioners, as established in the Atlantic Ocean,—at the expiration of one year from the date thereof, for the sum of fifteen thousand dollars, provided the parties of the first part shall not have sold said property before that time."

It also provided that the parties of the second part might purchase 50 feet on the rear or northerly side of the above-described tract, fronting on Connecticut avenue, with a depth of 175 feet, at

any time during said year, for the sum of \$3,500, provided said lot was not previously sold to other parties. Under this agreement the complainants entered into the possession of the leased premises, and erected thereon a more or less substantial building for exhibition purposes, at a cost of several thousand dollars. On the 6th of September, 1895, the complainants notified the defendants that they would be prepared to accept deeds for the two tracts mentioned in the agreement, and pay the cash price for the same. It was soon discovered that there was a difference between the parties as to the quantity of land to be sold under the contract, the complainants herein insisting that the first tract was to be identical in its location and dimensions with that included within the lease, while the defendants contended that it comprised only that particularly described in the agreement, and which on the line of Connecticut avenue, measuring northerly from the Board Walk, fell short of that described in the lease by upwards of 100 feet. The location of the second tract on which complainants had an option was consequently disputed, inasmuch as it adjoined the first tract on its northerly side. On the 16th September, 1895, and within the year after the date of the agreement, the complainants herein tendered to the defendants the sum of \$18,500, and demanded, for the sum of \$15,000, a deed for a lot having a frontage of 50 feet on the Board Walk, and running northerly 340 feet, and for \$3,500 a deed for a lot adjoining the above on the north, having a frontage of 50 feet on Connecticut avenue, with a depth of 175 feet. The defendants declined to make deeds for the properties demanded, but offered "to convey" to complainants "the property described in said agreement in" their "covenant to convey." This offer of the defendants was refused by the complainants, and on the 8th day of October, 1895, they filed their bill of complaint herein, setting out that by a mistake, unintentional, or intentional and fraudulent, the defendants did not truly describe the premises which they by the agreement had taken the option to purchase, and praying that the agreement be reformed so that the description of the lots to be purchased should conform to the ones they had leased, and that a decree be made compelling the defendants to convey the premises accordingly.

Testimony was taken, from which it appeared that at the time of making the said agreement there were present Elmer E. Pope and Calvin N. Dodson, the complainants, and Allen B. Endicott, William G. Hoopes, and Barclay H. Bullock, the defendants, and a Mr. Rogers, who was then in the employ of Adams & Co., real-estate agents, who were acting for the complainants. Pope and Dodson both testify that the only pieces of ground spoken of at the time of drawing the agreement were the one included in the lease, which was 50 feet front on the Board Walk, by 340 feet deep on Connecticut avenue, and the lot adjoining on the north, having a frontage of 50 feet on Connecticut avenue, by a depth of 175 feet, and that they supposed that the option to purchase covered the same premises which were included in the lease; while Endicott, Hoopes, and Bullock swear that they distinctly refused to sell to the complain-

ants the lot which they were willing to lease, and that they at that time gave complainants as the reason for such refusal that the sale of such a plot would not accord with their general plan of sale of the property of which this lot was a part, and that it would leave upon their hands a large piece of ground which would be inaccessible and practically worthless. They also say that it was because the land to be included in the lease and the land to be sold differed that a separate description was used for each, a more particular description used for the land to be sold, and the beginning point located with reference to a fixed and unchanging monument, the same as had been used by them on that day in making sales of property on that tract to other parties. The testimony of the complainants and defendants is irreconcilable. Mr. Rogers, who both parties agree was present and took part in the negotiations, and at whose suggestion the option on the tract 50x175 was granted and taken, was not called as a witness. It was incumbent upon the complainants to prove that the written instrument did not truly set forth the terms of the agreement, and their failure to give the court the benefit of the testimony of this disinterested witness must work to their disadvantage. Upon the evidence presented, it is impossible for the court to say that the proof in demonstration of a mistake in the description of the land is clear and satisfactory; its weight is rather to the contrary. Upon the one side is the testimony of the complainants; on the other, the written instrument, with its separate description of the land leased and to be sold, fortified by the assertion of the defendants that it was not intended by the parties that the tracts should be identical. In *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 48, the court said: "The writing must be regarded *prima facie* as a solemn and deliberate admission of both parties as to what the terms of the contract actually were;" and he who asks to have a written contract reformed must make out a perfectly clear case, free from doubt. *Hupsch v. Resch*, 45 N. J. Eq. 662, 18 Atl. 372; *Harrison v. Insurance Co.*, 30 Fed. 863. It seems that the difference of description was noticed by Mr. Pope when the agreement was sent to West Virginia, where he resided, for execution. No inquiry was made regarding the matter, but it was, he says, assumed that the option covered the same property as that leased. Against mistake due to negligent conduct the court will not relieve. *Haggerty v. McCanna*, 25 N. J. Eq. 48; *Voorhis v. Murphy*, 26 N. J. Eq. 435.

After the proofs had all been taken, the complainants obtained leave to file an amended or supplementary bill, which, without setting up new matter, asks that the court, if it should find that the complainants were not entitled to a reformation of the description of the lots to be conveyed them by the defendants so as to conform to the description of the lot leased, then the complainants might "be given an opportunity to elect whether they will take the same as described in the option, and, if they do, that the contract" may be specifically enforced in the manner admitted by the defendants. The complainants do not say that they are willing to perform the contract as it has been drawn and executed by them, but

ask the court to give them an opportunity to elect whether at this late day they will exercise the option to purchase which expired in October, 1895, and, if they do so elect, that the court will decree a specific performance. They ask the court to make a decree which would compel the defendants to convey, but leave them at liberty to reject the deed tendered in compliance with the decree. This the court cannot do. The remedy at the time of rendering the decree would not be mutual. In *Richards v. Green*, 23 N. J. Eq. 536, Chief Justice Beasley says: "It seems to me that the rule is universal to this extent: that equity will not direct the performance of the terms of an agreement by the one party when at the time of such order the other party is at liberty to reject the obligations of such agreement." The tender made by the complainants in the exercise of their option was for the tract of land described in the lease. The defendants offered to convey "the property described in said agreement in our covenant to convey." This the complainants refused to accept, saying "that they would not have anything only what the lease and option called for,—the three hundred and fifty feet the building stood on, and the piece fifty by one hundred and seventy-five;" "and we told them," said the witness, "we intended to have all the lease and option called for." Having thus refused to purchase the land according to the terms of the contract, the court cannot make a new agreement for the parties, by extending the time in which they may elect whether they will or will not exercise the option. *Henderson v. Stokes*, 42 N. J. Eq. 588, 8 Atl. 718. The complainants are not entitled to the relief prayed for in the bill, and it should be dismissed, with costs.

BROWN et al. v. CRANBERRY IRON & COAL CO.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1898.)

No. 243.

REFORMATION OF DEEDS—MISTAKE.

The owners of a tract of mineral land negotiated a sale thereof, but the transaction was suspended because two third persons gave notice that they claimed an interest in the minerals. To clear their title and consummate the sale, the vendors procured deeds from these persons, paying them about \$40,000 therefor. Formerly the two claimants had held their interests in common, but, before execution of the deeds, had, by agreement, partitioned the same. The deeds, however, described the entire tract, and conveyed an undivided one-half of the mineral therein. *Held*, that it was the evident intent of the parties to sell and purchase the entire interest of the claimants, and that the deed should be reformed on the ground of mutual mistake. 82 Fed. 351, affirmed.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

This was a suit by W. Vance Brown and others against the Cranberry Iron & Coal Company for partition of certain mineral land. In the circuit court a decree was rendered for defendant, and the complainants have appealed.

Charles E. Moore and Fred. Moore, for appellants.
James H. Merriman and R. H. Battle, for appellee.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL,
District Judges.

BRAWLEY, District Judge. This cause has been three times in this court. 25 U. S. App. 107, 13 C. C. A. 66, and 65 Fed. 636; 25 U. S. App. 680, 18 C. C. A. 444, and 72 Fed. 96; 25 U. S. App. 692, 18 C. C. A. 462, and 72 Fed. 103. The facts are so fully stated therein that a repetition of them is unnecessary. A cross bill was filed by leave of the court on April 20, 1896. A motion to strike this bill from the files was heard and dismissed on September 26, 1896, and on August 7, 1897, a decree was enrolled granting the relief prayed in the cross bill; this appeal is from that decree.

That a cross bill would lie was, in effect, decided when the case was last here (25 U. S. App. 692, 18 C. C. A. 462, and 72 Fed. 103), and the opinion of this court disposes of the objections now urged against it on the ground of laches, for all the material facts upon which that argument is predicated were then within the knowledge of the court. Hoke and his associates had negotiated the sale of the lands in controversy, believing that they had a perfect title thereto, and being so advised by Gaither, a lawyer of large experience and practice, and familiar with the property. Before the sale was consummated they were informed that Brown and Avery claimed title to a part of the lands. As the intending purchasers regarded this claim as a cloud upon the title, they would not complete the transaction until it was removed, and negotiations were then had with Avery and Brown for the purchase of their interest, whatever it might be. These negotiations terminated in an agreement to buy, at a price named, what was understood by Hoke and his associates to be the entire interest of Avery and Brown, and conveyances were duly executed by the executors of Avery and the agents of Brown. These conveyances were drawn by Gaither, and were executed in the year 1867; and if at that time Avery and Brown had been tenants in common of the mineral interests claimed, as seems to have been the belief of the parties to the negotiation, they would have sufficed to convey the whole interest. But it appears that some years prior thereto there had been a severance by compromise between Brown and Avery, and that each had an undivided interest in all of the mineral on either side of what has been denominated in the proceedings as a compromise line made in 1853. Hoke and associates, having secured what they believed to be the entire interest of Avery and Brown, and thus removed what had been considered a cloud upon the title, subsequently conveyed the lands to the Cranberry Iron & Coal Company, which has made extensive and expensive improvements in the development of the property. This litigation was commenced in 1887. Its various phases appear in the volumes of Reports above cited, and it has culminated in the cross bill filed to correct the mistake alleged to have been made in the conveyance made by Brown through his agents in 1867; the contention in behalf of plaintiffs, who are defend-

ants in the cross bill, being that only one-half of the mineral interest in the lands was conveyed by said deed, and that they are tenants in common with the defendant company of all the lands on the east side of the aforementioned compromise line.

The only question before us now is whether the deed of conveyance of June 7, 1867, made by John E. Brown, through his agents, should be corrected. This deed conveys "the following tract of land, situate and being in the county of Mitchell, in the state of North Carolina; that is, the one-half of the mineral interest in said lands." Then follows a description by metes and bounds of the lands conveyed, the boundaries being the same as in the deed of the executors of Avery to Hoke and his associates. The habendum clause is, "To have and hold the one-half of the mines and mineral interests in the said lands," with a general warranty of the title "to the one-half of the mines, mineral, ore bank, and mineral interests within the boundaries of said lands." The conveyance of Avery's executor, after describing the tract by metes and bounds, defines the interest thereby conveyed as being "one-half the mineral interest in said lands." The contention of the plaintiffs in the cross bill is that Gaither, the attorney who drew both the conveyances, had forgotten that there had been a partition of the lands by Avery and Brown, and that each was entitled to a whole and undivided interest in the separate parcels lying on either side of the compromise line, and by his inadvertence and mistake the conveyances were drawn as if each of the parties was entitled to an undivided half interest in the whole tract; the compromise agreement not being at that time on record. If the testimony is clear, strong, and convincing that such mistake was made, it would be the duty of the court to correct it, and make the instrument conform to the real intention of the parties. This presents a question of fact, and the learned circuit judge who heard the case below has determined it in favor of the plaintiffs in the cross bill. His conclusion, after considering all the testimony, is that Hoke and his associates intended to buy, and actually paid for, all of the interest in the minerals claimed and held by Avery and Brown, and that it was the intention of Avery and Brown to convey the entire interest, and that Gaither was instructed to carry out that intent, and that by his inadvertence the deeds of conveyance failed to do so. The venerable judge of the district court, before whom the cause first came, directed an issue to be submitted to a jury to determine whether the plaintiffs in that action, who are defendants in the cross bill, were estopped, by their acts, declarations, or otherwise, from claiming any interest in the mines and minerals in the land described, and the verdict of the jury was that they were estopped. The learned judge, in a carefully considered opinion, says:

"The attorneys in fact of the grantor (one of whom was the late Gov. Vance, who testified upon the trial) were highly honorable men, were faithful agents, and were familiar with the rights of their principal. From the nature of the transaction, and judging their conduct by the ordinary principles of common honesty and fair dealing, which might well be expected from men of such high character, we cannot suppose that they intended to reserve from the operation of the deed an undeveloped mineral interest, which, without any expense on the part of the grantor, would be greatly enhanced in value by the subsequent

expenditures of the company, to which the grantees might sell the property. They well knew that the material inducement to the contract on the part of the grantees was to obtain a complete transfer of the entire interest of the grantor, in order that they might accomplish their purpose, which had been previously defeated by the outstanding interest of the grantor. The evidence shows conclusively that the attorneys in fact acted in good faith, and intended to convey, and believed that they did convey, all the mineral interest of their principal. We are strongly inclined to the opinion that the present claim of the plaintiff was an afterthought not suggested by his agents. We are confirmed in this opinion by the fact that he asserted no claim to an un conveyed mineral interest for nearly twenty years after the execution of the deed, although he had knowledge that the defendant company had made large expenditures in developing the minerals, and were in possession, claiming to hold the premises in severalty."

This judge and jury had the opportunity of seeing and hearing the witnesses, and although the judgment in that case, when brought here for review, was remanded on other grounds, nothing has occurred to diminish the great persuasive force of their opinions on the question of fact which is now before us. We are clearly of opinion, upon the whole case, that it was the intention of the purchasers from Brown to buy his entire interest in the lands; that they paid for the entire interest, and that it was their understanding that the deed conveyed it; that it was through the inadvertence and mistake of the draftsman that the deed failed to carry out the intent of the grantor, which was to convey the entire interest; and that it should be reformed. In our judgment, the contention of the plaintiff in error concerning the North Carolina statute of limitations is without merit, as that statute is not applicable to this case. We fully agree with the court below in the conclusion reached, and in the relief granted. It follows that the decree appealed from should be affirmed, and it is so ordered.

TIMMONDS v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. February 16, 1898.)

No. 415.

1. CLAIMS AGAINST UNITED STATES—LIMITATION.

One suing the government, under the act of March 3, 1887, providing for bringing suits against the United States, is barred as to any part of his demand arising over six years before filing his petition.

2. SAME — GOVERNMENT EMPLOYEES—EIGHT-HOUR LAW—EXTRA COMPENSATION.

Rev. St. § 3738, providing that "eight hours shall constitute a day's work for all laborers, workmen and mechanics" employed by the government, is a mere direction by the government to its agents, not a contract with its servants, and gives the latter no right to extra compensation for working more than eight hours a day. U. S. v. Martin, 94 U. S. 400, followed.

In Error to the Circuit Court of the United States for the District of Indiana.

This was a petition by Richard H. Timmonds against the United States to recover compensation alleged to be due for working overtime as a government employé. In the circuit court judgment was given for the defendant, and the plaintiff sued out this writ of error.

Laurent A. Douglass, for plaintiff in error.

Frank B. Burke, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge. The plaintiff in error, Richard H. Timmonds, on June 24, 1895, filed his petition in the court below, alleging (1) that from December, 1866, to April 30, 1887, he was employed at various times by the United States as station engineer at the Jeffersonville depot, quartermaster's department, at a specified salary per month, varying from time to time, and ranging from \$50 to \$125 per month, and at the latter date was discharged from service; (2) that from December 7, 1889, until September 1, 1893, he was so employed at \$75 per month, and at the latter date was again discharged from service; (3) that during all the time of such service he was compelled to work 12 hours a day during each day of such service, without any special agreement that he should work 12 hours each day, or should render such service for the same amount of pay as for 8 hours a day; (4) that he was so compelled to work in excess of 8 hours a day contrary to law, and that the United States received and accepted the benefit of his additional 4 hours of labor during each day of that time. He prayed judgment for the value of his labor in excess of 8 hours a day. The court struck out of the petition all that part claiming compensation for services rendered prior to June 24, 1889, and afterwards sustained a demurrer to the petition as it stood after striking out part of it.

We are of opinion that the court below properly struck out of the petition all allegations relating to services prior to June 24, 1889. Subdivision 2 of section 1 of the act of March 3, 1887 (24 Stat. c. 359, p. 505), entitled "An act to provide for the bringing of suits against the government of the United States," provides that "no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made." The demurrer to the petition embracing the claim for extra hours of service from December 7, 1889, to September 1, 1893, was also properly sustained. The right to recover for such services is predicated upon the act approved June 25, 1868 (15 Stat. c. 72, p. 77), which, as embodied in the Revised Statutes (Rev. St. § 3738), provides: "Eight hours shall constitute a day's work for all laborers, workmen and mechanics who may be employed by or on behalf of the government of the United States." It is urged that under this provision any laborer, workman, or mechanic who labors in the service of the United States more than eight hours a day may recover as upon a quantum meruit for the value of the extra time so given to the service, irrespective of the contract of employment. This statutory provision has passed under the scrutiny of the supreme court in *U. S. v. Martin*, 94 U. S. 400. It was there ruled that the provision in question is in the nature of a direction by the government to its agents, and is not a contract between the government and its servants; that it does not specify what sum shall be paid for the labor of 8 hours, nor that the price shall be larger when the hours are more, or smaller when the hours are less; and that, being in the nature of a direction from the government to its agents, it does not constitute a con-

tract to pay its servants for the excess of time employed. In the case before us, we take it the allegation that the petitioner was compelled to work for 12 hours a day was not intended to mean involuntary or compulsory service beyond the 8 hours a day, but that the work he undertook required that period of service at a stipulated monthly compensation. He was under no compulsion. He could have abandoned his service if it proved distasteful or onerous. Continuing, however, in a service which required 12 hours of time each day at a stated compensation per month, he is not entitled to recover as upon an implied contract for the service in excess of 8 hours a day. The act being construed to be merely a direction to the employing officer of the government does not furnish grounds of recovery for the supposed excessive service, nor confer any right upon or interest in the servant. It is otherwise with respect to letter carriers, because the act with respect to them expressly provides that they shall be paid for the extra time in proportion to the salary fixed by law (U. S. v. Post, 148 U. S. 124, 13 Sup. Ct. 567), a provision wanting in the act under consideration. The judgment appealed from is affirmed.

CLEVELAND, C., C. & ST. L. RY. CO. v. BALLENTINE.

(Circuit Court of Appeals, Seventh Circuit. February 16, 1898.)

No. 450.

NEGLIGENCE—PERSONAL INJURIES.

A boy of 17½ years, who, out of curiosity, goes upon the premises of a railroad company to witness the accidental burning of a train of tank cars, filled with petroleum, assumes the risks of the situation; and, though he voluntarily renders some services in preventing the spread of the fire to other property, he cannot recover against the company for injuries caused by an explosion of one of the cars.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

On the morning of January 31, 1893, the Southwestern Limited, a passenger train of the plaintiff in error, hereinafter called for brevity the "Railway Company," bound from St. Louis to Indianapolis and the east, by reason of a switch negligently left open, ran upon a siding, and collided with a train of 18 oil-tank cars, filled with petroleum oil, standing in the yards of the company at Wann, now East Alton, about 20 miles from East St. Louis. These yards were over 3,500 feet in length north and south, and over 625 feet in width. There were within the yards three small houses belonging to the Railway Company and some old stock pens and stock sheds. By reason of the collision, the forward end of the engine was driven through the end of an oil tank, and fire was communicated to the train of oil-tank cars. The passenger train, or such portion of it as had not taken fire from the collision, was moved away from the scene of the fire by means of a switch engine, and 10 of the oil-tank cars within a short time were also removed, leaving 8 oil-tank cars which were on fire. The smoke of the conflagration was dense and black, and the flames and smoke could be seen a long distance. The fire attracted the curiosity of a large number of people, and the yards were soon and during the entire forenoon occupied by from two to three hundred persons. This crowd was at different times during the forenoon warned by the servants of the Railway Company that there was danger of explosion. Hamilton S. Ballentine, the defendant in error, was a young man then 17½ years

of age, and at the time was working on the farm of his cousin, John Henry, about $2\frac{1}{2}$ miles distant from these yards. They both observed from the farm the ascending smoke, and drove to a store at Wann, where they fastened their horse and proceeded to the scene of the wreck. This store was 1,000 feet distant from the fire, and was not in danger. The two remained at the wreck as curious observers of the conflagration for nearly an hour, and then returned to the store. At 11 o'clock the two drove down the highway to the crossing of the railway at the south end of the yards, and the crossing being obstructed by an engine, as they claimed, they fastened the horse to a telegraph pole, and proceeded upon foot north along and upon or near the railway tracks towards the scene of the conflagration. While walking close to the tracks, and not far from the burning tanks, and between the bank on the west and the tracks, a certain farmer who was acquainted with Henry called to him and others to come up and "help put out these stock pens." Ballentine and Henry went to the stock pens, which were near the track upon which stood the burning oil-tank cars, and some one,—Ballentine said a man whom he thought was Moline, the section foreman,—gave Henry a spike hammer, and the latter commenced to knock planks off the stock pens, and Ballentine assisted to carry them away from the fire. After thus working a half hour, Ballentine raked the leaves away, and, having concluded that work, he stood not far from the burning oil-tank cars, "cooling off," when one of the tanks of oil exploded, sending forth a dense smoke and flame of burning oil, which fell upon him, inflicting serious injury. Ballentine had lived with his cousin upon this farm for about two years. Before that time he had lived in the city of Philadelphia, and had attended the public schools of that city until he was 15 years of age. When Ballentine went upon the tracks the second time the 8 oil-tank cars were on fire. The smoke and flame of the burning ascended 30 feet in height, and were accompanied with a loud roaring, hissing, intermittent noise. The fire, it seemed, would first catch in the vent of the tanks, and, the seams of the tanks opening, the gas would shoot out with a loud hissing noise, as one witness describes, "as though many locomotives were blowing off steam at once." Ballentine saw all this, but states in his testimony that he had understood the tanks were empty. The action is brought to recover damages for the injuries thus sustained. The declaration contains five counts, to each one of which a demurrer was interposed and was overruled. The first count avers the negligent collision, and that the Railway Company carelessly allowed the cars to remain on the siding exposed to the fire, and suffered the fire to burn and heat the tanks, whereby an explosion resulted, and injured Ballentine, who "was then and there exercising due care and caution." The second count alleges the negligent collision; that the fire could have been extinguished by the exercise of care and caution, but was negligently suffered to spread, and heat and explode the oil tank, whereby Ballentine, then and there lawfully passing along the public highway, "was prevented by said collision and fire from crossing the track of said railroad which was obstructed thereby, and who had no reason to suppose he was exposing himself to danger by so doing, and who was then and there in the exercise of due care and caution, was suddenly and unexpectedly smitten and enveloped by the said flames, and was thereby burned," etc. The third count is like the first count, with the addition that the servants of the Railway Company represented to Ballentine "that there was no danger; that the tanks contained cotton-seed and black oil; and that said tanks would not explode." The fourth count is like the first, with the additional averment that Ballentine was employed and ordered by the Railway Company to work for it in and about saving and preventing the loss and destruction from fire of its property, which he immediately, at the request of the defendant, then did, and that the Railway Company carelessly and negligently failed and neglected to notify Ballentine of the danger of the employment he was about to undertake, but negligently and carelessly represented and assured him that there was no danger that the tanks would explode, and that the contents thereof were not of a dangerous or explosive character. The fifth count is like the first, with the additional averment that Ballentine, in the exercise of due care and caution, was engaged and worked in putting out the fire, preventing the fire from spreading, and that he was wholly ignorant of the dangerous and

explosive quality and character of the contents of the tanks, or that there was danger of the tanks bursting or exploding. At the trial, upon the conclusion of the evidence, the court was requested by the Railway Company to instruct the jury to find the defendant not guilty. This request was refused, and an exception was taken. A verdict was rendered in favor of Ballentine, the plaintiff below, and the cause is brought here for review. Many errors are assigned upon the admission of evidence and the instructions of the court. The foregoing statement will, however, sufficiently indicate the grounds upon which the judgment of the court proceeds.

John T. Dye and George T. McNulty, for plaintiff in error.
James W. Patton, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

We dismiss without remark the consideration of the second and third counts of the declaration, because there is entire absence of evidence to sustain the allegation of the second that he was upon the highway at the time of this injury, or of the third that the servants of the company represented to him that there was no danger, or that the tanks contained cotton-seed and black oil, and would not explode. The first and fifth counts will be considered together, and the fourth count by itself.

We ruled in *Goodlander Mill Co. v. Standard Oil Co.*, 24 U. S. App. 7-12, 11 C. C. A. 255, and 63 Fed. 401, that "it is not every one who suffers loss from another's negligence who may recover therefor. Negligence, to be actionable, must occur in breach of a legal duty arising out of contract or otherwise, owing to the person sustaining the loss. *Kahl v. Love*, 37 N. J. Law, 5; *Bank v. Ward*, 100 U. S. 195. Mr. Wharton defines 'legal duty' to be 'that which the law requires to be done or forborne to a determinate person, or to the public at large, and as correlative to a right vested in such determinate person or the public at large.' *Whart. Neg.* (2d Ed.) § 24." We are to deal with legal, and not moral, obligations. We have therefore to inquire, first, whether, upon the assumption that there was no contractual relation between Ballentine and the Railway Company, there was in the distressing occurrences of this conflagration violation of any legal duty owing by the former to the latter, operative to his injury as a proximate and natural cause of that injury. The collision and the resulting fire were caused by the misplacing of a switch, presumably the negligent act or omission of a servant of the Railway Company. That negligent act or omission, however, was not in breach of any duty owing to Ballentine, and as to him was innocuous, he being two miles away at the time and unaffected thereby. He came upon the scene afterwards, and while the conflagration was in progress. He went upon the grounds of the Railway Company where he had no right to be, and going there, at best, as a mere licensee, he was bound to take things as he found them, and he assumed the risk of the situation. *Elevator Co. v. Lippert*, 24 U. S. App. 182, 11 C. C. A. 521, and 63 Fed. 942. So it is held that firemen entering upon premises to extinguish a conflagration and to save property do so, not by permission or invita-

tion of the owner, but under license of the law, and they also must take the risks as they find them. *Woodruff v. Bowen*, 136 Ind. 431, 34 N. E. 1113; *Gibson v. Leonard*, 143 Ill. 182, 190, 32 N. E. 182. Ballentine went upon the grounds of the Railway Company impelled by natural curiosity. The danger was obvious. There was no concealment of explosives. The peculiar construction of the tanks declared the character and quality of their usual contents. We held in *Goodlander Mill Co. v. Standard Oil Co.*, *supra*, that petroleum oil is not a dangerous agency, within the rule that he who uses it does so at his peril, and must respond to the injuries thereby occasioned not caused by external natural occurrences or by the interposition of strangers. It is dangerous when, in considerable quantity, it is brought in contact with fire. This is matter of public and general knowledge, of which no American schoolboy of the age of 15 years can be presumed to be ignorant, and knowledge of which seems only to be ignored by the stupid servant who, in spite of repeated warnings, pours the fluid upon the fire, as we are periodically advised by the press. The scene itself was a signal of danger. The hissing, roaring, escaping gas should have proven a sufficient warning. It is impossible to credit the statement of Ballentine that he understood the tanks were empty. The obvious situation showed that that could not be so. The case, therefore, so far as presented by the first and fifth counts of the declaration, and by the evidence to sustain them, was this: That Ballentine, impelled by curiosity to witness a great conflagration, went upon the grounds of the Railway Company, to the scene of it, in the face of obvious danger of explosion. He went without inducement or invitation, without legal right, and assumed the perils of the situation. He voluntarily and negligently exposed his person to danger. "*Volenti non fit injuria.*" The Railway Company owed to him no active duty,—only the duty to abstain during his presence on the premises from positive wrongful act which might result in injury to him. It was not bound to remove the burning cars to another part of its yards, either in the discharge of any duty towards him, or, so far as the record discloses, in discharge of duty towards any one. All was done that could reasonably be demanded when general and repeated warnings were given of danger from explosion. The company was not in duty bound to engage a constabulary force to drive the crowd from its premises. We perceive no grounds in the allegations of the first and fifth counts, or in the evidence produced to uphold them, upon which Ballentine could rightfully recover for the injury he sustained.

It is urged that under the fourth count this judgment can be upheld because Ballentine was employed to assist in the removal of the stock pens, and he, being ignorant of the qualities of petroleum, was not previously warned of the danger, but that the Railway Company assured him that the contents of the tanks were nonexplosive. It might suffice to say that we are of opinion that there is no evidence to sustain the finding that he was employed by the Railway Company. In the excitement of a great fire, at the suggestion of one who had no connection with the Railway Company, Ballentine

accompanied his cousin to assist in removing certain structures. He was a volunteer. His act was doubtless impelled by generous and laudable motive to assist in preventing the spread of the fire, as at every fire volunteers are not wanting to assist in staying the ravages of a conflagration. Assuming, however, that he may be deemed a servant of the company *pro hac vice*, we fail to observe any failure of duty upon the part of the Railway Company. As we have said, the danger was obvious, and it certainly cannot be that in the heat and excitement of the occasion it was the duty of the Railway Company, by its officers, to ascertain if each volunteer was possessed of knowledge common to all, and to carefully instruct each person, whom it might permit to assist, in the properties of petroleum oil and of its liability to explosion before it allowed him to engage in the work of removing the structures. If Ballentine can be treated as a servant of the company for the particular work he did, he entered into the service, subject, at least, to its obvious perils. There is no evidence of any representation to him that the contents of the tanks were not of a dangerous or explosive character, or that no explosion need be apprehended. He states that he understood the tanks to be empty. He does not state from whom he obtained such information, and, as we have observed, such information was opposed to the manifestations of his own senses of sight and hearing. We are of opinion that the court below should have directed a verdict of not guilty. The judgment will be reversed, and the cause remanded, with directions to award a new trial.

CRAWFORD v. FOSTER.

(Circuit Court of Appeals, Seventh Circuit. February 11, 1898.)

No. 428.

1. REVIVOR OF JUDGMENT—SERVICE OF NOTICE.

The Indiana statute requires 10 days' personal notice of a proceeding to revive a judgment unless the adverse party "be absent or nonresident, or cannot be found, when service of notice may be made by publication, as in an original action, or in such manner as the court shall direct." Burns' Rev. St. 1894, § 687 (Rev. St. 1881, § 675). *Held*, that in the case of a nonresident who may be found the court may direct personal service on him by a marshal or deputy, and such service in another state is valid.

2. SPECIAL AND GENERAL APPEARANCE.

A special appearance for the purpose of objecting to the jurisdiction becomes general if the defendant then disputes the merits of the cause, and no words of reservation can make an appearance special which is in fact to the merits.

3. APPEAL—REVIEW—ORDER REVIVING JUDGMENT.

On error from proceedings to revive a judgment, in which the court made no special finding, the only questions for review are rulings made on the hearing of the petition.

4. EVIDENCE—EXECUTION—CONTRADICTION OF RETURNS.

A return showing the levy of an execution is not contradicted by proof of a subsequent disposition of the property levied on.

In Error to the Circuit Court of the United States for the District of Indiana.

This was a motion by William Foster under the Indiana statute to revive a judgment at law against Henry Crawford. An order of revivor was entered in the court below (80 Fed. 991), and the defendant sued out this writ of error. This court, on January 3, 1897, affirmed the judgment (83 Fed. 975), but the appellant has filed a petition for a rehearing.

Henry Crawford and W. R. Crawford, for plaintiff in error.

A. W. Hatch, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The opinion of the court in this case is not at variance with the rule declared in *Harkness v. Hyde*, 98 U. S. 476, that "illegality," misquoted in the petition for rehearing as "irregularity," in the service of process by which jurisdiction is to be obtained, is not waived by answering to the merits, if there had been first a special appearance, and motion that the service be set aside; but to prevent possible misapprehension a further statement of the case is now made. Nothing more than irregularity in the process or service is alleged here, and that only in particulars which are quite immaterial. The notice required by the statute of Indiana (section 675 of the Revision of 1881; section 687 of Burns' Revision of 1894) is "ten days' personal notice to the adverse party, unless he be absent or nonresident, or cannot be found, when service of notice may be made by publication, as in an original action, or in such manner as the court shall direct." In this case, on presentation of the petition of the appellee the circuit court ordered "that notice be given said Crawford by the clerk that said petition has been filed, and that on the expiration of fifteen days from and after service of said notice on said Crawford by any marshal of the United States, or an authorized deputy of such marshal, the petitioner will be entitled to have execution on said judgment unless cause is shown why the same should not be done." A duly-certified copy of this order was issued, and, as is shown by the return indorsed thereon, was served personally upon the judgment defendant on the 1st day of December, 1896, at the city of New York by the United States marshal for the Southern district of New York. On the ensuing 15th the defendant entered a so-called special appearance in writing, which embraces four propositions, in substance as follows: (1) That the defendant enters a special appearance for the sole purpose of objecting to the jurisdiction of the court. (2) That upon the filing of the petition and motion to revive the judgment the court, without any hearing or oral evidence or notice to the defendant, entered an *ex parte* order reciting that, unless within 15 days after service of a copy of the order upon the defendant he should show cause, the judgment should be revived, and execution issued for the collection of the same. (3) That at that time the defendant was, and ever had been, a citizen and resident of Chicago, Ill., and not of Indiana or New York; that under section 605 of the Revised Statutes of Indiana the court had no jurisdiction to enter any order allowing execution to issue, except on notice by publication, and for 30 days, and that such *ex parte* order was irregularly

and improvidently granted, because, under the statute, the court had no jurisdiction to enter any order whatever directing the issue of an execution simply upon the ex parte affidavit of the petitioner; and that the defendant was entitled to a regular hearing of the motion upon oral evidence after due notice had been given. (4) That "this defendant, further reserving all his rights in the premises, shows that it is disclosed in and by the record of said cause in this court that such cause has never been legally tried, or the issues filed by him heard or disposed of, and that such pretended judgment set up in the said petition of said Foster is void upon its face, and incapable of enforcement by execution,"—and concludes with a prayer to the court "to decide that it had no jurisdiction to enter such ex parte order, and that the same should be vacated and annulled." This prayer was denied, and an exception to the ruling duly saved by bill of exceptions.

The plaintiff in error being a nonresident, and absent from the state of Indiana, but not impossible to be found, it was a case for notice in such manner as the court saw fit to direct, and not one in which publication was necessary, if, even, it would have been proper. There is, therefore, no ground for objection to the order entered in so far as it provided for notice to the judgment defendant; and the only further objection urged is to the concluding statement, in the form of a rule nisi, that the petitioner will be entitled to have execution on the judgment if cause to the contrary be not shown. That part of the entry was at once needless and harmless. It in no manner affected the validity of the order for the purpose of notice to the defendant to appear and show what cause he might why the judgment should not be revived. No execution was finally ordered, or in fact issued, until after a proper hearing, at which the defendant was represented by counsel.

It is to be observed in passing that a party cannot be at once in court and out of court. He may not, in the same breath, dispute the merits of the cause alleged against him, and deny jurisdiction of the court over his person. This the plaintiff in error seems to have attempted to do by alleging that the process against him was defective, and that the judgment sought to be revived was void upon its face, and incapable of enforcement by execution; so that, although called special, the first appearance of the defendant probably ought to be regarded as general. No words of reservation can make an appearance special which is in fact to the merits.

The cause was brought to this court by a writ of error, and we adhere to the view that, the court below having made no special finding of the facts, no question touching the merits which did not arise upon a ruling of the court during the progress of the trial—that is to say, upon the hearing of the petition—can be considered. It is urged that section 700 of the Revised Statutes of the United States is applicable only when there is an issue of fact in a civil action, and that, in a proceeding under the Indiana statute to revive a judgment, not only is a trial by jury not contemplated, "but that no pleadings are allowed to be filed, and no issue raised, and that the only question to be determined by the lower court is a question of the amount

remaining due and unpaid upon the judgment, and no other question can be properly determined upon a motion of this character." Whether in such a case pleadings are not to be allowed under any circumstances may be questionable, but it is immaterial here to determine. The question of the amount due and unpaid upon the judgment was, without other pleadings than the petition or motion, an issue of fact upon which any relevant evidence was admissible. For instance, it was competent for the plaintiff in error to show that a prior levy of an execution issued upon the judgment remained undisposed of, and constituted a prima facie satisfaction, and, on the other hand, it was competent for the defendant in error to prove the loss or destruction of the property so levied upon, or any other disposition of it which would remove the inference or presumption of satisfaction of the judgment. No exception has been saved to the admission of evidence on the subject, and, in the absence of a special finding of the facts, it is not within our jurisdiction to consider whether the circuit court reached the right conclusion. It is plain, however, that proof of any subsequent disposition of property levied upon can involve no contradiction of the return showing simply the fact that a levy had been made. The petition is overruled.

PAULEY JAIL BLDG. & MFG. CO. v. CRAWFORD COUNTY.

(Circuit Court of Appeals, Eighth Circuit. January 31, 1898.)

No. 1,011.

1. CIRCUIT COURT OF APPEALS—JURISDICTION—CONSTITUTIONAL QUESTIONS.

Where, in a suit in the circuit court, it is claimed that a law of a state is void because it contravenes the constitution of the United States, the circuit court of appeals has no jurisdiction of the case, although it may also involve the consideration of many other questions.

2. STATUTES—RETROSPECTIVE EFFECT—CONSTRUCTION

In a statute relating to judgments "rendered or to be rendered," the use of the word "rendered" demonstrates the legislative intention to make it operative upon judgments already entered when the statute was enacted.

3. JUDGMENTS—STATUTORY CHANGE AS TO INTEREST—RETROSPECTIVE EFFECT—CONSTITUTIONAL QUESTION.

At the date of rendering a certain judgment in Arkansas against a county of that state, the Arkansas statutes (Mansf. Dig. c. 109, p. 934, §§ 4740, 4741) provided that judgments should carry interest from the day of signing thereof, until the effects should be sold or satisfaction made. Shortly thereafter, and on March 21, 1893, an act went into effect amending section 4741 by further providing that "no judgment rendered or to be rendered against any county in the state on county warrants * * * shall bear any interest after the passage of this act." Acts 1893, p. 145. *Held*, on appeal from an order canceling the judgment upon payment of its face, with interest to March 21, 1893, that the statutory intent was to include judgments entered before its enactment, but that as it was claimed that the statute, as thus construed, contravened article 1, § 10, of the constitution of the United States, relating to the obligation of contracts, the circuit court of appeals had no jurisdiction of the case.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

J. M. Harrell, for plaintiff in error.

E. B. Peirce, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. On February 11, 1893, the Pauley Jail Building & Manufacturing Company, the plaintiff in error, obtained a judgment against the county of Crawford, in the state of Arkansas, the defendant in error, upon a contract for materials furnished and services rendered, for the amount of \$7,836.66. At the time the contract was made upon which this judgment was based, and at the time when the judgment was rendered, the statutes of Arkansas provided:

"Sec. 4740. Creditors shall be allowed to receive interest at the rate of six per cent. per annum on any judgment before any court or magistrate authorized to enter upon the same, from the day of signing judgment until the effects are sold, or satisfaction be made.

"Sec. 4741. Judgments or decrees upon contracts bearing more than six per cent. interest shall bear the same interest as may be specified in such contracts, and the rate of interest shall be expressed in all such judgments and decrees, and all other judgments and decrees shall bear interest at the rate of six per cent. per annum, until satisfaction is made as aforesaid." Mansf. Dig. Ark. c. 109, p. 934.

In March, 1893, the legislature of the state of Arkansas, by an act which was approved and took effect on March 21, 1893, amended the foregoing provisions of the statutes of that state by adding to section 4741 this proviso:

"Provided, no judgment rendered or to be rendered against any county in the state on county warrants or other evidences of county indebtedness shall bear any interest after the passage of this act." Acts 1893, p. 145.

The judgment rendered in favor of the plaintiff in error had been evidenced by county warrants before it was obtained, and on August 10, 1897, the defendant in error obtained from the court below an order canceling this judgment upon the payment of the face thereof, and interest at 6 per cent. from its date until March 21, 1893, when the proviso we have quoted took effect. The writ of error challenges this order, and the plaintiff insists that it was entitled to receive interest at 6 per cent. per annum upon its judgment until it was paid, and that the order of the court, discharging the judgment without requiring payment of this interest, was in violation of the provision of section 10 of article 1 of the constitution of the United States, that no state shall pass any law impairing the obligation of contracts. It is true that there is another question presented in the briefs submitted in this case,—the question whether or not the act of the legislature of Arkansas of 1893 was intended to have a retrospective effect. This question, however, is entitled to very little consideration, in view of the fact that the proviso reads that no judgment rendered or to be rendered shall bear any interest after the passage of the act. The use of the word "rendered" is a demonstration of the intention of the legislature to make this proviso applicable to judgments which had then been entered. The result is that the

only substantial question in this case is whether or not this law of the state of Arkansas is in contravention of the constitution of the United States. But this court has no jurisdiction to consider or determine that question, or any case in which a question of that character is presented. Section 5 of the act of March 3, 1891 (26 Stat. c. 517, p. 826), declares that appeals may be taken to the supreme court "(6) in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States." Section 6 provides that, in cases other than those provided for in section 5, the circuit court of appeals may exercise appellate jurisdiction, unless otherwise provided by law. We have repeatedly held that, if it is claimed that a law of a state is void because it contravenes the constitution of the United States, this court has no jurisdiction of the case, although it may also involve the consideration of many other questions. A careful examination of this question will be found in the opinion of this court delivered by Judge Thayer in *Hastings v. Ames*, 32 U. S. App. 485, 15 C. C. A. 628, and 68 Fed. 726; and upon the authority of that case, and the cases cited in that opinion, the writ of error in this case is dismissed.

LITTLE ROCK & M. R. CO. v. BARRY.

(Circuit Court of Appeals, Eighth Circuit. January 31, 1898.)

No. 804.

1. MASTER AND SERVANT—PERSONAL INJURIES—RAILROAD COLLISIONS—RULES FOR RUNNING TRAINS.

Rules adopted by railroad companies for the management of trains are presumably selected as the best for avoiding accidents, and, unless clearly shown to be palpably unreasonable or insufficient, the company should not be charged with negligence on account of their adoption and use.

2. SAME.

In an action by a railroad engineer to recover for personal injuries received in a rear-end collision, it appeared that, by the rules of the company, employes in charge of trains were not to be notified as to the position and movements of other trains, but were required to protect themselves by sending out flagmen, and putting torpedoes on the track, in case of unusual stoppages. These rules were adopted pursuant to the recommendation of a committee of experts, and were in force on more than 58,000 miles of railroad in this country. Three experts testified that these rules were better calculated to prevent accidents, by always requiring trainmen to be vigilant, than was the opposite rule, of attempting to keep them informed as to the position of all trains. Three other experts testified that in the particular case the engineer and conductor of each train should have been notified of the location and movements of the other. *Held*, that it was error to charge that, in sending out special trains, due and sufficient notice should be given of the whereabouts of all other trains which are liable to be met or overtaken.

B. SAME—ASSUMPTION OF RISKS.

A railroad engineer, taking service under reasonable rules adopted by the company for the operation of trains, without objecting thereto, assumes the risk arising from their nonobservance by employes operating other trains.

4. SAME—REASONABLENESS OF RULES—QUESTION OF LAW.

When a railroad company has deliberately adopted a system of rules, which have been made familiar to its employes, and its road is operated under them, the reasonableness and sufficiency of these rules are questions of law, and not of fact for the jury.

5. SAME—PERSONAL INJURIES—PROXIMATE CAUSE.

The engineer of an extra passenger train was injured by a collision of his train with the rear end of a delayed freight train, of whose position he had not been notified. The employes of the freight train had entirely failed to observe the company's rules, requiring them, in case of stoppage, to send out a flagman, and place torpedoes on the track. *Held* that, even if free from negligence himself, and if it were negligence on the part of the company not to notify him of the position of the freight train, or not to notify the freight-train employes of the approach of the extra passenger train, still the proximate cause of the injury was the negligence of his co-employes in charge of the freight train.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

G. B. Rose (U. M. Rose and W. E. Hemingway, on the brief), for plaintiff in error.

J. M. Moore and W. L. Terry, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. About 2 o'clock in the afternoon on October 26, 1890, engine No. 5 of the Little Rock & Memphis Railroad Company ran into the rear of a freight train on the railroad of that company; and G. F. Barry, the defendant in error, who was the fireman on this engine, leaped from it, and was injured. He sued the company for damages, and alleged that he was injured by its negligence in employing an incompetent conductor upon the train his engine drew, and in failing to give notice to its servants in charge of engine No. 5 of the whereabouts and movements of the freight train, and in failing to give notice to its servants in charge of the freight train of the whereabouts and movements of engine No. 5. The plaintiff in error, the railroad company, answered that its conductor was not incompetent, and that it was not its duty to give the conductor and engineer of either of the trains which collided notice of the movements or whereabouts of the other. Upon these two issues the testimony was conflicting, and the jury found for the defendant in error. These facts, however, were uncontradicted: The railroad of the plaintiff in error extends from Hopefield, a town opposite Memphis, in the state of Tennessee, westward to Little Rock, in the state of Arkansas. The first telegraph station west of Hopefield is Edmondson, 15 miles distant, and the second is Forrest City, 47 miles distant. Argenta is a station still further west, near the city of Little Rock. The freight train was a regular train. It had left Hopefield at 3:50 a. m.; was due at Edmondson at 5 a. m., but had been so delayed that it did not leave that station until 9:40 a. m., 4 hours and 40 minutes later than its schedule time; and while it was standing on the main track, on a curve in a deep cut outside the yard limits, about half a mile east of Forrest City, at about 2 o'clock in the afternoon,

engine No. 5 crashed into the rear of it. The engineer in charge of this engine had passed this freight train at Edmondson at 9:30 that morning, on his way east to Hopefield, and he knew it was late. When the superintendent of the company delivered the order, under which the train drawn by engine No. 5 was operated on this day, to its conductor, he told him to look out for this freight train, as it was still in the bottom between Edmondson and Forrest City; and the conductor repeated this warning to the engineer when he communicated the order to him before leaving Hopefield. In the early part of this day a military company, which arrived at Memphis too late for the regular passenger train, engaged of this railroad company an extra train to take it to Little Rock, and the engineer and fireman of engine No. 5 were directed to draw this train with their engine. The freight train was, as we have said, a regular train, and it was known as "No. 5." This was the order under which the extra ran:

Little Rock & Memphis Railroad.

Telegraphic Train Order No. 5

31

Memphis, Oct. 26, 1890.

To C. & E. of Eng. 5, Hopefield

C. & E. No. 5 at Forrest City

C. & E. Eng. 4 & No. 6 Brinkley

Engine 5 will run from

Hopefield to Argenta extra

when No. 5 is overtaken pass

and run ahead of them

meet No. 6 and Eng. 4 at

Brinkley, do not pass Brinkley

Unless Eng. 3 is there.

A. J. W.

The rules of the company made this extra train inferior in grade to the regular freight train, under this order, and imposed upon its conductor and engineer the duty to keep out of the way of that freight train, which they knew was somewhere upon the single track in front of them. These rules also required the crew of the freight train, when it stopped and stood, as it did, for three-quarters of an hour before the accident occurred, on the curve, in a deep cut, one-half mile east of Forrest City, to immediately station and maintain a flagman 10 or 12 telegraph poles in the rear of its train, and to place torpedoes on the track, not less than 15 telegraph poles behind it, for the purpose of warning and stopping approaching trains which might follow it. These rules gave the employes of the company notice that it proposed to use its railroad for the passage of trains at any time it chose, and that they must protect themselves against their approach. The engineer of the extra train, however, did not keep his engine under control, so that he could stop it when he saw the freight train, but he drove it on with such speed that it was impossible for him to prevent the collision after he came in sight of the regular train; and the crew of the freight train failed to give warning to the

approaching extra of the presence of their train, either by torpedo or by flagman. In short, these fellow servants of the defendant in error were guilty of gross negligence, without which it is highly improbable, if not impossible, that the accident could have occurred.

One of the rules of the company, however, required all orders to be given in writing, where practicable; and counsel for the defendant in error insisted that the company was negligent because it did not insert in the written order to the men in control of the extra train a statement that the freight train was delayed east of Forrest City, and an admonition to beware of it, and because the train dispatcher did not stop the extra train at Edmondson, as it passed there, and notify its crew again that the freight had not reached Forrest City. In support of their view, three witnesses for the defendant in error, who had had experience in railroading, testified that in their opinion this course should have been pursued. On the other hand, it appeared by the evidence that this railroad was operated under the standard rules, which were prepared some years ago by experienced railroad men chosen for the purpose by the officers of various railroad companies, and that they had been subsequently so generally adopted, as the best in use, that, in 1888, 58,000 (and at the time of the trial many more) miles of railroad were governed and operated under them. Three witnesses of skill and experience in the operation of railroads, who were familiar with these rules, and the practice of railroads under them, testified, in effect, that in their judgment, and in the judgment of those who had prepared and adopted them, they were the best and the most conducive to safety of any rules in use in this country; that it is more conducive to the safety of the operation of railroads to require the men in charge of a train to look out for, and protect themselves at all times against, other trains and engines, without notice of their whereabouts and movements, than it is to undertake to give them notice of these movements and whereabouts, and this for the reason that if men receive, and come to expect, notice of approaching trains, they will invariably relax their vigilance, and rely upon the notice, rather than upon their watchfulness, for their safety, and that in the long run they will be caught in danger more frequently, and more accidents will happen at times when it is impossible or impracticable to convey notice to them, than would occur if they were spurred to constant watchfulness by the knowledge that a train was liable to come upon them at any time without notice. These witnesses testified, in substance, that this was the theory upon which the standard rules were based, and that they did not require the superintendent or train dispatcher to give the men in charge of either of these trains notice of the whereabouts or movements of the other. They also testified that in their opinion neither the duty of the company, nor the safety of its servants, required that the crew of either train should have notice of the movements or whereabouts of the other, or that the extra train should be stopped at Edmondson, and its conductor or engineer informed that the freight was still between that station and Forrest City, where they knew it to be when they started. In this state of the evidence, it is assigned as error that the court charged the jury:

"In sending out special or extra trains, due and sufficient notice of the movements and whereabouts of all other trains and locomotives which are liable to be met or overtaken by the special or extra should be given to the officers or servants in charge of such trains. And due notice of such special or extra train should, in like manner, be given to the servants in charge of such other trains, as far as may be necessary to guard against and prevent accident. And if, from any cause, it is impracticable to give such notice, then such other precautions as are reasonably adapted to prevent danger of collision or accident should be taken. If the jury believe from the evidence that the defendant, through any default or neglect on its part, failed to perform the aforesaid duties, and that the collision was caused by such failure, and that thereby plaintiff sustained the injuries complained of, the defendant is liable in this action."

This instruction is a plain declaration that the theory which the wisdom and experience of many of the most careful and intelligent railroad operators have deemed most conducive to the safety of their employes, their passengers, and their property, is unsound, that the rules based upon it are unreasonable, and that the operation of a railroad in accordance with it is negligence. Such a declaration of the law ought not to be made without clear and convincing proof, nor without the most careful and deliberate consideration. The theory upon which these rules are based, the rules themselves, and the operation of railroads in accordance with them, have all received the sanction of respectable authority. *Railroad Co. v. Neer*, 26 Ill. App. 356, 360; *Id.*, 31 Ill. App. 126, 134, 139; *Kennelty v. Railroad Co.* (Pa. Sup.) 30 Atl. 1014; *McGrath v. Railroad Co.*, 15 R. I. 95, 97, 22 Atl. 927; *Wright v. Railroad Co.*, 25 N. Y. 562, 569. It does not seem unreasonable to suppose that men who are warned that other trains will pass over the railroad on which they are operating without notice to them, and that they must watch for and protect themselves against them at all times, would operate their trains with more care and fewer accidents than they would if an attempt were made to notify them of the whereabouts and movements of all trains, in view of the fact that the expectation of such notice might relax their vigilance, and that they would often be in locations where it would be impossible to give them the notices. If experience has proved this supposition to be in accordance with the fact, and has led to the adoption of rules which do not require, but discountenance, such notices, because the habit of giving them has been found to increase the number and danger of accidents, as the adoption of these standard rules by so many railroad companies, and the testimony of the experienced witnesses who are operating railroads under them, tend to show, it cannot be said that it was the duty of the defendant to give these notices, nor that its failure to give them was negligence. The fact is not forgotten that the defendant in error produced three witnesses who testified that such notices should have been given. But in our opinion their testimony is insufficient, in the face of the evidence of three witnesses of equal credibility who testified to the contrary, to so clearly establish the vice of the theory, and the unreasonableness of the rules and practice which companies operating more than 58,000 miles of railroad have adopted as the best and most conducive to safety, as to warrant a court in so declaring as a matter of law. The skilled and experienced railroad oper-

ators who seem to have developed this theory and formulated these rules are undoubtedly more competent than jurors or judges to select and prepare rules most conducive to the safe, economical, and prosperous operation of railroads. The interest of the owners of these railroads, the interest and ambition of those who operate them, alike prompt them to select and use the best; and, unless the rules they adopt are clearly shown to be palpably unreasonable or clearly insufficient, railroad companies ought not to be charged with negligence on account of their adoption and use. *Vedder v. Fellows*, 20 N. Y. 126, 133; *Enright v. Railway Co.* (Mich.) 53 N. W. 536. In our opinion, there was no such proof in this case; and at the close of the trial the court should have instructed the jury that the system of rules, and practice under them, which the company had adopted, was neither unreasonable nor insufficient. The defendant in error and the other servants of the company were familiar with these rules, and the theory upon which they were based. By taking service under them without objection or protest, they assumed the risks and dangers of the theory that every employé who operates trains must beware of other trains moving in the same direction, without notice of their whereabouts, and the risks and dangers of the system of rules which was based upon this theory. *Wolsey v. Railroad Co.*, 33 Ohio St. 227. When a railroad company has deliberately adopted a system of rules, which have been made familiar to its employés, and its railroad is operated under them, the reasonableness and sufficiency of these rules are questions of law, and not of fact. These questions must be determined by the court, because there is no other way in which a set of rules may ever be established or adjudicated as either reasonable or sufficient. It may be said that trial judges often differ upon questions of this character. But the answer to this objection is that the appellate court will finally settle them, and in the end a substantial uniformity of decision as to the reasonableness and sufficiency of any set of rules in general use must eventually result, if these questions are left to the determination of the courts. If, on the other hand, they are remitted to the juries, their various findings can result in little less than confusion worse confounded. The decision of an appellate court becomes a precedent for the rulings of many inferior courts. But the finding of one jury is no precedent for the decision of another, and a rule that is found to be reasonable by one jury will frequently be thought to be unreasonable by another; and no criterion will ever be established by which railroad companies may measure their duties in this regard, if the reasonableness and sufficiency of their rules are to be daily submitted to new tribunals, which are governed by no precedent, and are without experience in the determination of these questions. We adhere to the view of this question expressed by Judge Caldwell in the opinion of this court in *Railway Co. v. Dye*, 36 U. S. App. 23, 28, 16 C. C. A. 604, 607, and 70 Fed. 24, 27, which is supported by the following authorities, among others: *Vedder v. Fellows*, 20 N. Y. 126, 130; *Railway v. Adcock*, 52 Ark. 406, 410, 12 S. W. 874; *Railway Co. v. Hammond*, 58 Ark. 324, 334, 24 S. W. 723; *Railroad Co. v. Whittemore*, 43 Ill. 420, 423; *Railroad Co. v. Flem-*

ing, 18 Am. & Eng. Ry. Cas. 347, 352; *Tracy v. Railroad Co.*, 9 Bosw. 396, 398, 402; *Hoffbauer v. Railroad Co.*, 52 Iowa, 342, 343, 3 N. W. 121.

Moreover, the court, in effect, told the jury by this instruction that, if they believed that the collision occurred through the failure or neglect of the railroad company to give these notices, the defendant in error might recover. It is difficult to understand what basis there is in this case, under the admitted facts, for a finding that a failure to give these notices caused this collision. If we concede that the failure to write the notice which was verbally given to the conductor and engineer of the extra train at Hopefield, that they must look out for the freight train which was in the bottom between Edmondson and Forrest City (an unreasonable concession, except for the sake of argument), and the failure to stop the extra train at Edmondson, and notify its conductor and engineer that the freight train was still there, and the failure to send a courier from Forrest City, or some other point, to the freight train, to notify its conductor and engineer that the extra train was coming, constituted negligence, there still remains what seems to us an insuperable obstacle to a recovery on this ground. An injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable. An injury that is not the natural consequence of an act or omission, and that would not have resulted but for the interposition of a new and independent cause, is not actionable. *Railway Co. v. Elliott*, 12 U. S. App. 381, 386, 5 C. C. A. 347, 350, and 55 Fed. 949, 952; *Finalyson v. Milling Co.*, 32 U. S. App. 143, 151, 14 C. C. A. 492, 496, and 67 Fed. 507, 512; *Railway Co. v. Bennett's Adm'x*, 32 U. S. App. 621, 16 C. C. A. 300, and 69 Fed. 525; *Railway Co. v. Callaghan*, 12 U. S. App. 541, 550, 6 C. C. A. 205, 210, and 56 Fed. 988, 993; *Railway Co. v. Moseley*, 12 U. S. App. 601, 609, 6 C. C. A. 641, 646, and 57 Fed. 921, 926; *Insurance Co. v. Melick*, 27 U. S. App. 547, 557, 12 C. C. A. 544, 550, and 65 Fed. 178, 184. It was the duty of the engineer and conductor of the extra train to look out for and to so operate their train that their engine would not crash into the freight which they knew was on the track before them. It was the duty of the engineer of that train, who alone could see the track in front of him, to so govern the speed of his engine that he could at any time stop it within the range of his vision. It was the duty of the crew of the freight train to place torpedoes on the track at least 15 telegraph poles in the rear of their train when it stopped at the place of the collision, and to station a flagman 10 or 12 telegraph poles behind that train. The railroad company had the right to presume that its servants on these trains would obey its rules and discharge these duties, and it had the right to act upon that assumption. It was its right to calculate the natural and probable result of its acts and omissions upon this supposition. Indeed, it could reckon upon no other, for it is alike impracticable and impossible to predicate and administer the rights and remedies of men on the theory that their associates and servants will either disregard their duties or violate the laws. Now, no one who reckoned on the faithful discharge of their duties by these employ  s could reasonably

have anticipated this fatal collision as either a natural or probable consequence of the failure to give these notices. Nor could it have been the result of such failure, had not the unforeseen negligence of the engineer of the extra train, and the gross and unexpected carelessness of the crew of the freight train, intervened to interrupt the natural sequence of events, to turn aside their course, and to prevent the safe operation of these trains, which was the natural and probable result of the rules and the orders which the defendant gave. It was the gross negligence of these servants, which no one could anticipate, that constituted the intervening and proximate cause, without which this collision could never have been; and it is to this, and not to the failure to give the notices, in our opinion, that this accident must be attributed, under the maxim, "*Causa proxima, non remota, spectatur.*"

There are many other errors assigned in this case, and many other questions discussed in the briefs of counsel, but the case must be retried on account of those to which we have referred. What has already been said will be a sufficient intimation of our views to guide the court in the coming trial, and it would be unprofitable to extend this opinion by the discussion of other questions which may not again arise. The judgment below must be reversed, and the cause remanded to the court below, with directions to grant a new trial; and it is so ordered.

THAYER, Circuit Judge. I concur in the view that the case should be reversed for error in the instruction which is quoted above, in the opinion of the majority of the court. There was a controversy before the jury as to whether the engineer and conductor of the extra train ought to have been notified at Edmondson that freight train No. 5 had not arrived at Forrest City, and that they must keep a sharp lookout for the freight train between the two stations last mentioned. Three expert railroad men, who were called as witnesses for the plaintiff below, testified, in substance, that such notice ought to have been given; that as the engineer of the extra train would naturally infer that the freight train had reached Forrest City by the time the extra train reached Edmondson, since the freight train was then overdue at the former station, he ought to have been notified by the train dispatcher at Edmondson that such was not the fact, and that for some unknown reason the freight train had been delayed, and was not where it would very naturally be expected to be. In other words, three railroad men expressed the opinion, in substance, that, as applied to the facts existing when the extra reached Edmondson, the standard rules were not adequate to afford protection to trainmen and passengers, but that some further precautions ought to have been taken by the train dispatcher. Several witnesses for the defendant company expressed a contrary opinion, namely, that the standard rules were sufficient to meet any and every emergency, and that no additional notice ought to have been given at Edmondson. This was one of the crucial issues in the case, to which the attention of the jury should have been more specifically directed. The instruction above quoted, which was given by the

court, was couched in very general language, and was liable to be understood by the jury as meaning that it was the duty of the train dispatcher, in any event, and without reference to the existence of the rules, to have given notice at Edmondson that the freight train had not arrived at Forrest City. Being too general, as applied to the issue of fact above stated, and for that reason being liable to mislead, I agree that the case should be reversed, and a new trial ordered.

Other views, however, are expressed in the opinion of the majority of the court, to which I cannot assent. It is held broadly, as I understand, that when a railroad company adopts rules for the operation of its trains, or for the management of its business, and puts them in force, the question as to the reasonableness and sufficiency of such rules to afford protection to its employes and to the traveling public is always a question of law to be decided by the court. In my judgment, this proposition is not tenable, either upon principle or authority. When a controversy arises in a court of justice touching the reasonableness or sufficiency of a code of rules that has been adopted by a corporation or individual for the management of their business, and competent witnesses express different opinions upon that subject, an issue of fact is presented, which can only be determined by a jury, unless a trial by jury is waived. Judges cannot arrogate to themselves the power of determining such questions, on the ground that such practice insures greater unanimity of opinion, or on any other ground, without denying suitors their constitutional right of a trial by jury. The cases cited by the majority of the court in support of the proposition that the question whether a given code of rules is reasonable and sufficient is one of law (with one exception, to wit, *Railway Co. v. Whittemore*, 43 Ill. 420, 423) were all cases where a rule or regulation was introduced without any testimony tending to show whether the regulation was reasonable or otherwise, and the decisions were simply to the effect that in such cases the court could properly decide as to reasonableness of the regulation. In three of the cases, and particularly in the case of *Vedder v. Fellows*, 20 N. Y. 126, 131, to which all the other cases refer as the foundation of the doctrine, it was clearly intimated that the reasonableness of a regulation is a question of fact for the jury when there is a conflict of testimony upon that issue, and it is difficult to conceive how the rule could be otherwise without ignoring fundamental principles. In the case of *Railway Co. v. Adcock*, 52 Ark. 406, 410, 12 S. W. 874, the court said, "The facts being uncontroverted, it was the province of the court to declare the regulations reasonable." The same remark was quoted with approval in the subsequent case of *Railroad Co. v. Hammond*, 58 Ark. 324, 334, 24 S. W. 723; and in a late case in New York (*Abel v. Canal Co.*, 128 N. Y. 662, 666, 667, 28 N. E. 663), where the sufficiency of a code of rules which had been adopted by a railway company was challenged, and there was some testimony on that subject besides the rules themselves, it was held that the issue presented was properly submitted to the jury. I conclude, therefore, that the reasonableness of a regulation is a question of law for the court only in those cases where no testimony is offered tending to show whether it is reasonable or otherwise, and

that where, as in the case at bar, there is a conflict of testimony on such issue, the question is one of fact for the jury.

In the opinion in chief it is further held that the defendant company is not liable to the plaintiff, even if it was guilty of negligence in failing to inform those in charge of the extra train at Edmondson of the then whereabouts of the freight train. This conclusion is based on the ground that the negligence of the defendant company was not the proximate cause of the accident, but that the accident was solely occasioned by the fault of certain fellow servants of the plaintiff. I am not able to assent to this proposition. If, as the testimony for the plaintiff below tended to show, the rules were insufficient for the protection of trainmen and passengers, as applied to the conditions existing when the extra train reached Edmondson, and if at that station the train dispatcher ought to have given the information last above specified to the engineer and conductor of the extra train, then, in my judgment, it was the right of the jury to determine whether such omission of duty on the part of the defendant company directly contributed to the accident. The question as to what was the proximate cause of an injury is ordinarily not one of legal knowledge, but of fact, for the jury to determine, in view of all the accompanying circumstances. *Railway Co. v. Kellogg*, 94 U. S. 469, 474. And in the case at bar the jury might well have reached the conclusion that a word of caution spoken at Edmondson to the engineer in charge of the extra train would have prevented the disaster. The operator at Edmondson evidently thought that the extra train ought to be warned that the freight train had not reached Forrest City, for as it came into view he said to the train dispatcher, over the wire: "Here comes the special. Have you any orders for it?" The engineer of the extra train well knew that sufficient time had elapsed to enable the freight train to reach Forrest City, and he doubtless supposed that it had passed that station some time before the extra reached Edmondson. If he had been warned that it had not reached Forrest City, he would doubtless have exercised a degree of care commensurate with the conditions which actually existed, and the jury might reasonably have found that the failure to give such warning directly contributed to the injury. Moreover, the fact that certain fellow servants of the plaintiff were also guilty of negligence did not absolve the defendant company from liability for its own neglect of duty, or that of its train dispatcher, since it is well settled that it is no excuse for a master, when sued by his servant, that the negligence of a fellow employé, as well as his own, contributed to occasion the injury. For these reasons I cannot concur in the views of my associates, that they have the right to determine that the negligence of the defendant company was not the proximate cause of the accident.

WOTTON et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 9, 1898.)

CUSTOMS DUTIES—CLASSIFICATION—HAT TRIMMINGS—GALOONS.

Cotton hat trimmings, of the variety called "galoons," were dutiable as galoons, under paragraph 263 of the act of 1894, and not as "trimmings of which cotton is the component material of chief value, not specifically provided for," under paragraph 276.

This was an appeal by Wotton & Rumler from a decision of the board of general appraisers as to the classification of certain merchandise imported by them.

Comstock & Brown, for appellants.

James T. Van Rensselaer, for the United States.

TOWNSEND, District Judge (orally). The articles in question are cotton hat trimmings, as found by the board of general appraisers. But they are also a specific variety of hat trimmings, namely, galoons, and therefore dutiable as such, under the provisions of paragraph 263 of the act of 1894, and not under the provisions of paragraph 276, as "trimmings of which cotton is the component material of chief value, not specifically provided for," as found by the board of general appraisers. The decision of said board is therefore reversed.

KOECHL et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 9, 1898.)

CUSTOMS DUTIES—CLASSIFICATION—MEDICINAL PREPARATIONS—LORETIN.

Loretin, a medicinal preparation, the medicinal action of which as an antiseptic and otherwise is chiefly due to its acid properties, was free, under paragraph 363 of the act of August, 1894, as an "acid used for medicinal purposes," and not dutiable, under paragraph 59, as a medicinal preparation.

This was an appeal by Victor Koechl & Co. from a decision of the board of general appraisers as to the classification for duty of certain merchandise imported by them.

Hartley & Coleman, for appellants.

James T. Van Rensselaer, for the United States.

TOWNSEND, District Judge (orally). The merchandise in question herein, loretin, is a medicinal preparation, as claimed by the United States and found by the board of general appraisers. But it is also an acid, used for medicinal purposes, and its medicinal action as an antiseptic and otherwise is chiefly, if not entirely, due to its acid properties. In accordance with the rule laid down by the court of appeals in *Matheson & Co. v. U. S.*, 18 C. C. A. 143, 71 Fed. 394, it should have been classified as an "acid used for medicinal purposes," and free, under paragraph 363 of the act of August, 1894. The decision of the

board of general appraisers sustaining an assessment of 25 per cent., under the provision for medicinal preparations not specifically provided for in paragraph 59 of said act, is reversed.

CENTAUR CO. v. HEINSFURTER et al.

(Circuit Court of Appeals, Eighth Circuit. January 10, 1898.)

No. 899.

TRADE-MARKS—PATENTED ARTICLES—EXPIRATION OF PATENT.

When a patented article becomes known by a particular name, though an arbitrary one invented by the patentee, such as "Castoria," such name becomes public property on the expiration of the patent; and no trade-mark right exists therein, or can be acquired by subsequent use. *Singer Mfg. Co. v. June Mfg. Co.*, 16 Sup. Ct. 1002, 163 U. S. 189, followed.

Appeal from the Circuit Court of the United States for the District of North Dakota.

This is a suit brought by plaintiff in the circuit court of the United States for the district of North Dakota to restrain the defendants from the use of the word "Castoria," claimed by it as a trade-mark. The bill, filed on June 10, 1896, alleges that plaintiff is a corporation engaged in the business of manufacturing and selling, in bottles, with labels thereon, a certain vegetable preparation for assimilating the food, and regulating the stomachs and bowels, of infants, designated and known by the trade-mark or name of "Castoria"; that one Dr. Samuel Pitcher first used said name as a trade-mark; that he used the same prior to May 12, 1868, at which time letters patent of the United States, numbered 77,758, were granted to him for a composition to be employed as a cathartic, or substitute for castor oil; that the word "Castoria" nowhere occurs in the specifications, or appears upon or in connection with said letters patent, but was adopted and used as a trade-mark; that it is not a general designation for the preparation, is not descriptive of the same, or of the ingredients of which it is composed, but has been used purely and arbitrarily to point out the origin and ownership thereof by plaintiff and its predecessors, as manufacturers of the same. The bill sets forth in detail the various transfers by which all the rights of Samuel Pitcher passed to plaintiff, and avers that it had expended large sums of money in advertising and placing said preparation before the public under the name of "Castoria" or "Pitcher's Castoria," and that the preparation had acquired a recognized and standard reputation throughout the land. The bill further charges that defendants are commencing the business of manufacturing and selling a medicinal preparation under the designation of "Castoria"; that they have issued circulars describing themselves as the manufacturers and sellers of Castoria, in which circulars they claim and represent that the medicine which they are making and selling is the only one on the market which is prepared according to the recipe originally prescribed by said Dr. Pitcher, and for which the patent was issued, and that under the name of "Castoria" an article had for years been imposed upon the public, the ingredients of which were different from those used by Dr. Pitcher,—thus, as is claimed, representing that plaintiff's manufacture is a spurious article. The prayer is that defendants be enjoined from "directly or indirectly manufacturing and putting up, selling, advertising, offering, or exposing for sale any preparation for assimilating the food, and regulating the stomachs and bowels, of infants and children, or as a remedy for the troubles of infants and children caused by indigestion, and other irregularities of the stomachs and bowels, under said name, 'Castoria,' or under any word or combination of words liable to create confusion in the mind of the public with that used by your orator as a trade-mark as aforesaid, and which will in any manner simulate said trade-mark, so as to be calculated to deceive or mislead purchasers of the same, either in large or in small quantities, at wholesale

or retail, and infringe upon the said exclusive rights of your orator." After answer, and upon pleadings and proofs, the circuit court, on January 16, 1897, entered a decree in favor of the defendants, dismissing the bill, from which decree this appeal was duly taken.

F. W. Lehmann and Edmund Wetmore (Henry S. Priest, Hubert A. Banning, William H. Bliss, William E. Hale, and Wilbur F. Boyle, on the brief), for appellant.

C. L. Bradley and J. W. Tilly, for appellees.

Before BREWER, Circuit Justice, SANBORN, Circuit Judge, and RINER, District Judge.

BREWER, Circuit Justice, after stating the case as above, delivered the opinion of the court.

This case turns upon the question whether the plaintiff has an exclusive right to the use of the word "Castoria" as a trade-mark; for, except by the use of that word, there is no evidence in the record of anything done by defendants calculated to mislead purchasers into the supposition that they are buying an article manufactured by the plaintiff. On the contrary, the circulars sent out by the defendants call attention to the fact that they are the only parties manufacturing Castoria according to the original formula of Dr. Pitcher, and, though not in terms naming the plaintiff, yet, as it was the only other party engaged in the manufacture and sale of Castoria, plainly casting reflections upon it, as not giving to the public a genuine article. In other words, the defendants went into the market, representing themselves as manufacturing and selling Castoria, and declaring that that which they manufactured was the only genuine Castoria; that all other manufactures placed on the market were spurious. So that it cannot be pretended that they were deceiving the public with the idea that the article which they manufactured and sold was something manufactured and sold by plaintiff, unless that deception resulted from the use of the word "Castoria." Hence, if the defendants had a right to use the word "Castoria," as descriptive of the article which they were manufacturing and selling, there can be no doubt that the decree was rightly entered in their favor. Whether the defendants had a right to use this name depends on the further question whether the word "Castoria" is the generic name of the thing manufactured and sold, or is a mark or name used to distinguish one party by whom the thing is manufactured and sold from all other manufacturers of that thing. The relation of the patent to this matter must be first considered. In 1868 Dr. Pitcher compounded a medicine, composed of various ingredients, according to a certain formula which he invented and discovered. For this invention and discovery he obtained a patent, which gave to him the exclusive right of making, using, and selling this new medicine. During the life of that patent he alone, or his successors in interest, had the right to manufacture and sell that medicine, by whatsoever name it might be called. The patent gave no right to any particular name, but simply to the exclusive manufacture and sale. All such rights expired in 1885, and from that time forth any party has had a right to manufacture and sell that particular compound, and also a right to manufacture and sell it under the name by which it has

become generally known to the public; and, if to that public the article has become generally known only by a single name, that name must be considered as descriptive of the thing manufactured, and not of the manufacturer. It is true that during the life of a patent the name of the thing may also be indicative of the manufacturer, because the thing can then be manufactured only by the single person; but, when the right to manufacture and sell becomes universal, the right to the use of the name by which the thing is known becomes equally universal. It matters not that the inventor coined the word by which the thing has become known. It is enough that the public has accepted that word as the name of the thing, for thereby the word has become incorporated as a noun into the English language, and the common property of all. Whatever doubts may theretofore have existed on this proposition have been, for the federal courts, put at rest by the recent decision of the supreme court in the case of Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002. In that case it appeared that the Singer Manufacturing Company, under its patents, had the exclusive right to manufacture and sell a certain class of sewing machines, known as "Singer Machines." After the expiration of the patents it claimed a trade-mark in the word "Singer," on the ground that that word was not only descriptive of the kind of machine, but had also become indicative to the public of the origin of manufacture; but this claim was denied, and it was held that there was no trade-mark in the word "Singer" which would prevent others from using it as descriptive of the sewing machines of like kind which they were manufacturing and selling. The opinion of Mr. Justice White is an exhaustive discussion of the question, covering substantially all the points made in this case. There, as here, it was urged that during the life of the patent the word had become, not only descriptive of the thing, but indicative of the source of manufacture, and by virtue of the latter fact was entitled to protection as a trade-mark; and upon this the court said (page 183, 163 U. S., and page 1007, 16 Sup. Ct.):

"We conclude, then, upon the two pivotal and controverted questions of fact which we proposed at the outset to consider: (1) That the Singer sewing machines were covered by patents which gave to the manufacturers a substantial monopoly; that, in consequence of the enjoyment of this monopoly by the makers, the name 'Singer' came to indicate, in its primary sense, to the public, the class and type of machines made by the Singer company or corporations, and thus this name constituted their generic description; that, also, as this name applied to and described machines made alone by the Singer firm or corporations, the use also came, in a secondary sense, to convey to the public mind the machines made by the firm or corporations. (2) That the word 'Singer' was also voluntarily applied by the Singer firm or companies as a designation of the general type of machines made by them, with the intention that such machines should be accepted by the public under that name. Thus, the course of the business, and the purposes for which the name 'Singer' was used, brought about results identical with those which sprang from the existence of the monopoly. Hence that name became, not only the description of the machines, but also, in a subordinate sense, the indication of the source of manufacture."

Yet, notwithstanding this, it was held that, because the word had become descriptive of the thing, it could not be appropriated as a trademark; and the conclusion was summed up in these words (page 199, 163 U. S., and page 1014, 16 Sup. Ct.):

"The result, then, of the American, the English, and the French doctrine, universally upheld, is this: That where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements, and by other means, subject, however, to the condition that the name must be so used as not to deprive others of their rights, or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it as will unmistakably inform the public of that fact."

It is true, in that case there also appeared certain matters which the court held were sufficient to indicate an effort on the part of the defendant to deceive the public into the idea that the machines which it was manufacturing and selling were in fact manufactured and sold by the Singer Company; and, to the extent of restraining any such accompanying devices, it was held that the plaintiff was entitled to an injunction. But, as we have heretofore observed, in the present case, outside of the use of the word "Castoria," there is nothing to mislead the public into the belief that the Castoria manufactured and sold by the defendants was in fact manufactured and sold by the plaintiff. On the contrary, the information was full and specific that the defendants were the manufacturers and vendors. Counsel seek to distinguish this case, in that there the controversy arose immediately after the expiration of the patent, while here the plaintiff continued in the exclusive manufacture of Castoria for some 10 years thereafter, and hence it is insisted that, during the time when the right to manufacture and sell was common, it acquired a trade-mark in the name. But this matter of time makes no difference. The word had become known as the name of the thing, and as such it could not be appropriated as a trade-mark. *Canal Co. v. Clark*, 13 Wall. 311; *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625. As well might a manufacturer of flour claim a trade-mark in the word "flour," as the manufacturer of "Castoria" a trade-mark in that name. The case of *Manufacturing Co. v. Nairn*, 7 Ch. Div. 834, is much in point. The word "Linoleum" was a fancy name invented by one who had obtained a patent for a new kind of floor cloth, and during the life of the patent the public came to know the article as "Linoleum Floor Cloth," or simply "Linoleum." At the expiration of the patent the defendant entered upon the manufacture and sale of Linoleum floor cloth, calling it by that name, and this was a bill to restrain the use of the name. It was held that the action could not be maintained. In the course of his opinion, Mr. Justice Fry said (page 836):

"In the first place, the plaintiffs have alleged, and Mr. Walton has sworn, that having invented a new substance, namely, the solidified or oxidized oil, he gave to it the name of 'Linoleum,' and it does not appear that any other name has ever been given to this substance. It appears that the defendants are now minded to make, as it is admitted they may make, that substance. I want to know what they are to call it. That is a question I have asked, but I have received no answer; and for this simple reason, that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that, if 'Linoleum' means a substance which may be made by the de-

fendants, the defendants may sell it by the name which that substance bears. * * * In my opinion, it would be extremely difficult for a person who has been, by right of some monopoly, the sole manufacturer of a new article, and has given a new name to the new article,—meaning that new article, and nothing more,—to claim that the name is to be attributed to his manufacture, alone, after his competitors are at liberty to make the same article."

See, also, *Manufacturing Co. v. Shakespear* (1869) 39 Law J. Ch. 36.

That the word "Castoria" has become the one name by which this medicine is generally known, does not admit of doubt. The testimony makes this perfectly clear. No other name is suggested by which the article is called. It is universally bought and sold as "Castoria," and not by any other name. Indeed, the court might almost take judicial notice of this fact. Beyond the testimony of witnesses as to the general use of the name, may be noticed the plaintiff's bill, in which it is averred that, by virtue of a great expenditure in advertising, the preparation "has become extensively known to the public as 'Castoria,'" and nowhere in the bill is any other name given by which the medicine is known or called. Further, the documents which the plaintiff offered in evidence to show the successive transfers of title from the original owner to itself all indicate that "Castoria" is the name, and the only name, of the medicine. The certificate of the organization of Pitcher's Manufacturing Company on March 4, 1870, described it as a "corporation established at Boston, in said commonwealth, for the purpose of manufacturing Castoria." The option of purchase given by the Pitcher Manufacturing Company to Joseph B. Rose on January 17, 1872, was of the "right to manufacture and sell a medicine called 'Castoria.'" The bill of sale on January 22d, following this option, also described the thing sold as the "right to manufacture and sell a medicine called 'Castoria.'" In January, 1872, in an assignment by Rose to Demas Barnes, is this description: "The exclusive right to use the name of the said Samuel Pitcher in connection with the manufacture and sale of the said patented medicine, named 'Castoria.'" In an assignment by Barnes to his wife on December 31, 1872, the description is "a medicine known as 'Castoria,' or 'Pitcher's Castoria.'" In an assignment by Mrs. Barnes to Demas B. Dewey, March 25, 1876, are found like words of description. And so through other documents. It is true, in these various documents reference is made to the claim of a trade-mark, and that is included among the properties transferred; but this does not change the fact that the only name by which the article is called is "Castoria," or "Pitcher's Castoria." Many advertisements and circulars were also introduced in evidence by the plaintiff. In these the medicine is always called "Castoria," or "Pitcher's Castoria." So that, beyond the testimony of individuals as to the general use of the word, the plaintiff's bill, the documents and advertisements introduced by it show that this article was and is known by that name, and by that name only. Within, therefore, the decision in *Singer Mfg. Co. v. June Mfg. Co.*, supra, the word "Castoria," being the generic name by which the article is known to the public, has become the property of the public, and any one is at liberty to use it as descriptive of the thing he is manufacturing and selling. We see no error in the ruling of the circuit court, and its decree is affirmed.

AMERICAN STRAWBOARD CO. v. ELKHART EGG-CASE CO.

(Circuit Court, D. Indiana. January 27, 1898.)

No. 112.

1. PATENTS—INVENTION—PROCESSES.

Elasticity, being a known law of nature, the use of it in a known manner is not an inventive act.

2. SAME—MECHANICAL PROCESSES.

The method of forming egg-cases from strawboard, consisting in cutting the material into suitable strips, forming interlocking notches and points in the same, assembling them into sets, one below and one above, obliquely to each other, and then thrusting the upper set down upon the lower one, so as to form a partially collapsed or diamond-shaped cell-case, comprises a purely mechanical process, which is not patentable.

3. SAME.

The function or mode of operation of a mechanical device is not patentable as a process; especially not where the process is not separable or distinguishable from such function or mode of operation.

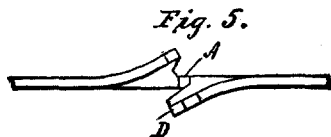
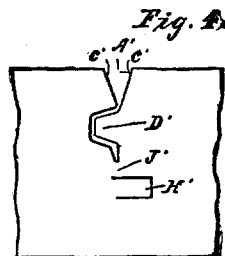
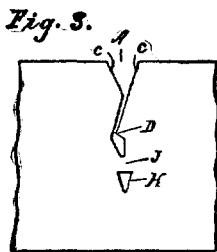
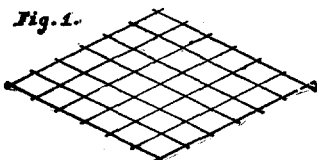
4. SAME—EGG-CARRIERS OR CELL-CASES.

The Williams patent, No. 533,331, for a process of manufacturing cell-cases or egg-carriers, is void for want of invention, and as involving a merely mechanical process.

This is a suit by the American Strawboard Company against the Elkhart Egg-Case Company for damages and injunctive relief for the alleged infringement of letters patent No. 533,331, issued to William E. Williams on January 29, 1895, and by him duly assigned to the complainant. The patent relates to an improvement in the art of manufacturing cell-cases, commonly called "fillers," from strawboard or other suitable material, for the storage and transportation of eggs and other small articles. The defendant, in its answer, alleges want of patentable novelty in the alleged invention, anticipation as shown in the prior art, and noninfringement. The process consists in making cell-cases, or fillers, which are usually 2½ inches deep, and are made of strips of strawboard cut and put together so that each cell shall have four walls. The strips so put together usually consist of 2 sets, each 7 in number, forming 36 cells. The material part of the specification, omitting the drawings, is as follows:

"My invention relates to the manufacture of cell-cases which are made by locking together from their edges strips of strawboard, or other suitable material, for the purpose of transporting eggs and other articles, and it is in the manner of holding the strips while they are being put together that the invention consists. Cell-cases of this class are usually made of strips of strawboard or wood veneer, and are locked together by notches from their edges, and these notches are made of sufficient width to permit the cells to collapse to permit their shipping conveniently. Various-shaped notches are used to lock them together to prevent their coming apart in handling, and several forms of these notches are quite effectual in holding the strips together while the cells are in the form for holding the eggs, but, when collapsed, and thrown about, they come apart. The fault lies in putting the strips together, which process has been to place one set of strips, either by hand or machinery, on a suitable form, parallel to each other, and the right distance apart for the finished cells, and then insert the other set in the same form at right angles to the position of the other set. This is usually done by revolving the form after the first set of strips have been placed upon it, and then the others are inserted. But

there is another class of machines for making these cases, wherein one set of strips are fed along in continuous strips, and are notched and held into grooves the right distance apart parallel to themselves with the notches and ends in a right line to their sides, and are thus passed by another set of mechanism which inserts the other strips into them at right angles, thus forming the case in its right position. Thus all methods so far used lock the strips together when they are held in their right position to sets of strips at right angles to themselves. Thus the various forms of locks of the notches must be made of the shape and form the elasticity of the material of which they are made will permit. Strawboard or wood splints have very little elasticity in the direction of stretching or compressing the fibers, either lengthwise or transversely, but they readily bend to some limit without injury, and it is to employ the bending quality I design the process of holding the strips in position while locking them together, and thus the locks can be made more accented in their locking qualities, and forms of locks can be used that would not be practicable by the other method.



"Fig. 3 shows the lock commonly employed, and will illustrate for all that class sufficient for the purpose herein. The corners at the entrance of the notch, A, are cut away as shown by c, c, to more readily permit the entrance of the transverse strip, and the projection, D, is supposed to give a little itself, and to spring aside the same projection of the entering strip while being thrust in, and when the strip is forced home the projection, D, is supposed to spring out and interlock into the hole, H, of the other strip, which it does, when they are in the right form, but when collapsed they are liable to come apart. I construct the form to hold the strips as near as practicable in the relative positions to each other as when the case is collapsed, shown in Figs. 1 and 2. Thus the strips are held close up together, and parallel to each other, and each succeeding strip is held sufficiently in advance of the other to make the right distance between the notches of the next set of strips, which can then

only be inserted at an acute angle, forming diamond-shaped cells; and the construction of the form is such that the sides of the notches are bent outwardly from each other when held in the form shown by Fig. 5, permitting the entrance of the other strips, and as they are forced home the projections, D, are sprung past each other, and the body of the strips shown by J between the hole, H, and notch, A, enter home. When they spring into their normal positions, the projection, D, interlocking the hole, H, making a secure lock, and when the case is removed from the form it will be right up the same as others; and the same principle of a locking as shown by Fig. 3 can be accented to the form of Fig. 4, and make a more secure fastening, and in no way damage the board out of which it is made; and other forms of locks of similar nature, whereby the strips are locked together by incisions from their edges, may be made more accented and secure by using my process of putting the strips together. It is not essential that the strips be placed in a form as shown, but they may be advanced along continuously, but sufficiently near each other, and the notches and ends of each successive strip be sufficiently in advance of the other to permit the insertion of the transverse strips at an acute angle, forming diamond-shaped cells, as above described; the point of my invention being to lock the strips together while the cells are partly collapsed, thereby availing of the sidewise bending of the locking parts of the board for the purposes described.

"What I claim is: (1) A step in the art of making cell-cases, which step consists in forming two sets of strips with interlocking perforations, and assembling the strips in relatively inclined positions to form a cell-case in a collapsed or partially collapsed condition. (2) The method of forming cell-cases which consists in providing the strips with suitable interlocking slots and perforations, assembling one set of strips in a suitably spaced group, placing the strips of a second set across the first set at an oblique angle, and pressing them edgewise into said slots, substantially as set forth. (3) A process of making cell-cases which consists in taking strips of strawboard or other suitable material which have notches cut in their edges, of a form to lock into each other when the strips are placed together transversely to each other, substantially as described, and holding one set of strips parallel to each other, but each successive strip in advance of the other, substantially as described, then thrusting the other strip into the first-mentioned strips, forming diamond-shaped cells, which may be collapsed or righted up for the purpose desired."

The patent to Shepard—No. 489,664, issued January 10, 1893—describes his process of forming cell-cases or fillers from two sets of strips as follows:

Fig. 1.

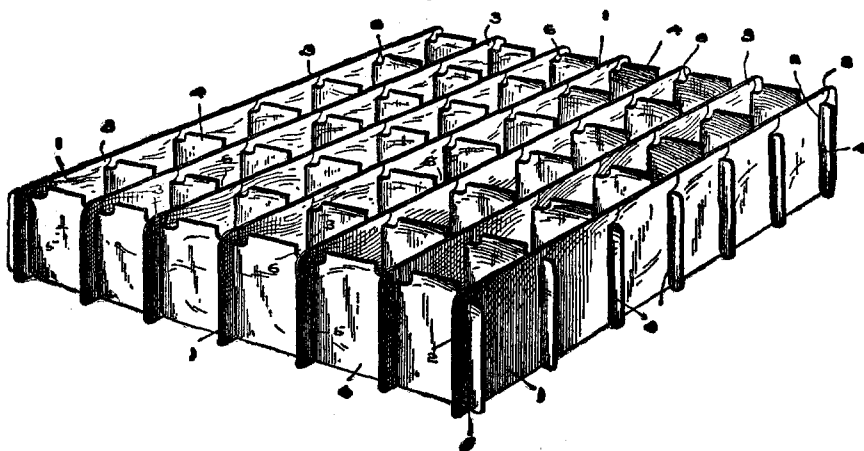
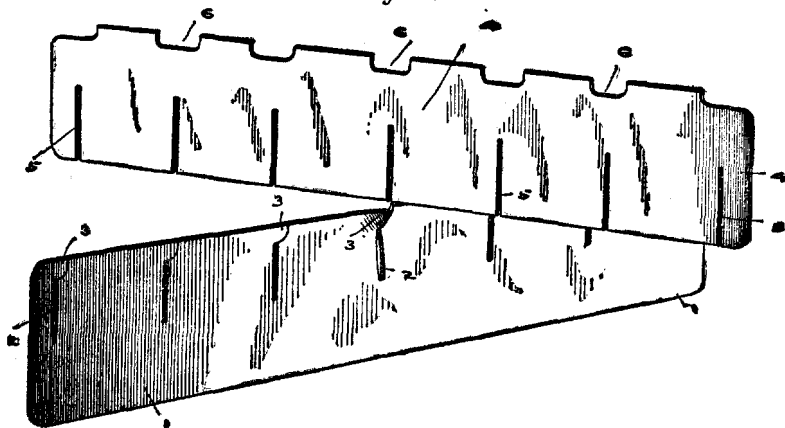


Fig. 2.



"In putting the filler together by hand, two of the strips, 1 and 4, are placed in respect to each other as shown in Figure 2 (i. e. obliquely), and the slot, 2, with its curved slit, 3, in the strip, 1, is opened, and the strip, 4, with its slots, 5, is passed down into that of the strip, 1, causing them to interlock at the points as shown in Fig. 1, and when in place the hook (3) on the lower strip springs back into place, preventing the removal of the strip."

The patent to McCarren—No. 203,356, issued May 7, 1878—describes his method of assembling two sets of strips as follows:

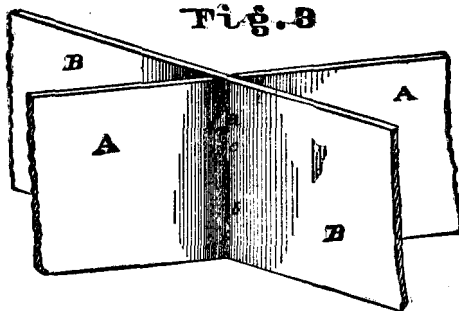
Fig. 1



Fig. 2



Fig. 3



"To place the two together, the incisions, b and c, in the two sides, A and B, are brought together with the aforesaid sides at right angles, or nearly so, to each other, and the one passed over the other, the flexibility of the material used in their construction permitting the projection, a, to spring away from the solid part of the side, B, until the slot, a, is reached, into which it passes, and locks the two sides securely together, the incisions on each of the sides accommodating the solid part of the other until the two edges of each are parallel."

The defendant's expert testified as follows:

"The first claim [of the patent in suit] is for 'a step in the art of making cell-cases.' The second claim is for 'the method of forming cell-cases.' The third claim is for 'a process of making cell-cases.' The claims are, therefore, very obviously for an art or process as distinguished from a machine. The art or process seems to me to be purely and essentially a mechanical one, as distinguished from such processes as involve chemical or other elementary change, or such as operate to change the condition or substance of the material operated upon, or such as take place through the operation of heat, electricity, or other such elements. Had the patentee described in detail an operative machine such as he refers to for assembling the strips, the art or process made the subject-matter of these claims would be the function of such a machine."

This statement is nowhere denied by complainant's expert. The complainant's expert testified that the diamond-shaped cell-case forms no part of the patented invention; that, if a person should make a cell-case by hand by taking a strip in each hand, and holding them obliquely to each other, it would not be an infringement; that, if a person should take seven strips of cardboard, and place them parallel to each other, and then take another strip, and place it across the seven obliquely, so as to form three sides of a cell-case, it would not be covered by complainant's patent; and, if he should then place another strip across the first seven parallel to the last one, so as to make six complete diamond-shaped cell-cases, it would be a mere repetition of the first operation, and would not be covered by the complainant's patent. He further testified that if a person should build up a cell-case of 36 cells by placing the strips across each other at an oblique angle, one by one, he would not be following the process described by complainant's patent.

L. L. Bond (Adams, Pickard & Jackson, on the brief), for complainant.

J. M. Van Fleet (V. W. Van Fleet, on the brief), for defendant.

BAKER, District Judge (after stating the facts). The patent in suit is for a process in manufacture, and not for the mechanism employed, nor for the finished product of such manufacture. *Le Roy v. Tatham*, 14 How. 156, 22 How. 132, establishes the doctrine that the application of a newly-discovered principle to known objects, through known means used in an accustomed manner, and producing a previously known result, constitutes a patentable process. In that case the invention did not consist in the novelty in the machinery, but in bringing a newly-discovered principle into practical application, by which a useful article was produced. *Mowry v. Whitney*, 14 Wall. 620, decides that the application of a known force to a new object through known means used in their accustomed manner, producing known effects, constitutes a patentable process. Cast-iron car wheels had never been subjected to an annealing process in connection with slow cooling before the process was discovered or invented by Whitney. A new and previously unknown result was thus obtained. In *Foot v. Silsby*, Fed. Cas. No. 4,916, 14 How. 218, it is held that the application of a known force to known objects, through known instruments used in a new manner, and producing a useful result, either new or old, constitutes a new and

patentable process. Each of these arts constitutes a new operative means. In the first, the force is new; in the second, the object; and in the third, although the instrument is old as a concrete embodiment of one idea of means, its new use, producing a useful result, constitutes a means of an entirely different character in respect of the operation in which it is now employed. Beyond these three, no result of an inventive act can be conceived. Tested by these principles, the process of the complainant's assignor involved no act of invention. No new force is employed. The force employed is mechanical, except the elasticity of the board which operates to straighten the flexed interlocking points which had been forced out of a right line by mechanical pressure in putting the two sets of strips together. The elasticity of the board is not new, nor was it new with the complainant's assignor to discover that an elastic substance, when sprung out of its natural position by mechanical force, would, when such force is removed, return to its normal position. The object sought to be obtained was old, namely, the interlocking of two or more strips together by the means here used. Nor was the manner of its use new. It is an old use of elastic substances to flex them to one side by mechanical force, and then to have them return to their normal shape and position when the force is removed, by reason of the elastic force inherent in them. Elasticity is the known law of their nature, and the use of it in a known manner does not constitute an inventive act. Besides, the patentee does not claim the use of the elasticity of the strawboard as a part of his invention. He claims as his invention "the manner of holding the strips while they are being put together." Every step in the process was old and familiar, except, possibly, the assembling of the two sets of strips at an oblique angle. But it can hardly be contended that the assembling of the strips at an oblique angle, in view of the prior art, would constitute a patentable process. It seems clear enough that the complainant's assignor could not claim as his invention the assembling of strips at every degree of obliquity less than a right angle. Given the interlocking strips, the method of putting them together so as to avoid the fracture of the interlocking points would be a matter involving mere skill and experience, and not invention. Diagram Fig. 2 in the Shepard patent shows that the strips were assembled obliquely, and not at right angles. That the strips were put together by hand in the Shepard patent is immaterial, as complainant's patent discloses no mechanism for use in practicing its process. Shepard, in his patent, clearly describes the method of availing himself of the side-wise bending of the interlocking points, and of their elasticity in springing back into place in assembling his strips, which is the precise object of the complainant's process. McCarren's patent describes the same thing. He says the flexibility of the material used in the construction of egg-cases permits the interlocking points to spring away from the solid part of the strip until the slot or opening is reached. It is clearly implied that when the interlocking point reaches the slot or opening, having been previously flexed, it

springs into place. I am therefore of opinion that the complainant's process discloses no inventive act.

But if it were conceded that complainant's patent disclosed invention, I am of opinion that it is for a mere mechanical process, and hence invalid, under the doctrine announced in *Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, and *Glass Co. v. Henderson*, 15 C. C. A. 84, 67 Fed. 930, 34 U. S. App. 19. The principle deducible from these cases is that when the process is mechanical, and involves no chemical or other similar elemental action, it is not patentable. Or, as stated in the last above cited case, where the process is mechanical, and there is involved no chemical or other elemental action which is separable or distinguishable from the functions of the several mechanical devices which are employed to effect the result, it is not the subject of a patent. The defendant's expert testified that the complainant's process was purely and essentially mechanical, as distinguished from such processes as involved chemical or other elemental changes, or such as operate to change the condition or substance of the matter operated upon, or such as take place through the operation of heat, electricity, or other such elements. This statement was neither explained nor denied by complainant's expert. I am of opinion that the view of the defendant's expert is the true one. The cutting of the strips, the forming of the interlocking notches and points in the same, the assembling of the sets of strips one below and one above, obliquely to each other, and then thrusting the upper set of strips down upon the lower ones so as to form a partially collapsed or diamond-shaped cell-case, are all purely mechanical processes. The bending or flexing of the interlocking points in putting the two sets of strips together, is mechanical. The only thing in the whole process which is not purely mechanical is the returning of the interlocking points to their normal position on the removal of the mechanical pressure. This results from the elasticity of the substance. This quality of such substances is as old and well known as the substances themselves. The use of this quality of such substances is old and familiar, and is shown to have been availed of in the process of manufacturing egg-cases before complainant's assignor applied for his patent. The utilization of this quality of strawboard in the complainant's process cannot, in my judgment, rescue the patent in suit from the claim that it is purely mechanical.

The patentee, in the specification preceding his claims, has clearly stated in what his invention consists. He says:

"My invention relates to the manufacture of cell-cases which are made by locking together from their edges strips of strawboard or other suitable material, for the purpose of transporting eggs or other articles, and it is in the manner of holding the strips while they are being put together that the invention consists."

Thus he explicitly limits his invention to the manner of holding the strips while they are being put together. The complainant's expert testified, and, in my opinion, correctly, that the diamond-shaped cell-case forms no part of complainant's patent. He admits that if a person should take strips in each hand, and hold them obliquely,

and thus place them across each other one by one until he had constructed a partially collapsed cell-case having 36 cells, it would not infringe the complainant's patent. These admissions make it clear that the assembling of two sets of strips, one by one, at an oblique angle, constitutes of itself no part of the manner of holding the strips while they are being put together. Hence others would have the right to put two sets of strips together at an oblique angle, unless they put them together in sets of two or more strips at a time. But no process of putting two sets of strips together at an oblique angle is conceivable except by some mechanical device. Nor is it possible to conceive of such a process as something separable and distinguishable from the function or mode of operation of such mechanism. The patent for the process in suit is nothing more than an attempt to secure the function or mode of operation of purely mechanical devices. If the patentee had described clearly and fully the mechanical devices by means of which the two sets of strips were held obliquely while they were being put together, he might have secured a patent for them; but not for the function or mode of operation of such devices. As his process can only be practiced by purely mechanical means, it is the result or function of mechanical devices as certainly as though he had described and patented the mechanism by which the result was produced. The function or mode of operation of a mechanical device is not patentable as a process; certainly not where the process is not separable or distinguishable from such function or mode of operation. Besides, the complainant's patent fails to disclose any means by which his process can be reduced to practice. It cannot be claimed that the description of the process would suggest to a person skilled in the art the means intended to be employed in reducing the process into practice. The means of practicing the process must be described, unless the description of the process itself plainly suggests the means. It may well be doubted whether the process practiced by the defendant is an infringement of that protected under the complainant's patent. If one of the steps claimed as essential is omitted, and its place is left unsupplied, or if for it is substituted a step which the patentee intended to avoid, or if the succession of the acts is changed in any material degree, the identity of the invention practiced with the patented invention is destroyed, and the former is not an infringement. 3 Rob. Pat. § 925; *Arnold v. Phelps*, 20 Fed. 315; *Hammer-schlag v. Garrett*, 10 Fed. 479; *Cotter v. Copper Co.*, 13 Fed. 234; *Fish Co. v. Roberts*, 12 Fed. 627; *Russell v. Dodge*, 93 U. S. 460. The complainant's patent discloses no mechanical devices which can be used in the practice of its process. Its process comprises the following steps: The forming of the strips, providing them with suitable interlocking slots or notches, assembling one set of strips in a suitably spaced group, placing the strips of the second set across the first at an oblique angle, and pressing the strips of the second set into the slots or notches of the first set of strips. The first step in the process is the forming of the strips of suitable length and width. It does not appear that the complainant's process can be

practiced in any other manner; and it would seem to be an indispensable element in its process. The defendant's process consists in uniting by suitable mechanism the ends of 14 continuous sheets of strawboard, 7 on each side, simultaneously, and afterwards severing these interlocking ends from the continuous sheets, thus forming an egg-case filler. The defendant's process seems to be purely mechanical, and it makes use of continuous sheets of paper, which are not severed into strips until the egg-case has been completely formed.

The stipulation of the parties shows that the defendant is making cell-cases in accordance with claims 2 and 3 of Smith's patent, No. 507,761, which consists in presenting "two series of continuous sheets," which are not severed until the cell cases have been completely formed. As it was decided in the interference proceeding that the Williams invention was prior to that of Smith, it may be safely assumed that he would not fail to claim all of the Smith invention which he truthfully could. But with Smith's claims 2 and 3 before him for the construction of cell-cases by presenting two series of continuous sheets, he limited his claims to two sets of strips, thus taking from Smith only his first claim. It thus appears that Williams did not venture to claim in the patent office either that he conceived the idea of uniting two series of continuous sheets, or that his two sets of strips were the same thing as the defendant's two series of continuous sheets. He ought not now to be permitted to set up a claim which he failed to assert in the patent office. The fact that the defendant was granted claims 2 and 3 is cogent evidence that the Williams invention could not rightfully be enlarged to cover these two claims in the defendant's patent. But, without definitely deciding the question of infringement, I am of the opinion that the complainant's patent is invalid. The bill will therefore be dismissed for want of equity, at the complainant's cost.

GORMULLY & JEFFERY MFG. CO. v. WESTERN WHEEL WORKS et al.

(Circuit Court of Appeals, Seventh Circuit. February 11, 1898.)

No. 411.

1. PATENTS—INVENTION.

There is no invention in employing the well-known spiral spring to hold a bicycle brake from the tire by bending the spring around the axis of the brake, and having portions of it pressing on the head and the brake.

2. SAME—BICYCLE BRAKES.

The Jeffery patent, No. 312,473, for improvements in bicycles, is void as to claim 11, covering a spring brake, because of anticipation and lack of invention.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was a suit in equity by the Gormully & Jeffery Manufacturing Company against the Western Wheel Works and Adolph Schoeninger for alleged infringement of a patent for improvements in velocipedes or bicycles.

C. K. Offield, for appellant.
Arthur v. Briesen, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This suit is brought to restrain the defendants from infringing letters patent No. 312,473, dated February 17, 1885, issued to Thomas B. Jeffery, of Chicago, Ill., for the invention of a velocipede. The inventor, in his specifications, states that his invention relates to improvements in the variety of velocipedes termed bicycles. The invention is fully set forth in 13 distinct claims, of which only the eleventh is now in question. That claim is as follows:

"The wire brake spring bent spirally around the axis of the brake, having portions pressing on the head and brake, substantially as and for the purpose set forth."

This spring is further described in the specification as follows:

"The brake spring N, Figs. 15 and 16 (shown also under the brake in Fig. 1), is formed of wire coil in a spiral form around the point on which the brake is hinged, as shown, one extremity of the coil resting under the brake, and the other against the head, and is adjusted so that the shoe of the brake is pressed upward."

This is the contrivance which the complainant claims has been infringed:

"The wire brake spring bent spirally around the axis of the brake, having portions pressing on the head and brake."

The most obvious construction would be that the claim for invention is on the spiral wire spring, but this is wholly disclaimed by complainant in his testimony on his examination, as follows:

"C. Q. 136. Referring now to the eleventh claim of your patent in suit, No. 312,473, please state whether you claim to be the inventor of the form of spring used, irrespective of its application to the brake of a bicycle. A. No, I do not." "C. Q. 141. It was common, before your invention, was it not, to employ many kinds of springs to keep the brake shoe out of contact with the wheel of the bicycle? A. Yes, it was." "C. Q. 144. Did you invent the particular form of brake appearing in defendants' machine? A. No, I did not."

Jeffery also admits that he was not the first to produce a bicycle brake wherein the shoe was normally held out of contact with the tire of the wheel to be braked, and that he did not invent the particular form of brake made use of by him.

Counsel for complainant, in his argument and brief, expressly disclaims any invention for the brake spring employed, which the evidence shows has been in use for a long time, not only upon bicycles, but in sewing machines and other devices. Nor is it claimed that there is anything new in the application of a spring brake to a bicycle. That many and various forms of brakes were used upon bicycles previous to the issuing of complainant's patent is shown by the record, and especially by the following patents: Patent to William Hanlon, No. 86,834, issued February 9, 1869; patent to S. H. Sawhill, No. 93,751, issued August 17, 1869; patent to McClintock Young, No. 95,753, dated October 12, 1869; patent to James A. McKenzie, No.

242,212, dated May 31, 1881. But suppose the eleventh claim to be capable of another construction, the one claimed for it, to wit, a wire brake spring, allied with the head and brake of a bicycle as a part of the combination, with the limitation that the spring shall be bent spirally around the axis of the brake, and that portions of the brake spring shall press upon the head, and portions upon the brake, to produce the desired result. This certainly is a pretty broad claim for so simple a statement as that contained in the patent, to wit: "The wire brake spring bent spirally around the axis of the brake, having portions pressing on the head and brake." In its obvious reading the claim would not seem to suggest a combination patent, and it seems clear that the combination suggested is no more than an aggregation of parts producing no new or useful result. Great stress was laid in the oral argument upon the supposed fact that Jeffery was the first one to connect the brake spring and machinery to the head of the bicycle frame, as though, if he were, that settled the question of invention. It is evident, however, that that idea was not new with him, but was contained in previous patents. In the patent to Sawhill, issued in 1869,—15 years before complainant obtained his patent,—the brake is pivoted to the post or head of the bicycle in front of the rider. It so appears in the drawing; and the specification is as follows:

"A brake, H, is pivoted to the post, C, and has an upward projecting handle, h, which is, by a spring, I, drawn forward to hold the brake off the front wheel. A simple motion of the rider will apply the brake."

The patent to Hanlon, issued also in 1869, shows a brake attached to the post or head of the bicycle in front of the rider, and the specification descriptive of its operation by the hands applies well to the modern brake device, viz.:

"It will be seen that by the application of the brake to the forward driving wheel, and the employment of a mechanism for operating it, which is manipulated by the hands of the rider, the brake is rendered more effective, and the carriage is more completely under the control of the rider, since a mere motion of the hands manipulates the brake mechanism, and he is not obliged to change his position, or assume any particular attitude while braking up."

The little differences between the application of those brakes and that of complainant do not seem to be important so far as the question of novelty is concerned.

But suppose the complainant is not anticipated in his claim that he is the first to make an alliance of the spiral brake spring and the head of the bicycle, does it follow that any invention is required to suggest such a combination? Manifestly not. It would not even require mechanical skill, but only a moderate degree of good sense and judgment. It is evident to the most ordinary capacity that the brake attachment should be connected to some stationary and permanent portion of the bicycle, and in a position where it can be seen by the rider, and operated by the hand. Besides that the hand is a much more capable and facile instrument than the feet for such a purpose, the latter are both quite constantly required for the much more necessary and important purpose of propelling the machine. Though perhaps not in proof, it is matter of common knowledge that, while every bicycle has two pedals to be operated by the feet, hardly

one in a hundred has any brake attachment of any sort, and that manufacturers and salesmen do not provide them unless specially ordered. Both feet are commonly required to move the wheel forward. Both hands are used to operate the handle bars, which guide and give direction to the wheel, though not in the same sense that the feet are required for the propelling power; as, though both hands are commonly used, the wheel may be guided with one, leaving the other hand to operate the brake, or one hand may very well guide the wheel and operate the brake, at the same time, leaving the other hand free. When a brake is used, then, the most obvious place to put it would seem to be in front of the rider, where it may be readily seen without turning the head, and be operated by the hand. The hands, of course, are usually upon the handle bars in front of the rider in the immediate vicinity of the main post or head of the wheel, to which the handle bars are attached. What could be more obvious than to attach the brake to this post or head, or the handle bars in close proximity to it? Brakes have sometimes been attached to the reach or horizontal bar of the frame under the rider, but the usual manner, in accordance with the obvious considerations before mentioned, is to attach it to the head or post in front of the rider, where it may, with most convenience, be manipulated, and this the evidence shows has been done for many years previous to complainant's patent. The conclusions reached by the court as to the merits of the complainant's claim accord very well with the general summing up by the defendants' expert in his testimony, as follows:

"The alleged invention of Jeffery's eleventh claim is, therefore, narrowed down to the application of an old form of spring in an old manner to a bicycle brake, to press this brake off from the wheel just as it had previously been pressed off by other springs differently applied. In view of the great number and variety of constructions of springs known in the mechanical arts for many years past, and in view of the common adaptability of springs bent from wire, or strips or plates of metal, for exerting pressure in various directions upon various movable parts used in mechanics, and in view also of the common use of springs of various kinds and variously applied for pressing bicycle brakes away from the wheels, it seems to me that the application of any old construction of spring to a bicycle brake, in the same manner and to the same effect that it was before applied in its previous locations, and to the attainment of no new effect upon the brake, amounted merely to an exercise of good judgment on the part of a mechanic in selecting from among the previously known springs the one best adapted to his purpose, and did not involve any of that ingenuity characteristic of an invention."

The decree of the circuit court is affirmed.

DIAMOND STATE IRON CO. et al. v. GOLDIE et al.

(Circuit Court of Appeals, Third Circuit. February 4, 1898.)

No. 32.

1. APPEALS IN PATENT CASES—QUESTIONS REVIEWABLE.

A suit was brought on three patents,—one for a railroad spike, another for a machine for making the spike, and a third for a method of making the spike. The court granted an injunction on the spike and machine patents, but refused an injunction on the method patent; the decree stating that it was without prejudice to complainant's rights thereunder. Defendant appealed from the decree "so far as the same grants an injunction," and plaintiff took no appeal. *Held*, that neither party was entitled to have the appellate court consider the method patent.

2. PATENTS—ANTICIPATION.

A patent for a railroad spike having a point with diagonal cutting edges on each side, and in the same perpendicular plane with its rear side, and a sloping compressing surface on its front side, is not anticipated by a spike whose point is formed by two regular sloping sides, having the under corners or edges rounded off, so that the shank terminates in a chisel point.

3. SAME.

A patent for a railroad spike is not anticipated by a patent for a horse nail, the functions of which are different, and which is adapted to an entirely different art.

4. SAME—INFRINGEMENT.

A patent for a railroad spike, having a point with diagonal cutting edges on each side, and in the same perpendicular plane with its rear side, is infringed by a spike having two points, each with diagonal cutting edges in the same plane with its rear side, so that, if split through the center, two of the patented spikes would be formed. 81 Fed. 173, affirmed.

5. SAME.

A spike-pointing machine, consisting in the combination, with a reciprocating plunger having one or more cutters on its end, of an anvil die having an inclined die face for supporting the spike in a position oblique to the movement of the plunger, is infringed by a similar machine in which the reciprocating plunger is provided with several cutters, each extending a little further forward or outward from the plunger; and also by a rotary machine, in which the cutters, instead of being fixed to the plunger, are formed on the periphery of a rotating disk, and placed successively further and further from the center of rotation, so that they perform the same function as those on the reciprocating plunger.

6. SAME—RAILROAD SPIKES AND SPIKE-POINTING MACHINES.

The Goldie patents, Nos. 394,113 and 413,341, covering, respectively, a railroad spike and a spike-cutting machine, *held* valid, and infringed. 81 Fed. 173, affirmed.

Appeal from the Circuit Court of the United States for the District of Delaware.

This was a suit in equity by William Goldie and others against the Diamond State Iron Company and others for alleged infringement of certain patents relating to railroad spikes and spike machines. The circuit court rendered a decree in favor of complainants (81 Fed. 173), and the defendants have appealed.

Francis T. Chambers, for appellants.

James I. Kay, for appellees.

Before DALLAS, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

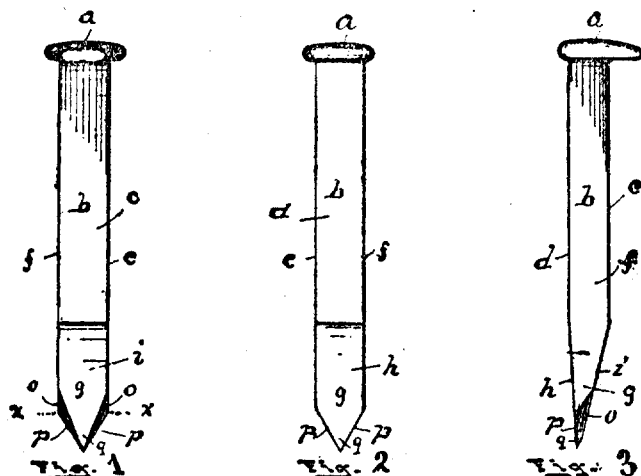
KIRKPATRICK, District Judge. The bill in this cause was filed for the alleged infringement of three patents, all granted to William Goldie, the complainant below,—the first, No. 394,113, dated December 4, 1888, for an improvement in railroad spikes; the second, No. 413,341, dated October 22, 1889, for a spike-cutting machine; and the third, No. 413,342, dated October 22, 1889, for a method of pointing spikes. The matter coming on to be heard before his honor, Judge Acheson, the validity of the patents No. 394,113 and No. 413,341 was decreed, and the defendants declared to be infringers, and as to these two patents injunction was directed to issue against the defendants according to the prayer of the bill. Upon a consideration of the third patent, No. 413,342, the learned judge, in view of the decision which had been rendered in the case of *Locomotive Works v. Medart*, 158 U. S. 72, 15 Sup. Ct. 745, did not express any opinion whether it was “for a patentable method, or merely for the operation of the described machine within the definition of patentability laid down by the supreme court in case cited.” The decree was “made without prejudice to the complainants’ rights under said letters patent No. 413,342, * * * on which this suit is also based.” The court declined to grant to the complainant the affirmative relief prayed for in his bill so far as it related to letters patent No. 413,342. This refusal worked no injury to the defendants, and therefore, in their appeal, after reciting that the decree had adjudged “that the defendants be perpetually enjoined from infringing on the claims of patents No. 394,113 and No. 413,341,” they state that they “appeal therefrom so far as the same grants an injunction.” The complainant, satisfied with the injunction order based upon the patents set out in the decree, does not appeal. Neither party is now in a position to bring to the attention of this court any matter relating to the patent upon which the court below declined to grant affirmative relief by way of injunction. If, after final decree, either party is dissatisfied with any failure of the court to make disposition of the rights of the parties so far as they relate to this patent, it will be competent for them to take such appeal as they may be advised is necessary for the protection of their interests. We are of the opinion that none of the questions relating to patent No. 413,342 are before us at this hearing, and that the only matters to be now considered are those pertaining to the validity of the other patents set out in the bill, and whether there has been infringement of the same. In determining these questions it will be necessary to consider the patents separately, and we will do so in the order in which they have been named.

Patent No. 394,113 relates to “improvements in spikes,” more particularly those adapted to be used in the construction of railways, and pertains entirely to the point which punctures the wood, and prepares a passageway for the spike body therein. The claims of the patent are as follows:

Claim 1: “A spike having a point provided on each side, with diagonal cutting edges located on the same perpendicular plane with its rear side, substantially as set forth.”

Claim 2: “A spike having a point provided with a sloping, compressing surface, on its front side, and with cutting edges, *v, v*, located in a plane with

the rear side of the point, and diverging from the center diagonally upward to the lateral sides, and with oblique facets O, O, on the front sides of saw-cutting edges, substantially as set forth."



The spike point, to which the invention relates, is formed by reducing the end of the front and rear of the spike to form the puncturing portion. It is provided with diagonal cutting edges on the rear corners of the lateral sides, which divide the fiber of the timber with a clean spearing cut. The front surface of the spike is made with a sloping, compressing surface, with cutting edges located in the same plane with the rear side, and with oblique side facets, which, as the spike is driven into the wood, force outwardly on one side the severed fiber of the wood, while on the other side the severed ends of the fiber retain their original position unbroken, and form a solid wall, which enables the spike the better and more firmly to resist the pressure of the rail. In the practical use of the spike, bending of the fiber and breaking down through the same is prevented, and the same are cut cleanly without tearing, as the result of placing the diagonal cutting edges on different planes, while the location of these cutting edges on the same perpendicular plane with the rear face of the spike results in forming the solid back wall, which enables the fibers of the wood to adhere more closely to the spike, and which holds the spike in line for driving, so that it will not turn. These were improvements upon all the previously devised spikes, which either broke down the fiber of the soft wood into which they were driven, thereby destroying the adhesive quality of the spike, rendering it loose from the tie, and affording an opening and receptacle for water, or were apt to be twisted in their driving, as was the lance point spike unless the four oblique faces were exactly balanced, and as was the spike made under the McLean patent. The spike point called for by the Finnerty patent is formed by two regular sloping sides of the spike, differing slightly from the ordinary spike in that he "rounds off the under corner or edges." In his description of his point Finnerty says that the back of the

shank is beveled, or cut away in "chisel-shaped form," and that the inclined sides of the shank terminate at the bottom "in a cutting or chisel point." This is the old chisel point, well known in the art, and cannot be considered an anticipation of the Goldie point as described in the patent under consideration. Neither do we consider the Kingsland horse nail patent, No. 191,242, to be in any way anticipatory of the Goldie patent. Its use and functions are different. It was adapted to an entirely different art from a spike. *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670; *Potts & Co. v. Creager*, 155 U. S. 606, 15 Sup. Ct. 194.

Without special reference to the other patents cited as anticipatory, we may say that none of them are of such character as to induce the court to accept the conclusions sought to be drawn from them by defendants' counsel. After careful consideration, we are of the opinion that the complainants' patent relates to an article of substantial, practical merit, which excels in operation and results other existing appliances, and that the patent is valid. *Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co.*, 59 Fed. 902. That the defendants' spike is an infringement of that described in the complainants' patent is apparent from an inspection of the defendants' exhibits Nos. 1, 2, and 3. It has the same diagonal cutting edges located on the back of the spike point, and in front of said edges the same oblique facets which direct the wood forward after it is cut. The outer facets differ only in size from those of Goldie, while the center facets, though somewhat concave, still form oblique facets on the front side of the diagonal cutting edges, just as called for in the patent. A spike identical with that of defendants can be made by joining side by side two Goldie spikes, while by dividing defendants' spike through the center you will obtain two spikes, each of which will have the Goldie point. The function performed by the spike points is the same in each, both that of Goldie and defendants, and the result obtained is also the same. The form of defendants' spike is for all practical purposes the same as Goldie's, differing only in the fact that it has two Goldie points instead of one. The defendants' spike point embodies all that was of value in the Goldie device, and the mere duplication of the point does not enable the defendants to evade the charge of infringement. *Hoyt v. Horne*, 145 U. S. 302, 12 Sup. Ct. 922.

It remains to consider the patent No. 413,341, known as the "Machine Patent," the claims of which are as follows:

Claim 1: "In a spike-pointing machine, the combination, with a reciprocating plunger provided on one end portion with one or more cutters, of an anvil die having an inclined die face for supporting the spike in a position oblique to the movement of the plunger, whereby the fiber of the rolled metal is divided obliquely in the direction of its length, substantially as set forth."

Claim 2: "In a spike-pointing machine, the combination, with a reciprocating plunger provided on its lower portion with cutters, and having a gauge stop projecting below and in rear of said cutters, with an anvil die having an inclined face for supporting the spike with its end presented to the cutters, and in a position oblique to the movement of the plunger, substantially as for the purpose set forth."

The complainant, in order to enable himself to put his spike upon the market at a reasonable cost, employed a special method of manufac-

ture, consisting of two steps: First, swaging down the hot spike bar to form front and rear compressing faces, and then shearing the cold spike at the end of the point obliquely, and in the direction of its length, to produce the sharp cutting edges thereon, as describe in his patent. To accomplish the second step in his method, Goldie provided a special machine, which is the subject of the above patent. The invention consists of a vertically reciprocating plunger, provided on its lower portion with one or more cutters to conform to shape required on the spike, and which has a guide or stop extending below the end in rear of cutters, for receiving the point of the spike, and sustaining it against downward pressure movement during the cutting operation, said plunger to be used in combination with a stationary or anvil die, having its front edge likewise fitted to conform to the required shape of the spike, and which has its upper face so arranged as to hold the spike, when placed thereon, in a position oblique to the movement of the plunger, and which supports the spike in proper position to receive the stroke of the plunger. In the practical operation of this machine it will be seen that the anvil die simply holds the spike to place, and sustains the strain put upon it by the stroke of the plunger or upper die, which, when striking the spike point forces it laterally away. It is the top die or plunger that does practically all the cutting, the lower die or anvil having but little cutting action. The spikes which are to be operated upon being small, all support must be provided by the dies, and the lines of the cutting all fixed by the shape of the plunger and anvil. In these respects the machine differs from the ordinary shear knives, and is a departure from anything connected with the shearing of metals, to which reference has been made. We find that the complainants' machine is a special one, adapted to a special purpose, relating to an art entirely different from that of ordinary shearing knives. After a careful examination of the whole record in this case, we fail to find anything which leads us to the conclusion that the complainants' invention, as disclosed in this patent, No. 413,341, was in any way anticipated, either by prior use or by any machine possessing its functions.

It is proved in this case, and not denied, that the defendants use two machines, one a reciprocating machine and the other a rotary machine. Each machine contains a stationary or anvil die with an inclined face having side guards on each side thereof to guide the spike point laterally, and the spike rests on the inclined face of the anvil die, its end projecting over the cutting edge thereof. It differs from the anvil die of the Goldie patent merely in the form of its edge, which is made to conform to the form of the point of the defendants' spike. In the reciprocating machine there is a plunger, having on its face a number of cutters, each extending a little further forward or outward from the plunger, and below these cutters a guide stop against which the spike point is placed. In the rotary machine, the cutters, of which there are several, instead of being secured to a plunger, are formed on the periphery of a rotating disk, and placed successively further and further from the center of rotation. The cutters on the plunger and the disk have the same function, and differ from the cutter on the

Goldie machine, in that several cuts are taken across the spike point, instead of one. The action of the cutters is to cut obliquely in the direction of the length of the spike across the face of the anvil die, and prepare the spike to receive the action of the last one of the cutters, which passes so close to the shearing edges of the anvil die as to form the sharp cutting edges of the spike point by an operation similar to that of the Goldie machine. The defendants' rotary machine has the same anvil die, and its cutters are arranged to operate with relation thereto in exactly the same way as on the reciprocating machine. They must be classed in the same category. *Oval Wood Dish Co. v. Sandy Creek, N. Y., Wood Mfg. Co.*, 60 Fed. 285. Each performs the same function, and produces the same result as the other, and both infringe the claims of the complainants' patent. For the reasons given above, the decree of the circuit court will be affirmed.

CHICAGO SUGAR-REFINING CO. v. CHARLES POPE GLUCOSE CO. et al.

(Circuit Court of Appeals, Seventh Circuit. February 4, 1898.)

No. 383.

1. PATENTS—PATENTABLE PROCESSES—MAKING STARCH FROM CORN.

The Behr patent, No. 247,152, for a process of treating corn in the manufacture of starch, glucose, etc., and consisting in the automatic and continuous separation of crushed corn into germs, hulls, and starch, by means of starch milk, itself continuously and automatically formed in the course of the operation, and being of such specific gravity as to cause the germs to rise to the top, so that they may be carried off through a chute, describes a patentable process, and was not anticipated by either the Anderson or Cavaye British patents of 1857 and 1872, respectively. 79 Fed. 957, reversed. Woods, Circuit Judge, dissenting.

2. SAME—MECHANICAL PATENT—VALIDITY AND INFRINGEMENT.

The Behr patent, No. 247,153, for an apparatus for carrying on his continuous process of separating from crushed corn the starch milk and germs, construed, and held not infringed as to the first claim, and void as to the fifth claim, for want of invention.

Wood, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

C. K. Offield and Robert N. Kenyon, for appellant.

L. L. Coburn, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge. The circuit court upon final hearing dismissed for want of equity a bill wherein this appellant charged infringement by appellees of the one claim of letters patent of the United States No. 247,152, and the first and fifth claims of letters patent of the United States No. 247,153. These patents were issued in 1881 to Arno Behr. They became later the property of

this appellant, by assignment. This appeal is taken from the decree of dismissal.

If grains of corn be dropped into a basin of water, they will sink, and lie on the bottom of the basin. If grains of corn be crushed, so that the germ of each is separated from the hull, and if the broken grains be then sifted, so that all loosened or liberated particles of the flour or starchy matter are removed, and the remainder dropped into a vat or basin containing water, both the germs and hulls will sink, and lie in a mass on the bottom, the germs above, the hulls below, since the germs, each of which contains a globule of oil, are lighter (that is to say, of less specific gravity) than the hulls. By means of some foreign substance capable of being held in suspension, or of uniting in solution with the water, the density of the liquid may be increased so that the germs will rise and float on the surface, while the hulls remain on the bottom. If in such case an opening or chute be provided near the upper edge of the containing vessel, and if provision be made for introducing into the vessel, by a regulated feed, additional crushed grains, mixed in due proportion with liquid of the appropriate density, then, while a portion of the hulls already separated, and equal in quantity to the increment of hulls, is constantly being removed (this being so done that the action of the liquid in continuously raising the germs from the hulls as so introduced is not interfered with), the liquid, together with the germs, will flow out of the chute continuously, and in a regulated volume. If a vibrating sieve, inclined outward from the lower exterior edge of the chute, and downward towards some receptacle with which it may be connected by an open mouth or spout, and having underneath a second vessel, be also provided, then the germs will pass over the sieve into the one receptacle, and the overflowing liquid will pass through the sieve into the other. By this process the mass of crushed corn and liquid, kept constant in volume by a regulated feed, may be continuously separated; the liquid passing into one receptacle, the germs into another, and the hulls into a third.

The first of the patents in suit concerns the treatment of corn, and involves a process in general outline as already suggested. The stratum of hulls lies in the bottom (a cross section of which is a half circle) of a long compartment, vat, or trough, wherein is contained longitudinally a revolving shaft, supplied with transversely projecting blades, set angularly to their planes of revolution. By the action of these blades (whose orbits do not approach or disturb the upper surface of the liquid) the stratum of hulls, as the germs part and rise through the liquid to the surface, is continuously stirred and moved from the receiving end of the trough to the opposite end, where a series of perforated scoops, attached to a belt running on a pulley affixed to the shaft and another pulley above, continuously lifts the hulls so accumulated, and deposits them upon an inclined, vibrating sieve, whence they pass into a receptacle provided to receive them. Water from pipes above this sieve is sprayed over the passing hulls, washing off the dense, adhering liquid

brought up from the trough, which liquid, together with the increment of water, passes into a receptacle below the sieve, and thence, by a pipe, back into the main vat or trough. In the process of this patent the particles of starchy matter or flour are not removed initially from the broken grains. The grains, having been previously softened by soaking, or in some other way, are then crushed. The crushed grains are then mixed with water and stirred, and this mixture is continuously fed into the receiving end of the long vat, through a pipe which connects with the vat near its bottom, in order that the surface of the contained liquid may not be disturbed. The liquid made use of in this process is water brought to the requisite density for floating the germs by the particles of starchy matter or flour softened in the preliminary soaking, and released and dissolved in the preliminary crushing and stirring, and by the action of the bladed shaft already mentioned. These dissolved or comminuted particles are held in suspension in the water, and the proportions of crushed corn and water, and the rapidity of the operation, are graduated so that the appropriate density in the liquid (10° or 12° Baume) is permanently maintained. If the degree of density be too low, the germs will sink; if too high, the hulls will float along with the germs. In other words, the separating liquid, formed as stated, and called "starch milk" in the patent, is maintained at such density that the germs float and the hulls sink. By this process the mass of crushed corn and water divides itself, and forms a lower stratum of hulls, a middle stratum of starch suspended in water, and an upper stratum of germs. Each subdivision is gradually and continuously separated from the mass; the starch milk and the germs passing through the chute together by gravity, and the starch milk by gravity parting from the germs, and passing into the receptacle below the sieve. The claim of this patent is expressed in the following words:

"The process of treating corn in the manufacture of starch, glucose, and other products therefrom, herein described, which consists in mixing with corn, which has been softened and crushed, sufficient water to form a mixture of such density that the germs of the corn will tend to separate from the hulls and other heavier portions, and rise to the surface of the mixture, and in mechanically stirring such mixture in a separating tank or compartment provided at the top with a suitable chute, and thereby causing the germs and pieces of germs to be carried off in a surface current caused to overflow through the chute by the influx of crushed corn and water into the separating tank, and in removing the hulls and adherent matter from the lower stratum of the mixture by mechanical means; the materials removed from the separating tank being respectively screened in the usual manner, and the purified mixture of the mealy parts of the corn and water being collected in a suitable reservoir."

It is said that this claim is void *prima facie*. Counsel for appellees insists that the claim "is void upon its face," and independently of the prior art. "This position," he says, "is based upon the well-known principle that that which is shown but not claimed in a patent is thereby disclaimed, and conceded to be old and public property. It is apparent upon the face of the process patent in suit that Behr made no attempt to claim broadly the separation

of the germs from the perisperms by immersing a mixture of the two in a liquid of intermediate specific gravity. He admitted this process of separation to be old, and stated his invention to be the carrying out of this process in the particular manner determined by the apparatus employed for the purpose." Counsel insists that the words, "mixing with corn, which has been softened and crushed, sufficient water to form a mixture of such density that the germs of the corn will tend to separate from the hulls and other heavier portions, and rise to the surface of the mixture," describe the process, and he goes on to say:

"Had Behr been the first to do this, he would have been the inventor of a process. If his claim stopped here, and at the same time were novel, the claim might be patentable as a process claim. This process, however, was not novel. This is not only shown by the prior art, but is conceded by the fact that Behr did not claim the process broadly, as above stated."

The point of novelty will be considered later. The question now concerns the *prima facie* validity of the claim. Owing to the natural qualities which distinguish the constituents of a grain of corn, namely, the germ, the starchy portion, and the hull, and the natural qualities of water, the characteristic process of the claim is attained under the conditions named therein; that is, when the apparatus specified, or some equivalent apparatus, is supplied. Without the forces inevitably and naturally brought into play by the water and the ingredients of the corn grains, the apparatus would accomplish nothing. The apparatus is functional, towards the result intended, only as supplying conditions under which movements and changes of structure due to the natural qualities of the substance treated take place. If the process be new, if it were first reduced to practice by the apparatus proposed or indicated in the claim when read in the light of the specification, then the claim sets forth a new means. If the operation, namely, the automatic separation of an increasing mass of corn into germs, hulls, and starch by means of starch milk, itself continuously and automatically formed in the course of the operation, be new, then the claim would seem to be valid and patentable. In 1 Rob. Pat. (footnote 2), p. 256, we find the following:

"For, if the operation performed by the machine is new in reference to the object upon which it is employed, a new process has been invented; and this is no less true if the machine or instrument employed is new than if it were old, or if the process can be performed in no other known way than by this particular machine. While, on the other hand, if the operation is known in reference to the object, the invention of a new machine for performing it does not make a new process, but only a new instrument for applying it. Thus, in the art of planing lumber, if the end to be accomplished were the smoothing of the boards, and there were no known methods of attaining this end, the process of smoothing by removing inequalities would be a means, and the inventor of this process would be entitled to a patent for it, no matter what method he may have employed. But, it being once apparent that smoothness could be effected by removing inequalities, the removal of inequalities becomes the end, and a process for removing them the means; and, if the process now invented for that purpose be the cutting of the surface by a group of knives applied in a certain speed or order of succession, this also, as a new means, is a new invention. This peculiar excision of the surface

now becomes an end, and every machine devised for performing it a means; and at this point invention passes from process into instrument, and every subsequent invention for the same end is only as broad as the new character of the instrument produced. Whether or not a new machine is the reduction to practice of a new process, or is a new instrument for the performance of an old process, is therefore to be determined by the state of the art at the date of the invention. If it is the former, the process is patentable, though the machine be new. If the latter, only the machine can be allowed the protection of the law."

In *Corning v. Burden*, 15 How. 267, 268, the supreme court of the United States said:

"The term 'machine' includes every mechanical device, or combination of mechanical powers and devices, to perform some function and produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called 'processes.' * * * It is when the term 'process' is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not effected by mechanism or mechanical combinations."

The opinion of the supreme court in *Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, contains the following statements:

"It may be said in general that processes of manufacture which involve chemical or other similar elemental action are patentable, though mechanism may be necessary in the application or carrying out of such process, while those which consist solely in the operation of a machine are not. Most processes which have been held to be patentable require the aid of mechanism in their practical application, but, where such mechanism is subsidiary to the chemical action, the fact that the patentee may be entitled to a patent upon his mechanism does not impair his right to a patent for the process, since he would lose the benefit of his real discovery, which might be applied in a dozen different ways, if he were not entitled to such patent. But, if the operation of his device be purely mechanical, no such considerations apply, since the function of the machine is entirely independent of any chemical or other similar action. A review of some of the principal cases upon the subject of patents for processes may not be out of place in this connection, and will serve to illustrate the distinction between such as are and such as are not patentable. * * * It will be observed that in all these cases the process was either a chemical one, or consisted in the use of one of the agencies of nature for a practical purpose. It is equally clear, however, that a valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, or, in other words, for the function of a machine."

Eames v. Andrews, 122 U. S. 40, 7 Sup. Ct. 1073, concerned a process claim, wherein, as a means for obtaining water, air pressure tending to drive the water from a distance through an underground, water-bearing stratum, and into the lower end of a vertically sunken tube, from which the air had been exhausted, was made use of. The apparatus was a hollow shaft containing a pump. Mechanical means was employed to drive the shaft down to and into the water-bearing stratum, so that the material of said stratum would be compacted against the lower end. The supreme court of the United States quotes with approval from the opinion of Mr. Justice Blatchford, at the circuit, the following:

"The novelty of the process under consideration does not lie in a mechanical device for sinking the shaft, or raising the water to the surface, but in the method whereby water, by the use of artificial power, is made to move with

increased rapidity from the earth into the shaft, whence it results that a tube but a few inches in diameter, driven down tightly to a water-bearing stratum of the earth, affords an abundant supply of water to a pump attached thereto, and constitutes a practical and productive well. Such an invention is without the field of mechanical contrivance. It consists in the new application of a power of nature, by which new application a new and useful result is attained. There is no new product, but an old product—water—is obtained from the earth in a new and advantageous manner."

Cochrane v. Deeneer, 94 U. S. 780, sustained a process patent for making flour. An air blast in connection with mechanical apparatus was made use of. Commenting on this decision, the court said in the case of *Locomotive Works v. Medart*, already referred to:

"It will be observed in this case that the process for which the patent was sustained * * * was a series of acts performed upon a subject-matter to be transformed and reduced to a different state or thing."

The apparatus named or indicated in the process claim in question (the "separating tank," "provided at the top with a suitable chute"; the "mechanical stirring," and "removing the hulls"; the screening the removed hulls and germs, respectively, from the starch milk; and the ultimate reservoir for the latter) is, as expressed by the supreme court, "subsidiary" to the process. The apparatus supplies the conditions under which the process, the operation of natural forces, goes on towards the ultimate result of obtaining from the corn the starch, the oil germs, and the hulls. If the process as reduced to practice by Behr be novel, then it cannot be treated as out of the field of invention, and hence a mere result or function of the apparatus. On this hypothesis the claim is *prima facie* valid.

It is strongly contended that the process of the claim in suit is found in the prior art. Many patents were shown in evidence. A British patent to one Anderson in 1857, concerning an improvement in the treatment of maize, contained the following language:

"A quantity of the grains of maize or Indian corn is primarily placed in a trough, or other suitable vessel, for the purpose of steeping them so as to disintegrate or partially disintegrate the component parts of the solid matter of the grains. The softening of the grains may be effected either by means of water, or the operation may be hastened by using an alkaline or saline solution in lieu of pure water. Whatever menstruum or fluid be used, a sufficient quantity thereof to cover the grains of maize or Indian corn contained in the trough or other vessel is poured or allowed to flow into the same. The maize is allowed to remain in the fluid until it is sufficiently softened. The fluid, having access to the solid internal matter of the grains, acts upon the vegetable granules, and serves to separate or partially separate them from the embryo of the plant. This softening or partially disintegrating process having been effected, the steep water or fluid is run off from the trough or vessel containing the grains. The maize, after undergoing the preparatory process of steeping, is passed between rollers, or otherwise subjected to mechanical pressure or frictional action, in order to further reduce the grains, and effect the more complete separation of the embryo from the perisperm or albuminous vegetable matter. The maize thus far prepared is now to be placed in a fluid, the specific gravity of which must be such as to allow the perisperm or albuminous portion of the grain to sink to the bottom of the containing vessel, whilst the embryo floats upon the surface of the fluid. This separation of the starchy matter from the embryo by gravitation may be conveniently and economically effected by means of salt and water, the density or strength of which must be regulated so that the albuminous or starchy matter is not held in sus-

pension, but will fall through the solution to the bottom of the vessel. The floating embryo of the grain is skimmed or otherwise removed from the fluid. * * * The saline or other solution is now to be run off from the perisperm or albuminous portion of the maize or Indian corn."

Clearly, the idea of detaching and dissolving starch particles to make starch milk, from which the starch is to be ultimately extracted, and at the same time of so controlling the density of the starch milk that the hulls will sink while the germs float (in other words, the idea of starch milk as an instrumentality whereby the germs and hulls can be separated) is not found in this Anderson publication. In the process of the process patent in suit, the regulated feed, the regulated surface overflow of germs and surplus starch milk, and the mechanically removing and stirring the lower stratum of the mixture, whereby the dissolution and liberation of softened and loosened starch particles to be held in suspension is aided, are functional. Without these agencies the requisite density of the liquid could not be maintained so that the process could be realized. This is not an intermittent process. If the feed is stopped, the surface overflow will stop. If the action of mechanically stirring the lower stratum ceases, then all parts of the corn will gradually sink to the bottom. The natural qualities of the ingredients composing the mixture actively assert themselves to the end proposed in the patent only by the aid of a going apparatus.

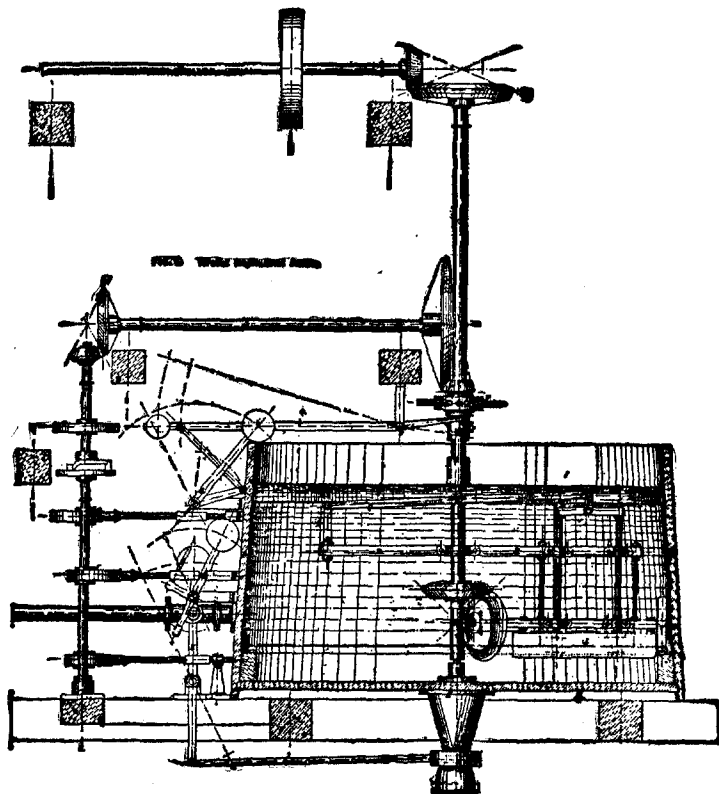
A subsequent British patent to the same Anderson contains the following language:

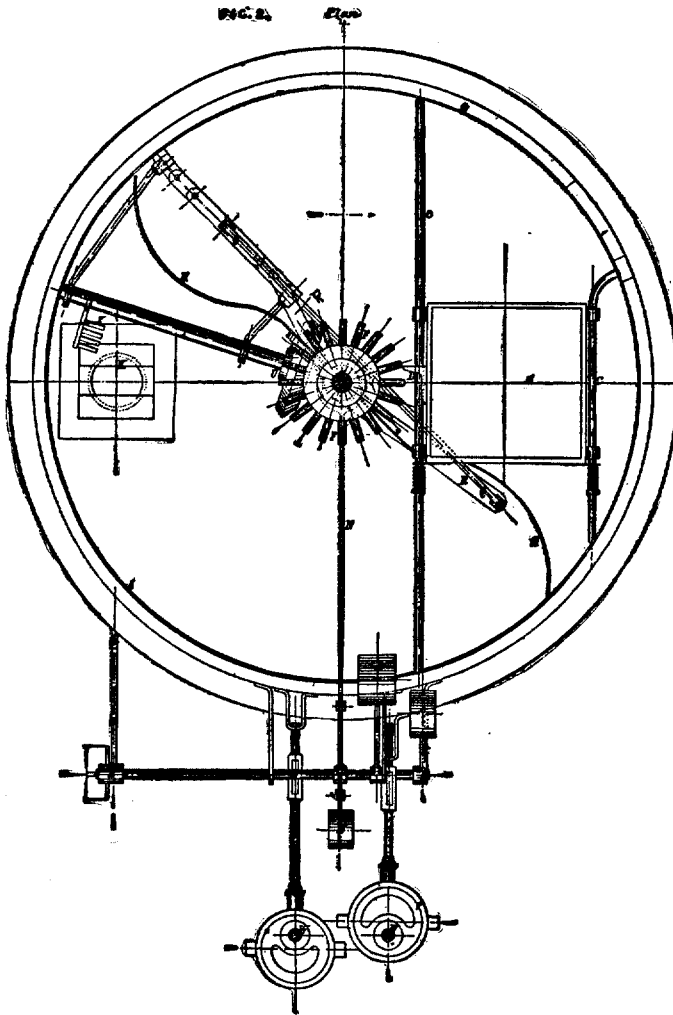
"In one modification of the separating process the use of a saline solution to float the embryo is dispensed with, and the liquid is made of sufficient density to effect that purpose by mixing into it some starchy matter from a previous operation, or in process of separation, and, by preference, in its undried state."

In this patent to Anderson the hull was first separated from the germ, or "embryo," as Anderson calls it, by an operation called "decortication." The "separating process" mentioned in the quotation was intended to part from the germ or embryo the starchy matter or perisperm adhering thereto. The words quoted seem to indicate that, in place of salt, starchy particles may be taken up and held in suspension by the water during the operation, and that the liquid may be thereby made of sufficient density to float the germs, which can then be removed, leaving the starchy portion behind. The Anderson patent contains no other suggestion, than as above quoted, in any way pertinent to the question here. It contains no suggestion of any apparatus of any kind to be used in carrying out the hint contained in the language above quoted. No stirrer or mechanical appliance is proposed, whereby the dissolution and liberation of the starch particles may be aided and controlled towards any practical result. The language quoted contains a hint which might have developed something useful by further experiment with apparatus to be contrived by the experimenter. It is enough for the present case that Anderson got rid of the hulls by decortication. The idea of separating the germs from the hulls by making the con-

taining liquid of such density as to float the former and submerge the latter, such liquid being starch milk, itself obtained in the operation, which operation is to go on continuously upon a mass of material kept uniform in volume by a regulated feed, is not found in the Anderson patent. The idea of so controlling the density of the liquid that the hulls will sink, or of utilizing a liquid so obtained to separate the germs, not only from the starch, but also from the hulls, is not found in that patent. It will scarcely do to say that the process of the claim in suit is anticipated by the Anderson patent, or that prior processes wherein foreign substances or chemical combinations were resorted to to obtain the requisite density in the separating fluid can be treated as anticipating the process of the patent in suit.

Each of the experts for appellees swears that in his judgment the Cavaye British patent of 1872 shows most distinctly the process of the process claim in suit. The apparatus, in vertical longitudinal section and in plan, is shown in the two figures below:





Following is the description of the apparatus, and of what takes place by means of it, as given in the patent.

"The said apparatus is constructed with a vat, A, filled with water, in which the mixture of germs and crushed grains is caused to fall by means of a rectangular vibrating hopper, B, the bottom of which is formed of an iron plate perforated with holes so as to distribute the fall of the material upon a sufficiently large surface of the basin, A, whereby the lighter germ will be caused to float on the top, and the heavier fragments of maize will fall to the bottom. The hopper, B, is supported upon two parallel columns, C, and carries at its side an angle block, D, continually pressed by the springs, E, against a cogwheel, F, attached to the vertical axle, G, fixed at the center of the vat, A. A gatherer, which is put in motion by the shaft, G, and whose height may be varied by an arm, N, brings back the floating germs, and directs them towards the door, I, through which they pass out of the apparatus. A second

gatherer, J, near the bottom, and actuated by the shaft, G, pushes the crushed maize into an aperture, K, made at the bottom of the vat, whence the substance falls into a conduit, L, closed by a trapdoor, M, which opens and shuts automatically. The arm, N, jointed at O, controls a socket, P, to which is suspended a lever, Q, one of whose jointed ends is fixed to the horizontal rod, R, fixed upon the shaft, G. It also acts as a guide to the rods, S, to which the gatherer, J, is suspended, and which are themselves supported by the free end of the lever, Q. By this contrivance the gatherer, J, can be raised or lowered according as it is desired, or not, to extract the material collected together at the bottom of the vat, A. Behind the gatherer is placed a horizontal shaft, T, put in motion by cogwheels, U, controlled by the shaft, G, and carrying at its extremity a roller, V, which moves upon a circular way cut upon the circumference of the vat, A, and which thus gives to the entire apparatus a general driving motion into the vat, A. Upon the shaft, T, is fixed an agitator, X, for separating from the grain the germs which have been drawn down to the bottom of the vat, and which are thus brought back to the surface of the liquid, whence the gatherer, H, conducts them out of the apparatus." "In order to produce alternately the agitation of the liquid, the shaft, G, which may receive motion from any suitable driving shaft, Y, transmits it by means of a horizontal shaft, Z, to two vertical shafts, W, whereon are fixed three eccentrics, a, f, j. The eccentric, a, controls the balancing levers, s, which regulate the position and the motion of the agitator, X, and of the gatherer, J. The eccentric, f, controls the cock, E, by which the water comes into the vat, A. The eccentric, j, regulates by means of a balancing lever, z, the opening and closing of the slide valve, M, for the discharge of the water and the crushed maize. It results from the use of this system of eccentrics that at the moment when the gatherer, J, is to be actuated, the whole mechanism which supports the agitator, X, descends simultaneously, the cogwheels, U, no longer control themselves, and the agitator ceases to move, in order to allow the fragments of maize to settle at the bottom of the receiver, A, whence the gatherer, J, carries them into the funnel, K. The latter precedes the outlet valve, M, which opens and shuts alternately in a very short time, determined by the eccentric, j, so as to allow the escape only of liquid strongly charged with fragments of maize; the introduction of water being effected in the same manner at intervals, and in quantities always equal to the volume discharged by the apparatus."

In the case of the patent in suit the preliminary softening of the grain, and the crushing of the softened grain which follows, and the subsequent stirring of the mixture of softened and crushed grain and water, is functional in liberating and dissolving the starchy particles to make the starch milk. In the Cavaye patent the grain is crushed dry, and the dry particles dropped on the surface of the large tank containing clear water, "whereby," it is said in the specification, "the lighter germ will be caused to float, and the heavier fragments of maize will sink to the bottom." It is a fact shown beyond question in this record, and even in this very patent, that, if the water remain quiet and undisturbed, all parts of the grain will sink to the bottom. But by the revolution of the shaft, G, to which are fixed the two arms of the sweeper, H, the cross pieces, R, and Q, carrying the gatherer, J, and the shaft, T, carrying the vertically revolving stirrer, X, the water is agitated, and made to run centrifugally around the tank, while the crushed grain is shaken from the hopper. This action (possibly referred to where it is said that "the lighter germ will be caused to float") will probably tend to throw the germs to the upper surface of the water, and towards the exterior circumference, so that more or less of the germs may collect against the outward bend, and towards the extremity of each arm of the broad sweeper, H, and be thrown over

the lower edge of the opening, I, at each half revolution. "A gatherer which is put in motion by the shaft, G, and whose height may be varied by an arm, N, brings back the floating germs, and directs them towards the door, I, through which they pass out of the apparatus." The Cavaye patent was an importation from France. The words quoted were used in translating from the French into the English. "Brings back the floating germs, and directs them towards the door, I," seems to mean that the floating germs are swept back from the center of the upper surface of the water towards the outer circumference, whence they are pushed over the opening, I, by the curved end of the sweeper, H. It must be understood that as the broad-bottomed box or hopper, B, commences to vibrate and shake down the dry, crushed corn, the sweepers or gatherers, H and J, and the intermediate cross and upright pieces, and the shaft, T, carrying the vertically revolving stirrer, X, are all turning in the water with the shaft, G. A regulated current setting towards the door, I, is not contemplated in this apparatus. As the backwardly slanting end of each forwardly curved arm of the broad sweeper, H, passes the door, I, a portion of the floating germs supposed to be collected against it will be thrown out at such door or opening. "The said apparatus is constructed with a vat, A, filled with water." As the crushed corn is shaken into the vat, of course, a portion of the water must be expelled, but the action of the mechanism in the vat is such that this expulsion would seem uncontrolled and irregular. At all events, the liquid so ejected is not the starch milk of the patent in suit, but water. If, in this Cavaye patent, any liquid at all analogous to starch milk can be formed, such liquid is ejected through the bottom of the vat, and not through the door, I. The action of this apparatus is intermiffent. After a certain accumulation has been made in the bottom of the tank, the operation ceases. The water then becomes quiet, and all parts of the grain remaining in the tank sink to the bottom. The gatherer or scraper, J, having been lowered, now scrapes the mass of crushed grain along the bottom to the funnel, K, through which it passes out of the tank. When the apparatus commenced to operate, the tank held only clear water. The operation stops after a time, "in order to allow the fragments of maize to settle at the bottom of the receiver, A, whence the gatherer, J, carries them into the funnel, K." It is the reasonable inference from the drawings and the language of the specification that, when the operation stops for the purpose of removing the accumulation in the bottom, the action of the scraper, J, in circling around the bottom, is continued, and the opening and closing of the valve underneath the funnel, K, are repeated until approximately all the accumulation in the bottom has passed out. Meantime the eccentric, f, opens at alternate intervals the water passage at the side of the tank, so that for each volume of the mixture discharged through the bottom an equal volume of pure water is let into the tank. The valve, M, "opens and shuts alternately in a very short time, determined by the eccentric, j, so as to allow the escape only of liquid strongly charged with fragments of maize; the introduction of water being effected in the same manner at intervals, and in quantities equal to the volume discharged by the apparatus." Whatever liquid escapes through the bottom is

"strongly charged with fragments of maize." The starch milk of the patent in suit is not a liquid charged with "fragments of maize," in the sense in which these words are used in the quotation, but a liquid in which fragments of starch, previously softened, have been dissolved, and are so held in suspension. It is not the theory or sense of the Cavaye patent that the density of the liquid towards the upper surface is to be affected by starch milk, or that starch milk is to be generated for such a purpose, or that a special density is requisite to float the germs, or that a required density is to be uniformly maintained by means of starch milk. Whatever action in the way of floating the germs the Cavaye apparatus has at all, it has initially, and as soon as the crushed grain commences to fall into the clear water. It is apparently the theory of that patent, not that the density of water may be increased by starch held in suspension so that the germs will rise on an undisturbed surface, and be carried by an overflow out of the tank by the door, I, but that by the mechanical appliances in the tank such motion may be communicated that the germs as they fall from the vibrating hopper, B, will remain and collect on, and be thrown or swept from, a liquid surface when the liquid is pure water. In the Cavaye patent the density of the liquid towards the upper surface, so far as the same may be affected by particles of starch held in suspension, if it be so affected at all, is not maintained uniform. But the grain is not prepared with any view of liberating and dissolving starch particles to be held in suspension for the purpose of increasing the density of the liquid. It is by force of the process patent in suit that the idea suggests itself that the density of the water in the Cavaye tank may be affected in some degree by starch particles in suspension. The conception of a starch milk formed by the disintegration of previously softened starch in the grains, and maintained at such density as to float and carry off by its overflow, from a surface otherwise undisturbed, the germs of corn, while the hulls sink through such liquid to the bottom, is not found or in any way suggested by the Cavaye patent.

The infringement of the claim of the process patent seems beyond question. Appellees have the separating tank or trough with the rounded bottom, into one end of which is introduced, mixed with water, corn which has been first softened, and then crushed. They have the horizontal revolving bladed shaft, with the blades set at an angle to the planes of revolution, which gradually moves the stratum of hulls towards the far end of the tank, where such hulls are passed from the tank through an outlet with an adjustable gate, and there received on a screen through which such portion of the starch milk as goes out with the hulls is drained into a reservoir. They have, for the surface overflow of starch milk and germs, a pipe through the far end of their tank or trough, the mouth or interior end of which is curved upwards towards the level of the liquid. Towards and through this outlet the current from the upper surface carries the germs and starch milk to a receiving sieve, through which the starch milk drains into a reservoir. At the receiving end a cross piece is attached either to and across the upper portion of the tank, or else to that edge of the inlet or feed pipe or conductor most remote from the receiving end of the tank, in or

der to prevent the influx of the mixture from disturbing the upper surface of the water into which the germs are to rise. In the process made use of by appellees the starch milk formed in the course of the operation, and out of the materials operated upon, is the means of raising the germs to the surface while the hulls remain in the bottom.

The patent No. 247,153 concerns certain mechanism or apparatus for use in carrying out the process of the other patent. As stated in the commencement of this opinion, two claims of this second patent are here in dispute,—the first and the fifth. The first reads:

“A separating tank or compartment, provided with a stirrer, and having a chute or opening in its wall for fixing the direction of the overflow from the separating compartment, in combination with an inclined vibrating sieve for screening the germs carried off in the overflow, and a trough or reservoir for receiving the starch milk which drains through the meshes of such sieve, and means for mechanically removing from the lower stratum of the mixture in the separating tank the heavier portions of the corn, consisting of the hulls and matter adherent thereto, substantially as described.”

The specification of this patent shows near the far end of the separating tank a cross partition. If a horizontal line be drawn along this partition, from one side of the tank to the other, and through the center of the revolving shaft, the lower portion of this partition, as far as described, would be a half circle. One-half of this half circle is cut away, leaving an opening in said partition in the form of a quadrant. Through this opening the adjacent extremity of the stratum of hulls is continuously moved by the bladed, revolving, horizontal shaft. A series of elevator buckets, fastened to a belt running on pulleys, removes the hulls as the same are pushed through said opening. The expert for appellant was of opinion that the “means for mechanically removing from the lower stratum of the mixture in the separating tank the heavier portions of the corn, consisting of the hulls and matter adhering thereto, substantially as described,” was the bladed horizontal shaft, and the hole through the partition, as last described. This bladed shaft is previously specified as a factor in the claim. It is called the “stirrer.” As this claim is worded, the means for removing the hulls from the lower stratum of the mixture is obviously the string of elevator buckets. The lower stratum runs through the opening in the partition. The removal is from the extreme end beyond the partition. Since the elevator buckets are functional in lifting the hulls to an elevation whence the starch milk will run back into the separating compartment (a portion by the box which incloses the buckets, and the remainder by a pipe), the hole through the bottom of appellees’ trough is not the equivalent of the buckets, with their associated mechanism. These apparatus claims are to be read and thought about as though the process which they are intended to subserve were public property, open alike to appellees as to appellant. So understood, the fifth claim, “in a separating tank, substantially such as described, the shallow vertical partition, C⁵, as and for the purpose set forth,” does not, in our judgment, involve invention. The purpose being to prevent the surface where the germs are to float from being disturbed by the influx of the mixture to be separated, the shallow vertical partition, C⁵, is obvious. To contrive such a partition for

such a purpose would seem not to involve invention. We think the process claim of the first patent is valid, and that the same has been infringed, that there is no infringement of the first claim of the apparatus patent, and that the fifth claim of the apparatus patent is void. The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

WOODS, Circuit Judge (dissenting). We are agreed that the apparatus of Behr's second patent contains no invention, or has not been infringed, and it seems to me equally clear that the process of his first patent is lacking in the essential quality of novelty. In the principal opinion it is said:

"If the operation, namely, the automatic separation of the increasing mass of corn into germs, hulls, and starch by means of starch milk, itself continuously and automatically formed in the course of the operation, be new, then the claim would seem to be valid and patentable."

While this proposition, which seems to be advanced as the basis of the discussion, and as the test of patentability, makes a "continuous" and "automatic" formation of starch milk out of an "increasing mass" of corn essential characteristics of the process, the claim of the patent does not require their presence. The apparatus described is capable of a constant operation, but whether the starch milk will be continuously formed, like the continuity of other parts of the process, depends, as the specification itself says, "upon the continued introduction into the separating tank of crushed corn and water in the proper relative proportions," and, it should have been added, in proper quantities; but that such continuity of movement in any step of the process is not an indispensable characteristic, the wording of the claim leaves no doubt. If it were, it would be possible to use the very apparatus described for the purpose of accomplishing the intended results of the process, without infringing the claim, simply by passing the softened corn through the crusher and into the mixing tank intermittently, or in irregular quantities, determined arbitrarily in the course of operation, or by a predetermined arrangement of the device for the purpose of causing a regularly intermittent action. The essential part of the process, it is evident, is the use of the starch milk, produced in the course of the operation, as the means of separating the germs from the hulls; and, if the claim is to be so construed as to include the effects of the operation of the apparatus described, it is easy of evasion, because neither the entire apparatus, nor any part of it, is indispensable to the performance of the process. The complete separation of the germs, hulls, and starch-making parts of corn, by means of starch milk produced in the operation, may be effected, in the simplest way, by mixing the softened and crushed corn and water in any kind of vessel, by hand or otherwise, decanting enough of the liquid to carry off into another receptacle the floating germs, or removing the germs from the mixture by means of a perforated scoop or ladle. The use of screens to separate either germs or hulls from the starch milk had been well known from the beginning of the art, and the appliances for that purpose described as a part of Behr's apparatus are mere aggregations; and the screening, as a

step in the process claimed, is likewise an aggregation. What is meant by calling the process "automatic," if anything more than that it is effected by force of natural laws and by the mechanical agencies brought into action, I do not know. Once the crushed corn and water are in the mixing tank, the process is of that character; but how the softened corn is supplied to the crusher, from which it falls into the mixing tank, and how the quantity supplied is regulated, does not appear, but evidently it is impossible that the delivery in the manner and quantity required shall be wholly automatic. I find nothing either in the specification or claim to justify calling the corn, in process of separation, an "increasing mass." At the very commencement of the operation, and until the separating tank has been filled to the point of overflow, there will, of course, be an increase of the quantity of corn in the tank; but, once the overflow has commenced, there will apparently be no further increase while the process goes on. On the contrary, the quantity will be unvarying, if the influx from the mixing tank is constant and steady, as it is intended to be. If the substance of the claim is, as I think it was intended to be, in the use of the starch milk produced in the course of operation as the means of separating the germs and the hulls from each other, and if the apparatus described is referred to simply as an available, but not indispensable, agency of effecting the process, then the words "automatic," "continuous," and "increasing mass," instead of indicating essential characteristics, are merely incidental, and in respect to the question of novelty or invention are of no significance. It is said, "This is not an intermittent process"; but, as already suggested, it may be intermittent without change of its essential character, and may be intermittently performed upon the apparatus by which it is intended to be made continuous. If the feed is entirely stopped, the surface overflow, it is true, will stop, but the mechanism meanwhile may go on, keeping up the agitation in the separating tank until the feed is renewed and the overflow recommences.

However the claim is to be interpreted, there is no step of it which is not anticipated in the prior art. The chief feature, the production and use of the starch milk, is distinctly and unmistakably suggested in the second British patent of Anderson. In his first patent he had described a process whereby the maize was first softened, then crushed, and then "placed in a fluid, the specific gravity of which must be such as to allow the perisperm or albuminous portion of the grain to sink to the bottom of the containing vessel whilst the embryo floats upon the surface of the fluid"; and it is added that a liquid of the requisite density and strength may be obtained conveniently and economically by the use of salt and water. The idea of separating the constituent parts of corn of different degrees of specific gravity by means of a liquid of intermediate gravity is here fully developed, but the possibility of effecting the separation by means of the mixed water and starch, or starch milk produced in the course of the operation, Anderson had not then perceived. In his second patent he supplied that suggestion, not by a hint, but by an unmistakable statement that the saline solution may be dispensed with, and a liquid of sufficient density obtained by mixing into the water some "starchy matter from

a previous operation, or in process of separation, and, by preference, in its undried state." The meaning of that statement is not obscure. "Other suggestion" was not necessary to help it out. It means clearly, as in the opinion of the court it is conceded "to seem to indicate, that, in place of salt, starchy particles may be taken up and held in suspension by the water during the operation, and that the liquid may be thereby made of sufficient density to float the germs, which can then be removed, leaving the starchy portion behind." No other possible meaning has been suggested. The objection made that no apparatus, stirrer, or mechanical appliance for carrying out the hint to a practical result was proposed, is not only not tenable, but is destructive of the argument it is intended to support. The method and means suggested for carrying out the process are the same, whether salt or starch is used to strengthen the liquid; and, if the Anderson patent does not anticipate the use by Behr of starch milk so produced for that purpose, then his use of the saline solution would not be an anticipation, if Behr, in connection with his apparatus, had claimed the use of that or any other mixture for the same purpose. A further objection is, that, before applying his process, Anderson got rid of the hulls by decortication. The character of the process, evidently, is the same, whether the corn has or has not been decorticated. Besides, decortication was no part of Anderson's first process, which in other respects is identical with his second; and, once the availability of starch milk had been disclosed in the second patent, the practicability of using it in the process of the first patent, to separate the germs from other parts of the softened and crushed corn, which had not been decorticated, became evident, and thereafter, of course, could not be the subject of discovery or invention. That this was so, by reason of the Anderson process, or of some other process theretofore known in the art, is recognized in the specification of the patent in suit, where it is said:

"I am aware that corn which has been subjected to wet crushing has been stirred in a tank preparatory to being sifted; but in such cases the mixture of corn and water has been separated into only two parts, to wit, the starch milk and the refuse, consisting of hulls and germs together. By my invention the hulls and germs are separated from each other, and collected in different receptacles."

This attempt to make a distinction between a process for separating corn into two parts, and one for separating it into three parts, is a specious pretense. The separation by Behr's process is in fact into four parts,—the germs, hulls, and two distinct bodies of starch milk of different densities; and a seeming virtue might just as well have been made of so describing and claiming the process. The art of separating the starchy parts of corn from the germs and hulls, or from either germs or hulls, is recognized in the earliest patents as old and easy of accomplishment, involving nothing but softening, crushing, and mixing with water, and screening. The problem was to devise a successful method of separating from other parts of the grain the germs, in order to convert them into oil, once their value for that purpose had been discovered. The method of doing it, by softening and crushing, and then mixing the corn with a

liquid of such density that the germs would rise to the surface while other parts sank, and the fact that a liquid of proper density could be obtained by mixing water and salt, and that the starch milk resulting from the operation of the process itself could be used with the same effect, were discovered by Anderson, and, as the patent in suit concedes, were practiced in the art. All that has been done since has been designed, not to improve the process, but to devise better mechanical means for carrying it into effect. And even in that particular, while the apparatus of Behr is perhaps better than any which preceded it, it contains nothing which can be dignified by the name of invention. It is strikingly like the apparatus of Cavaye, though studious care seems to have been employed to create apparent differences, both in mechanical construction and in the methods of operation, but neither in method nor mechanism are the differences such as could have been produced only by invention. Cavaye's device by design works intermittently, but it could easily have been so made or modified as to work continuously. And so, without change, the apparatus of Behr can be operated intermittently, and, with modifications suggested in the Cavaye machine, could be so operated automatically. In Cavaye's device the crushed grain is fed in a dry condition into the mixing and separating tank, while in the device of Behr the grain has been first softened and crushed; but either mode of treatment was well known, and open to common use. To the assertion or inference that Cavaye had no conception or knowledge of the production and use of starch milk as the medium for softening the germs, it is sufficient answer that from the date of Anderson's second patent that knowledge belonged to the art, and Cavaye must be presumed to have had it. It is also said that starch milk would not form from dry meal dropped into the water in the manner of Cavaye's device, but that is asserted without other proof than the opinion of an expert, who, after stating his belief to that effect, went to the other extreme of saying that, if it did form, it would become so dense that the hulls could not sink, showing a perception that the starch milk must inevitably form in the Cavaye tank, while the fact was ignored or overlooked that there is, in the operation of that tank and its adjuncts, a regular introduction of fresh water, which would tend to prevent undue density, and that, if necessary, the quantity of water introduced could be varied, as it must be in Behr's process, to meet the requirements of the operation as it goes on. It is said further that "if in this Cavaye patent any liquid at all analogous to starch milk can be found, such liquid is ejected through the bottom of the vat, and not through the door at the top of the tank"; but, manifestly, before being thrown out it would drive the germs towards the surface, and in some degree would itself pervade the whole body of water in the tank, and tend to give it the density necessary to carry the germs to the top, thence to be expelled through the opening provided for that purpose. It seems to me equally illogical and unwarranted to say that "it is not the theory or sense of the Cavaye patent that the density of the liquid towards the upper surface is to be affected by starch milk," since in a body of thoroughly agitated water, as that

in the Cavaye tank is intended to be, there can not be a condition in the lower parts which will not with some effect extend to the top, and it is not to be presumed that Cavaye did not understand and intend the operation of natural laws so well and generally understood that mention of them was not necessary. The expert, while denying density of water in the tank sufficient to float the germs, attributes to Cavaye the ridiculous idea that, being pushed outward to the low place in the wall, "the thus piled-up germs would tumble over the top of the said low place in the wall, and thus be discharged from the tank." If a single germ could not float, it is evident that a pushing arm, the front face of which is a perpendicular plane, could not cause a mass of them resting on the water to pile up high enough to tumble out over the top of an opening, to the bottom of which, only, the water came. The bottom of the opening, doubtless, was meant, instead of the top; but, so amended, the proposition remains impossible. The fact that the germs of corn do not float in clear water was well known in the art, and presumably to Cavaye; and when he employed in his specification the expression, "whereby the lighter germs will be caused to float on top," it is not a fair or necessary inference that he understood, or supposed others would understand, that the germs would float instantly upon being dropped into the clear water, nor is it necessary to infer that his meaning was that they would be caused to float by reason alone of the agitation of the water caused by the devices connected with the rotating shaft. The agitation was doubtless intended, like the paddles of the separating tank in the patent in suit, to be instrumental in "promoting the rising of the germs to the surface." To sum the matter up, the prior art told Cavaye that the germs of corn could be made to float, and the hulls to sink, in a mixture of water and starchy parts of the corn produced in the process of separation; and, if it were conceded that the apparatus of Cavaye was not intended to embody that process, it needed no material alteration or reconstruction, and could involve no invention to make it do so, either by continuous or by intermittent action.

There is a possible construction of the claim that would make it include a process which might be declared patentable. If the terms of the claim permit or require that the particular effect of the operation of any part of the mechanism described be regarded as a constituent or essential part of the process as claimed, it is the expression concerning "the influx of crushed corn and water into the separating tank." This seems to be regarded by the court as making the operation described as carried on in the mixing tank a part of the process, but, if it has that effect, it should also be regarded as including the return current of starch milk, which is shown to come back through a pipe into the separating tank after separation from the hulls by the action of the vibratory screen near the top of the elevating device; but, with that feature included, the appellees have not infringed. That return current, while the apparatus is kept in motion, and supplied with crushed corn, as intended, is a constantly efficient force in causing the germs to be carried off in a surface current through the chute of the separating tank. Indeed, according

to the description given in the patent for the apparatus, the return starch milk is conducted to the mixing tank, as well as to the separating tank, by means of two distinct pipes.

FURNITURE CASTER ASS'N v. JOHN TOLER SONS & CO.

(Circuit Court, D. New Jersey. January 27, 1898.)

COMPROMISE AND SETTLEMENT—PATENT SUITS—ENTRY OF DECREES.

The real parties in interest in suits on patents owned by them respectively agreed upon a settlement based upon the principle that each patent was valid for the particular device described therein, and not in conflict with the other. The agreement then provided, among other things, that each party would consent to the entering of an injunction in any case to properly protect the rights of the other in accordance with this settlement; and that one of the parties might enter decrees in its favor establishing the validity of its patent, and granting an injunction against the other, according to the principle of settlement. *Held* that, as the agreement was expressly to settle all differences, the court would only allow the entry of this decree on condition that the party asking it would consent to the entry of a like decree against itself in the other suit.

This was a suit in equity by the Furniture Caster Association against John Toler Sons & Co. for infringement of a patent.

A. C. Denison, for complainant.

Thomas F. McGarry, for defendant.

KIRKPATRICK, District Judge. This matter comes before the court on supplemental bill for leave to enter a final decree in accordance with an agreement in writing between the complainant and one William S. Gunn, who is the real defendant in interest. The facts, as disclosed by the record, are that at the time of the making of the said agreement there was pending in this court a suit brought by the complainants herein against the defendants, setting out that the complainants held by assignment a certain patent issued to Berkey & Fox, July 13, 1886, and designated No. 345,613, issued for a certain new and useful improvement in furniture casters, fully described therein, and charging that the said defendants, in violation of their rights, were infringing upon their said patent rights by the manufacture and sale of furniture casters embodying some of the inventions and improvements especially described and claimed in their said patent, and praying that they might be enjoined and restrained from so doing. To this bill the defendants duly answered, denying infringement in fact, and setting up the invalidity of the patent sued upon. Testimony was taken by both parties after replication duly filed. It also appears that, prior to the making of the agreement above referred to, a similar bill, with the same object, had been filed by the complainants in the circuit court of the United States for the district of Connecticut against George D. Clark and William L. Cowles, and was still pending, to which suit also the said Gunn was the real defendant in interest. It is also set out in the

supplemental bill that after the filing of the original bill in this cause the said William S. Gunn became the owner of certain letters patent No. 342,930, issued to Silas H. Raymond and Edwin Doty, June 1, 1886, for a new and useful invention in furniture casters, application for which had been filed June 1, 1886. The said Gunn afterwards filed his certain bills of complaint, one in the United States circuit court for the district of Connecticut, against Wilmot & Hobbs, and the other in the Western district of Michigan, against the Berkey & Gay Furniture Company, both of whom were manufacturing and using furniture casters under the license of the patent of the complainants herein, and to which suit the complainants herein were the real defendants in interest, setting up his said patent, charging that the defendants were infringers thereof, and asking the usual relief by injunction. Answers and replications were duly filed in these suits, and the complainants' prima facie case put in, when the agreement hereinbefore referred to was made and entered into between the Furniture Caster Association and William S. Gunn, who were the real parties in interest in all of said suits. The agreement is in these words:

"For the purpose of settling the litigation now pending between the Furniture Caster Association of Grand Rapids, Michigan, as complainant, and John Toler Sons & Co., of Newark, New Jersey, and Clark & Cowles, of Plainville, Connecticut, as nominal defendants (William S. Gunn being the real defendant in interest), and William S. Gunn, as complainant, against the Berkey & Gay Furniture Company of Grand Rapids, Michigan, and the Wilmot & Hobbs Manufacturing Company of Bridgeport, Connecticut, as nominal defendants (the Furniture Caster Association being the defendant in interest), it is agreed as follows:

"(1) That the form of caster plate shown and particularly described and specified in patent issued to Silas H. Raymond and Edwin Doty, No. 342,930, the application for which was filed March 15th, 1886, and the patent dated June 1st, 1886, and the form of caster plate particularly shown, described, and specified in the Berkey and Fox patent, No. 345,613, the application for which was filed in the patent office July 29, 1885, and for which patent issued dated July 13, 1886, in no way conflict with each other; that the patent office correctly recognized the Berkey & Fox invention and the said Raymond and Doty invention as separate and independent inventions, in no way conflicting with each other.

"(2) That each party will consent to the entering of an injunction or appropriate restraining order at any time, in any case, properly to protect the rights of either party in accordance with the foregoing principle of settlement; it being understood that no decree is to be entered upon the Raymond and Doty patent, based upon the manufacture, use, or sale of the Berkey and Fox track plate or socket, as the same is described in the patent.

"(3) That each party receipt to the other in full for all alleged past profits and damages caused by the alleged infringements of said patents by the parties, or by any persons acting under or through them as contracting manufacturers, agents, or vendees, and for all taxable costs in said causes.

"(4) That the testimony taken be filed, and said suits be disposed of, so far as practicable, without further costs to either party; that the solicitors of record in the various causes shall enter into any stipulation offered that may be necessary to carry out this agreement.

"(5) That decree or decrees may, if the Furniture Caster Association desires it, be entered in its favor in the cause or causes in which it is the complainant, establishing the validity of the Berkey & Fox patent, and granting injunction in accordance with the foregoing principle of settlement, embodying in such decree or decrees, if said William S. Gunn requires it, the substance of paragraph one of this agreement."

Application is now made to this court on behalf of the complainant for leave to enter its decree in accordance with the terms of the fifth clause of said agreement, the form of decree submitted being in the usual form, with injunction, except that the provisions of the first clause of said agreement are incorporated therein. To this defendant objects unless the complainant will at the same time agree that similar decrees may be entered in the several suits in which the said Gunn is complainant.

It will be observed that the object of the agreement, as stated in its preamble, is to settle all the litigation then pending between the parties. It does not pretend to confer upon either party the right to manufacture and sell the patented article of the other, it assuming in its first clause that the caster covered by complainant's patent is so radically different from that described in defendant's patent that there is no conflict between them, and that no decree shall be entered in favor of one as against the other, based upon the manufacture and sale of the articles described in the respective patents.

There is no difference in the privileges accorded the one to the other in respect to any of the pending suits, or of the rights which either is to enjoy under the patents which they control. The suits are to be settled. Each is to receipt to the other for all alleged past profits and damages caused by alleged infringements. The testimony taken in the suits is to be filed, no further costs incurred, and each is to proceed to carry on business under its own patents. Under the first four articles of the agreement the rights of each are similar. The fifth article, however, grants to the complainant herein a privilege which Gunn does not reserve to himself. In the suits wherein the furniture company is complainant, if they so desire it is stipulated that a decree may be entered establishing the validity of the Berkey & Fox patent, and granting an injunction in accordance with the principles of settlement set out in said agreement embodying the substance of paragraph 1. It is clear from the reading of this paragraph that it was not intended that in this suit (being one of those provided for) the complainant should have the right to an unlimited injunction order against the defendant. It was, by its terms, to be restricted to such an injunction as accorded with the principles of the settlement, which were, as set out in paragraph 1, that the claims of the Raymond & Doty patent in no way conflicted with those of the patent of Berkey & Fox, and that no injunction should be entered upon the Berkey & Fox patent for the manufacture or sale of the Raymond & Doty track plate as described in the patent. Considering the agreement as a whole, and the object to be attained thereby, and reading paragraph 5 in the light of its context, I am of the opinion that in the cause pending in this court wherein the furniture company is complainant it is entitled to a decree establishing the validity of the Berkey & Fox patent, and also an injunction order restraining the defendant from manufacturing, selling, etc., track plates and sockets which shall conform to the track plate and socket which is specifically described in the Berkey & Fox patent, No. 345,613; the decree, how-

ever, recognizing the fact that the patent of Berkey & Fox, belonging to the complainant, and the patent of Raymond & Doty, belonging to said Scott, are separate and independent inventions, in no way conflicting with each other, so that the manufacture and sale of the device described in the one is not to be prohibited by any claims described in the other. The rights accorded to the complainant in the fifth paragraph were, however, but a part of those provided for in the agreement. The parties did not intend to have a decree entered in this suit, and an injunction order go against the defendant herein, and continue their disputes in other tribunals. It cannot be that Scott intended to permit decree to be entered against him in the suits wherein he was the real defendant, and then be compelled to forego the advantage of decrees in those wherein he was complainant; to discontinue litigation by submitting to unlimited injunction against himself and his licensees, and receive in return permission to continue his suits for the establishment of his rights under the Raymond & Doty patent, which he claimed were infringed, if he did not submit to such decree as the defendants afterwards saw fit to accede to. The object of the agreement was declared to be the termination of all litigation between the parties, as well that elsewhere as in this court. The rights of the parties were made mutual and reciprocal to accomplish the end in view. Gunn, as well as complainant, is entitled to decrees of settlement.

The privilege of entering decree in this cause will not be granted to the complainants except upon terms, viz. that they should stipulate to give to William S. Gunn their consent to the entry of proper decrees in the said several suits wherein the said Gunn is complainant and they are the real parties defendant, the settlement of which was contemplated by the parties at the time the agreement was signed, to the end that the said agreement may be fully and simultaneously carried into effect.

THE BURTON.

CONSTANTINE et al. v. THE BURTON.

(District Court, D. Massachusetts. February 10, 1898.)

No. 754.

MARITIME LIENS—WHARFAGE AND SERVICES IN DISCHARGING—DEALING WITH BROKER.

Persons who furnish wharfrage and services in discharging, on the order of a broker, who merely states that he is the ship's agent, are placed upon inquiry as to the source of his authority, and are chargeable with notice that he was acting for the charterers, who were required by the terms of the charter party to pay these charges.

This was a libel by Constantine & Co. against the steamship Burton to recover for wharfrage and services in discharging the vessel.

John D. Bryant, for libelants.
Carver & Blodgett, for respondent.

BROWN, District Judge. A lien is claimed upon the British steamship *Burton* for wharfage and services in discharging the vessel in the port of New York. The *Burton* was under a time charter requiring the payment of such charges by the charterer, the New York, Mobile & Mexican Steamship Company. The libel avers that the wharfage and services were furnished at the special instance and request of the owners. The evidence shows that the libelants received a telephone message from the office of F. J. Lord, a ship broker and steamship agent, that he wished to see the representative of the libelants with regard to discharging a vessel. Libelants' secretary thereupon called at Mr. Lord's office, where he saw a Mr. Duckett, then connected with Mr. Lord in business. He informed Mr. Duckett that he had called in answer to the telephone message, and inquired the name of the vessel, which Mr. Duckett informed him was the "*Burton*." He then asked if Mr. Lord was the agent, and was informed by Mr. Duckett that he was. After a few minutes, he saw Mr. Lord, who had been engaged when he entered the office; and Mr. Lord told him he had the *Burton*, and inquired if he had a wharf at which to dock her, and urged him to reserve it, which he agreed to do. Mr. Lord also said he wished libelants to discharge the vessel, and to measure her cargo to determine the quantity, and asked if those services would be rendered at the usual rates, to which libelants' representative responded that the services would be rendered at such rates, and then left. This conversation occurred more than 24 hours before the steamship arrived at the libelants' dock, where she was discharged. There were no dealings with the master, nor were the bills presented for his approval.

As Lord, unlike a master of a vessel, was clothed with no ostensible agency, or apparent authority to bind the owners or the vessel, the libelants were subject to the ordinary rule of law, requiring them at their own risk to inform themselves of the actual authority of the agent. So far as appears, there was no reason for the libelants to assume that Lord was acting for the owners, rather than for the New York, Mobile & Mexican Steamship Company, the charterer, except the ambiguous statement of Duckett that Lord was "the agent." The libelants were dealing with a third person, not the master, not the owner, and, so far as appears, known to them simply as a ship broker, upon whose request they had performed similar services for other vessels. It does not appear that they knew whether the *Burton* was a foreign or a domestic ship, or whether her owners were resident at the port of New York, or at a foreign port. The duty of reasonable inquiry rested upon the libelants. *The Valencia*, 165 U. S. 264, 270, 17 Sup. Ct. 323; *The Kate*, 164 U. S. 458, 17 Sup. Ct. 135; *The Suliote*, 23 Fed. 919, 926. Had this inquiry been made, they undoubtedly would have learned that the vessel was under a time charter requiring the charterer to pay these charges, and that the vessel was in no need of credit, as her master had funds. There were ample time and oppor-

tunity for inquiries, and the libelants' rights must be determined by the facts as they existed. In *The Ludgate Hill*, 21 Fed. 431, cited by libelants, the fact of a general agency for the owners was proved. See *The Suliste*, 23 Fed. 919-926. In the present case it is not established that Lord was the general agent of the owners, or that in the transaction he assumed to act for the owners rather than for the charterers. To support their libel, the burden is upon the libelants to show that the person with whom they dealt was acting for the owners, and with actual or ostensible authority from them, and that it was intended to pledge the credit of the vessel. *The Valencia*, 165 U. S. 264, 271, 17 Sup. Ct. 323; *The St. Jago de Cuba*, 9 Wheat. 409, 416, 417. This, in my opinion, they have failed to do. I see no reason for distinguishing between the claim for wharfage and that for services. They were both contracted for at the same time, and with the same person. *The Kate*, 164 U. S. 458, 470, 17 Sup. Ct. 135. The libel will therefore be dismissed, with costs.

THE LYDIA A. HARVEY.

TARR v. THE LYDIA A. HARVEY.

(District Court, D. Massachusetts. February 10, 1898.)

No. 854.

1. MARINE INSURANCE—SALVAGE BY INSURER.

A vessel was stranded on the beach, so that the tide ebbcd and flowed through her, and was deserted by her master and crew. Her owner informed the insurer that he was unable to meet the expense of getting her off, and the insurer employed another to raise and float her, replace her ballast, and tow her to port for \$350. The work was performed, the sum paid, and the insurer took an assignment of the salvage claim. *Held*, that the insurer did not act as a voluntary adventurer, but in its own interest, because of the insurance contract, and that it had no claim on the proceeds of her sale.

2. MARITIME LIENS—RESIDUE OF PROCEEDS—NONLIEN CLAIMS.

As against the owner petitioning for payment of the residue of proceeds to him, the court cannot distribute the same in payment of claims not maritime liens.

This was a libel in rem by James G. Tarr against the schooner *Lydia A. Harvey*. The cause was heard on a question as to the distribution of funds in the registry, resulting from the sale of the schooner.

Edward S. Dodge and Chas. Wolcott, for libelants.

J. D. Bryant and L. E. Griswold, for China Mut. Ins. Co.

W. F. Prime, for Lockwood Mfg. Co.

Carver & Blodgett, for Low and others.

Dana B. Gove & Sons, for petitioner Pigeon.

BROWN, District Judge. This case presents questions of the validity of claims to funds in the registry resulting from a sale of the *Lydia A. Harvey*. The China Mutual Insurance Company, as assignee, claims a first lien for salvage. December 16, 1896, the Har-

vey was stranded on Plymouth Beach, off the town of Plymouth, in this district, in a place where, though sheltered, and on a soft bed of sand, she was exposed to possible danger of injury from ice. The tide ebbed and flowed through her, and she was deserted by master and crew. Her owner forthwith informed the insurance company (insurer to the amount of \$800 on the vessel and \$200 on outfits and catch on a valuation of the vessel at \$2,000) that he would not get her off, as he was unable to meet the expense. The insurance company employed Sorrensen, a submarine diver and raiser of sunken vessels, to float her, replace her ballast, pick up her anchor, and tow her to Boston, agreeing to pay \$350 for the work when performed. The work was done. Sorrensen was paid by the company, and made in writing an assignment of his claim and lien. The company also paid to other persons for a survey, for services, and for calking, additional sums, amounting to \$95.42.

I am of the opinion that the insurance company has failed to establish any legal or equitable right to compensation from the fund in the registry. Though there was, probably, no proper abandonment or right to abandon, the company nevertheless interposed for its own interest, and upon the evidence must be regarded as the principal, who, through its employé, and at its own expense, got the vessel off, and brought her to Boston. It acted, not as a voluntary adventurer, but because of its previous contract with the owner, which made it directly interested in the preservation of the vessel. The company was liable, under its policy, for a partial loss. The contention that the loss did not amount to 14 per cent. of the valuation is based upon a deduction of one-third "new for old," which is not permissible in the present case. *Potter v. Insurance Co.*, 3 Sumn. 27, 45, Fed. Cas. No. 11,335; *Wallace v. Insurance Co.*, 22 Fed. 66, 70. Within the limit of the amount insured, its expense cannot be regarded as incurred for the benefit of all, but must be considered as incurred solely for its own benefit. *Providence & S. S. Co. v. Phoenix Ins. Co.*, 89 N. Y. 559, 563; *The Clarita and The Clara*, 23 Wall. 1, 17. The company must therefore stand upon its own rights resulting from its own acts, and cannot increase or alter them by taking an assignment from its own employés, who did not rely upon the credit of the vessel, and who have been paid. It would certainly lead to great confusion if underwriters who are liable for a loss by stranding should be permitted to get the vessel off, acquire a salvage lien, completely reimburse themselves from the vessel, and compel the assured to sue to recover from them the amount, or a portion of the amount, that the underwriters have received from the vessel.

I find it unnecessary to decide whether the company has paid out anything in excess of the amount of its liability, since, if it has done so, it has only a claim upon the owner, and none upon the fund.

The Non-lien Claims. I think it clear that against the objection of the owner, who petitions for the payment to him of any residue after satisfying the claims secured by maritime liens, the court has no power to distribute the proceeds in payment of claims not maritime liens. *The Lottawanna*, 20 Wall. 201, 219, 224; *The Willamette Valley*,

76 Fed. 838, 841, 844. There will be allowed, in addition to the lien claims of James G. Tarr and Sidney W. Oakes, for which decrees have been entered, the lien claim of George W. Smith, which, after correction of error, amounts to \$66.43; also the lien claims of Timothy B. Sprague and J. S. & J. H. Marquand. After satisfaction of the above claims, with interest and costs, the residue, after deducting therefrom the amount of \$231.91, will be payable to John Clancy, the owner. The sum of \$231.91 may, by the consent of Clancy, be paid to the proctor for J. Baker & Co., J. G. Tarr & Bro., and Sidney W. Oakes. The remaining claims are disallowed. A decree may be entered in accordance with this opinion.

THE A. J. WRIGHT.

THE SPIEGEL.

THE NEW YORK WORLD.

THE ELIZABETH FARRELL.

RELIANCE MARINE INS. CO. v. THE A. J. WRIGHT et al.

(District Court, N. D. New York. February 12, 1898.)

1. COLLISION IN ERIE CANAL—FAILURE TO REVERSE.

A wheelsman in charge of a steam canal boat, with a tow lashed in front, is in fault if, on perceiving the approach of another steam canal boat on the side where he himself is entitled to pass, he maintains his course and speed, and does not reverse until collision becomes inevitable.

2. SAME.

A collision between the forward tows of steam canal boats, proceeding in opposite directions on the Erie Canal at night, *held*, on conflicting evidence, not to have been an inevitable accident, but to have resulted solely from the fault of the westward-bound vessel in not keeping closely to its own side of the channel.

This was a libel in rem by the Reliance Marine Insurance Company, insurer of cargo, against the steamer A. J. Wright and the canal boat Spiegel. The steamer New York World and the canal boat Elizabeth Farrell were subsequently brought into the cause by petition.

Laughlin, Ewell & Houpt and Wilber E. Houpt, for libelant.

Potter & Wright and William B. Wright, Jr., for the New York World and the Elizabeth Farrell.

Ingram & Mitchell and John W. Ingram, for the A. J. Wright and the Spiegel.

COXE, District Judge. On the evening of July 18, 1896, the steam canal boat New York World was proceeding eastwardly on the Erie Canal, pushing the canal boat Farrell and towing two other canal boats at the end of a long hawser. At the same time the steam canal boat A. J. Wright was proceeding westwardly, pushing the canal boat Spiegel and towing two other boats. The Spiegel and the Farrell were rigidly fastened in front of their respective steamers.

They collided where there is a bend in the canal at a point about a mile east of Phillip's Locks and 500 feet east of French's Bridge. The collision occurred about 10 o'clock. It was a clear starlight and moonlight night. The stem of the Spiegel struck the Farrell about three feet from her stem on the port knuckle. The Farrell sank to the bottom of the canal, and her cargo of oats was damaged. The cargo was abandoned to the libellant, the Reliance Marine Insurance Company, which had issued a policy thereon. The damage to the cargo was subsequently paid by the libellant, and this action was commenced against the Wright and Spiegel. The World and Farrell were subsequently brought in by petition. It appearing at the argument that the canal boats Spiegel and Farrell were free from fault, being wholly under the control of their respective steamers, the libel, as to them, was dismissed without costs.

It is not pretended that the collision was the result of inevitable accident. It is conceded on all sides that it was due to negligence on the part of either the World or the Wright, or of both combined. The canal at the point in question is about 80 feet wide at the top, and about 50 feet at the bottom. The navigable channel for loaded boats is, therefore, about 50 feet wide. The boats were 17 feet 10½ inches beam, so that in passing they would occupy the entire channel, except about 15 feet. At the point of collision the convex side of the bend is towards the north. On the towpath side the bank of the canal is shelving. On the berm or south side it is nearly perpendicular, there being a rocky bank 15 feet high extending along the bend. Loaded boats could navigate at a distance of 5 feet from the berm bank. On the towpath side it was impossible, owing to the greater slope, to get nearer than 10 or 12 feet to the bank. The moon was southwest of the canal, and consequently the berm side was in the shadow of the rocky bank. As soon as the boats became aware of each other's presence signals were interchanged, the fleets agreeing that they would keep to the right and pass port to port. There was a current of about a mile an hour running toward the east. The World had the current with her. The Wright was going west against the current. When it is realized that the steamers with their consorts made two boats each nearly 200 feet in length and nearly 18 feet wide, and that these boats were attempting to pass in a curving channel less than 60 feet wide, it will be seen what a slight deviation by either would cause disaster. If each hugged its respective side as closely as possible, there would be only about 15 feet of clear water between them. It will also be seen how impossible accuracy is in such circumstances, and how easily witnesses may be mistaken when the question turns upon the variation of a few feet, and when darkness and excitement combine to make clear and cool observation impossible. If this controversy were tried by a jury a disagreement would be very likely to result. There is absent from the case any controlling circumstance to aid the court in reaching a conclusion. Each counsel contends that his boat was on the proper side of the canal, that the other boat was on the wrong side, and that the theory of his adversary as to the position of the boats and the cause of the collision is impossible and

absurd. The testimony is contradictory and wholly irreconcilable, and yet, on a bright night, with no abnormal conditions existing, the Farrell was sunk in a canal where hundreds of just such boats were continually passing in safety. Some one was to blame for this, and the court, with no certain guide to the truth, is compelled to find who it was. As one of the witnesses expresses it: "There was absolutely no reason for this collision if the boats had attended to their business." The World insists that the collision occurred on the berm side of the canal, the Wright that it occurred on the towpath side. The theory of the former is that the World and Farrell were well over towards the rocks, and that when 50 feet away the Spiegel took a sheer and struck the Farrell as described. The theory of the latter is that the World and Farrell, after signaling for the berm side, came down on the towpath side and continued there until the collision. There are difficulties in maintaining either theory, but after reading the testimony, and some of the more important portions several times, the court is constrained to accept the theory advanced by the World as the more plausible, and the one sustained by the preponderance of testimony. The reasons for this conclusion are briefly as follows:

First. The weight of testimony is to the effect that the World and Farrell were on the berm side of the canal. There were only two men on the Wright and Spiegel who were in a position to judge of the course of the boats prior to the moment of collision, and one of these, Jewell, says that after the boats came in sight "the Farrell's steersman appeared to be keeping his boat where it belonged on the berm bank." On the other hand at least five witnesses, who were in a position to see, testify that the Farrell and World were on the proper side of the canal.

Second. The World was in the hands of a competent crew. No charge of incompetency, based on facts, can be brought against any of them. The wheelsman was a man of experience. Before entering the bend he had checked down and given the proper signal to keep to the right. The channel on the berm side was much better than on the towpath side. Every motive of prudence and convenience prompted him to what he had signaled he would do. That in such circumstances a careful pilot should hug the wrong side of the canal seems inexplicable. Not only was it safer, but it was more convenient, to do the right thing.

Third. The wheelsman who was alone in charge of the Wright was a man who had had very little previous experience with steam canal boats. On the same evening he had had a similar encounter with another east-bound fleet, barely escaping collision, and raking the Mississauga and her consorts during their entire length. If his own testimony is to be accepted, he was certainly negligent, for, seeing the World and Farrell coming down on the towpath side, he kept on at the same rate of speed, and did not reverse until a collision was inevitable. His history, his testimony and his actions on the night in question, all indicate that he would be more likely to make a mistake in navigation than the wheelsman of the World, who was acting under the immediate eye of his captain. The captain of the Wright had

retired for the night. In any view of the matter the Wright should have been reversed much sooner than she was.

Fourth. The character of the blow on the Farrell's port bow, about three feet from the stem, and the breaking of the port coupling, tend to corroborate the theory of the World that the Spiegel sheered over and struck the Farrell. If the wound on the starboard side was made, as the counsel for the World contends, by reason of the Farrell having been driven by the force of the impact against the rocks on the berm bank, it is almost conclusive evidence of the negligence of the Wright. There is, however, too much doubt on the subject to warrant a finding to this effect. Although the witnesses speak of the Spiegel's action as a "sheer," it should be remembered that a deviation of 10 or 15 feet was sufficient to cause the accident. A slight error in judgment on the part of the pilot of a craft nearly 200 feet in length might produce this deviation, which could hardly be called a "sheer," in the ordinary acceptance of that term.

The court has thus indicated the principal reasons which have led to the conclusion that the Wright was responsible for the accident. Other minor reasons might be stated but it is not necessary. This is not a case where both boats can be held liable. The question turns solely upon the location of the boats. If the World were where the weight of testimony places her—on the berm side—she was guilty of no fault contributing to the accident. On the other hand, if she were on the towpath side, where the Wright's wheelsman places her, she certainly would be primarily responsible for the collision. Upon this proof the court cannot place the boats in a position where both were negligent. The two theories are diametrically opposed. The court may accept either, but not both. There is no middle ground.

The libel against the Spiegel and Farrell is dismissed without costs. The libel against the New York World is dismissed. As the subject of costs has not been discussed, the question whether the World should recover costs, and if so from whom, may be reserved until the settlement of the decree. The libellant is entitled to a decree against the Wright, with costs, and a reference to compute the amount due.

THE SYRACUSE.

THE GRACE DANFORTH.

(District Court, N. D. New York. February 12, 1898.)

1. COLLISION—TUG MOORED IN HARBOR.

It is not negligence for a tug to lie at the dock near the foot of Commercial street in Buffalo harbor; for, though the place is not a safe one, it is not more dangerous than other docks in the same harbor.

2. SAME—PROPELLER ENTERING BUFFALO HARBOR—EXCESSIVE SPEED.

It is negligent navigation for a large, grain-laden propeller to enter Buffalo harbor, with the assistance of a single tug, at the unusual and dangerous speed of five or six miles an hour, especially when a strong gale is blowing, and a rapid current setting up the river.

3. SAME—TUG IN HARBOR.

A tug undertaking to assist vessels into a narrow and dangerous harbor, like that at Buffalo, is bound to know the channel, the current, and whether, in the existing state of wind and water, it is safe to attempt to enter without further assistance.

4. SAME.

A tug assisting a steamer into a harbor is in fault for collision of the steamer with a vessel at a dock, where she permits the steamer to run past her, in the course of a sheer, so that the pull on the towline tends to throw her over so as to make it necessary to cast it off.

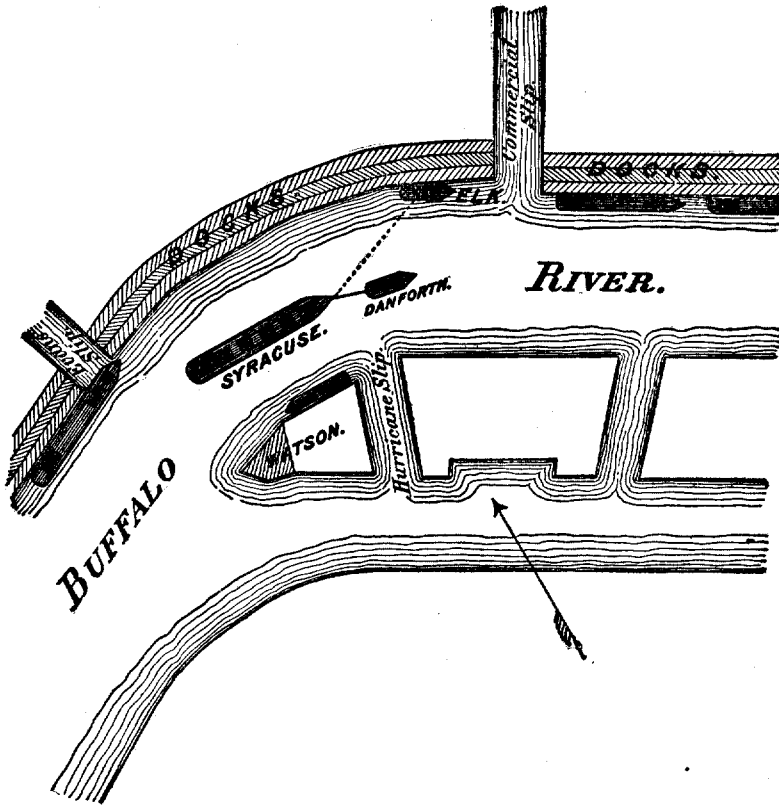
Libel by the Niagara Paper Company, owner of the steam tug Elk, to recover damages to said tug occasioned by a collision with the propeller Syracuse while the latter was being assisted, and partly towed, into the harbor of Buffalo by the steam tug Grace Danforth.

Clinton & Clark and George Clinton, for libellant.

George S. Potter and Harvey D. Goulder, for the Grace Danforth.

Josiah Cook, McMillan, Pooley, Depew & Spratt, and Maurice C. Spratt, for the Syracuse.

COXE, District Judge. At about 9 o'clock on the morning of November 26, 1895, the steam tug Elk was lying moored to the dock at the foot of Commercial street in the harbor of Buffalo. The Elk is a large tug, 96 feet long and $17\frac{1}{2}$ feet beam, having low-pressure engines and a detached condenser pump. She was left in charge of her fireman and deckhand, a young man about 17 years of age. Her master and her engineer were at the time on shore, attending to business connected with the tug. A severe gale was blowing from the southwest. The maximum velocity of the wind that day was 68 miles an hour, which is an unprecedented record for a November gale. At the time of the collision the velocity of the wind was about 40 miles per hour. The effect of this gale was to blow the water from the lake into the harbor, and it is undisputed that the water was unusually high, and that a strong current—about $3\frac{1}{2}$ miles per hour—was setting up the river, which at the point in question, opposite Commercial Slip, is 290 feet wide. While the Elk was lying moored in the manner described the Syracuse entered the harbor. The Syracuse is a large, powerful propeller, 280 feet long and about 38 feet beam. She had come from Chicago with a cargo of grain and flour. The Syracuse whistled for a tug, and the Grace Danforth responded. When opposite the old Buffalo light the tug took her line—about 35 feet in length—for the purpose of assisting her to the dock of the Western Transit Company, some distance up the river. The Danforth is a large and powerful tug, her dimensions being substantially the same as the Elk. When the Syracuse was passing the Watson Elevator she took a sudden sheer to port, and struck the Elk on her starboard quarter with a tremendous force, crushing the tug and breaking down the dock at which she was moored. The Danforth in the meantime had lost control of the propeller, and, when in danger of being rolled over, threw off the line. The following diagram, prepared by the court from the testimony, may, without pretense to perfect accuracy, serve to illustrate the situation and render further description unnecessary:



The libellant insists that the collision was due primarily to the fault of the *Syracuse* in proceeding at a dangerous rate of speed, and, perhaps, to the fault of the *Danforth* in failing to give proper signals to back, and in letting go the propeller's line at the time when help was most needed. The *Danforth* contends that the negligence of the *Syracuse* was the sole cause of the accident, and the *Syracuse* contends that it was due to the fault of the *Danforth* in not taking proper care of the propeller, and to the fault of the *Elk* in lying at a dangerous place, and in not moving away when the *Syracuse* commenced to sheer.

The *Elk*.

The proposition that it was negligent for the *Elk* to lie at the dock near the foot of Commercial street cannot be maintained. It was a dangerous place, no doubt, but so is every other dock within the limits of Buffalo harbor. That the harbor, with its narrow, shallow, crowded water ways, is entirely inadequate to accommodate the immense commerce of the lakes is lamentably true, but the court would hardly be justified in holding a vessel negligent the moment she makes fast to a Buffalo dock. Although the court can take judicial notice

of previous disasters all along the line, the testimony fails to show a collision at the precise point in question. Now that the hiatus is filled, it is safe to presume that the chain of accidents is complete from the Ohio Basin to the harbor light. The point where the Elk lay was well within the harbor, at the widest part of the river. There are coal docks, elevators, and freight sheds all along the northerly side of the river. In the transactions of commerce it is necessary for boats of all kinds, from the stately steel propeller to the humble canal boat, to moor at these docks. It appears from the testimony that on the morning in question the docks all along the river were occupied. Vessels with no motive power of their own; barges, schooners and scows, must lie there, and, as they are entirely helpless to protect themselves against the blows of moving vessels, they must, invariably, be condemned if the contention of the Syracuse is to be maintained. The Elk is almost the exact size of a canal boat. A canal boat could have done nothing had she been in the place of the Elk at the time of the collision. She would have been compelled to do what the Elk did—remain where she was. And yet a decision against the Elk would include a canal boat as well, should the next victim happen to assume that shape. The proposition is untenable. The Michigan, 52 Fed. 501; The Hornet, [1892] Prob. Div. 361; The Nicholson, 28 Fed. 889-892.

It certainly was imprudent to leave the Elk, and especially so on such an inclement morning, in the sole charge of an inexperienced deckhand. If it were shown that this neglect in any way contributed to the injury the court would have no hesitation in finding the Elk guilty of negligence. The proof is, however, overwhelming to the effect that when the collision seemed probable there was not time to move the Elk into a position of safety. The peril was immediate, the time was counted not by minutes but by seconds. The Syracuse was only about 200 feet away when the sheer commenced. The theory that three men in the excitement of the moment could have thrown off the lines of the tug and started her pump and engine is too problematical to consider. If they could have done so it is by no means clear that they would have bettered the situation. In the circumstances which surrounded her it was not negligent for the Elk to maintain her position.

The Syracuse.

That the propeller proceeded up the river at an unusual rate of speed is proved beyond question. No one denies this. It is conceded in the brief of counsel for the Syracuse. But they insist that this was inevitable because it was necessary for the propeller to go faster than the current in order to maintain steerageway. The current was running up the river at the rate of $3\frac{1}{2}$ miles an hour. The conditions on the morning of the accident were phenomenal if not unprecedented. A strong gale was blowing from the lake, a rapid current was setting up the river. The slips between the elevators acted as funnels through which the wind rushed with additional fury. One of these, at the Watson Elevator, is appropriately named "Hurricane Slip." In short,

the air and the water were full of eddies and cross currents which made navigation unusually difficult. The entry into the harbor of a large steamer was, therefore, a most difficult and dangerous operation and required the utmost skill and care. That the *Syracuse* was managed in a careless and imprudent manner is attested by a large preponderance of proof, and by the almost unanimous verdict of the disinterested witnesses who saw the steamer's course up the river. Ordinarily the speed of vessels entering the harbor is from 1 to 3 miles an hour. The *Syracuse* was going at the rate of 5 or 6 miles an hour, and faster than several of the witnesses had ever seen a vessel enter before. The master seems to have been oblivious to the strength and character of the current, and to have made his calculations accordingly. The *Syracuse* behaved badly all the way up the creek. She sheered on one or two occasions before the final sheer, and did not seem well in hand. Whether it was wise under the unusual conditions existing that morning to keep steerageway on her is a serious question. It would seem, however, after balancing all the probabilities, that there was less danger in coming in with the current, leaving the steering and management of the steamer principally to the tug. Certainly had she employed two tugs she would have reduced the chances of accident to the minimum.

It is not necessary to discuss the evidence in detail. It establishes beyond cavil that the *Syracuse* came up the harbor at an unusual and dangerous rate of speed, and maintained it until it was too late to prevent the collision. Practically all of the witnesses on the docks and other vessels who saw the *Syracuse* pass were astonished at her reckless course, anticipated disaster, and hastened to points of vantage from which to view the collision which seemed almost certain to occur somewhere in the vicinity of the Elk. For this fault, which was the primary cause of the accident, the *Syracuse* must be held liable.

The Danforth.

The *Danforth*, strictly speaking, was not towing the propeller. She was acting more as a rudder to assist the propeller into the harbor, the latter furnishing her own motive power. The tug was neither an insurer nor a common carrier, and the highest possible degree of skill was not required of her. On the other hand, she was bound to exercise reasonable skill and care, and their absence constitutes gross fault. The law requires that she should know the perils of the harbor, and the best way to guard against them. She was bound to know the channel, the current, and whether in the existing state of the wind and water it was safe to make the attempt to enter the harbor without further assistance. *The Margaret*, 94 U. S. 494; *The Nicholson*, 28 Fed. 889, 893, 894. The proposition seems to be undisputed that a tug cannot desert her tow at the supreme moment of peril unless she can excuse her action by the most urgent and imperative reasons. The masters of the propeller and tug were both required to know the harbor, but the latter was required to have a more minute and accurate knowledge than the former. Certainly on the morning in question he knew the exact situation, for he had left the harbor only about an

hour and a half before. He knew, or should have known, of the unusual current, the high water, and of the eddies and cross currents caused by the wind and water rushing through the slips. He knew, generally at least, what vessels were in the harbor, and where they were moored. If he were unable to bring in the Syracuse safely, he should not have attempted it. If she were at fault for not employing two tugs, the Danforth was at fault also for attempting so dangerous a task alone. Although it would have shown a commendable prudence to have procured another tug, the court is not prepared to say that the failure to do so was negligence. The journey could have been made with one tug had ordinary prudence been observed. Of course the Danforth was going at the same rate of speed as the Syracuse, and was as responsible as the propeller for this recklessness if she directed or acquiesced in it. She insists that she repeatedly protested by signaling the propeller to check down and back, but this the propeller denies, and thus a question of fact is presented which is an exceedingly difficult one to determine. Assuming that the tug protested against the steamer's reckless speed, no criticism can be made of her course until the propeller commenced the fatal sheer. It is admitted on both sides that she took a position at right angles to the propeller, and pulled to starboard with all the power at her command. At the time the line was thrown off, the tug was careened over to port so that the water was over her port rail, had run through the hatches and into the firehold, and wet the coal on that side of the tug so that it could not be used. She was, in short, in imminent danger of capsizing. The court is inclined to the opinion that the tug had reached the climax of her usefulness. She could not overcome the sheer in the position in which she then was. She might have pulled a few seconds longer, but, whether rolled over or not, her capacity to help was about exhausted. After the propeller had run past her the tug's ability to pull the propeller's bow to starboard was greatly reduced. The fault of the tug was not so much in throwing off the line as in permitting herself to get into a position where such a course was necessary, where she might be "tripped up" and thus rendered useless. With a steamer going at the rate of five or six miles an hour it seems plain, if permitted to outrun a tug attached to her bow by a short line, that the tug and not the steamer must give way, especially when the size of the two boats is as unequal as in the case at bar. The situation in this regard was similar to that condemned by this court in the case of *The Alpha*, 27 Fed. 759, where the court said:

"When within a few hundred feet of the slip [Commercial Slip] the tug in her efforts to bring the barge safely around the curve, put her helm hard a-port, thus heading for the south side of the river. In this position the barge passed the tug, and, in seaman's parlance, 'tripped her up.' They were proceeding against the current at the rate of about four miles an hour, their courses forming an angle of about 45 degrees. A tremendous leverage was thus brought upon the hawser, which rolled the tug up almost upon her beam's end. No ordinary line could resist such a strain. It broke about a minute after the helm was put hard a-port. There can be no doubt that it was bad seamanship for the *Alpha*, with so short a line, and so heavy and unwieldy a tow, to permit herself to get into such a dilemma. This was negligence, and to it the collision is alone attributable."

It is seldom that two cases are so nearly parallel upon the facts. If the Danforth had been capsized, and her owners had libeled the Syracuse for the damages sustained, is it not plain that the court would have been compelled to say that her own fault was responsible, in part at least, for the disaster? The conclusion cannot be avoided that, had the Danforth kept in a position where she could have continued to pull, the injury to the Elk might possibly have been avoided, and at all events would have been much less severe. The libelant is entitled to a decree against the Syracuse and the Danforth, with costs, and a reference to compute the damages.

THE LE LION.

THE ATLAS.

PHINNEY v. THE LE LION.

DUMONT v. THE ATLAS.

(District Court, E. D. Pennsylvania. February 11, 1898.)

Nos. 77 and 80.

1. COLLISION—BARGE ANCHORED IN CHANNEL.

A barge may properly anchor for the night near the middle of the channel of Delaware Bay, inside the capes, where it is four or five miles wide.

2. SAME—STEAMER WITH ANCHORED BARGE.

An anchored barge, which was run into by a steamer shortly after Act Feb. 19, 1895, prescribing one anchor light instead of two, will not be held in fault for having two lights, when the steamer saw only one, and therefore could not have been misled by the other.

3. SAME—BURDEN OF PROOF.

The rule that a vessel, clearly shown to be guilty of fault adequate of itself to account for the collision, has the burden of clearly proving contributory fault by the other, is peculiarly applicable where the other was at anchor, since there is a presumption in favor of an anchored vessel, and a presumption of fault on the part of a vessel running into her.

This was a libel against the master of the barge Atlas against the steamship Le Lion, and a cross libel by the master of the latter, to recover damages growing out of a collision.

Horace L. Cheyney and John T. Lewis, for the Atlas.

H. R. Edmunds, for the Le Lion.

BUTLER, District Judge. About 8 o'clock of March 24, 1895, the barge, in tow of the tug Shawmut, on her way from Boston to Philadelphia, anchored in the Delaware Bay, inside the capes, near the center of the channel,—which is upwards of four miles wide at this point. She put up the usual white light forward, and left her stern light, which had been up previously, burning. The tug anchored the fourth of a mile further up. A proper anchor watch was set upon the barge, and she remained in this situation, her stern swinging up stream, with the incoming tide, until near midnight. At that time the steamship, which was also coming up to Philadelphia, ran into her.

For the injury thus inflicted the barge libeled the steamship, and the latter subsequently libeled the barge for injury sustained by herself.

Is the steamship responsible for the collision? Unless the barge was guilty of fault which tended to it, this question must be answered affirmatively. She was near midway of the channel, as stated, which is from four to five miles wide, where vessels customarily anchor, and very near where the steamship anchored soon after. Her position was not therefore improper. In such a water way, vessels are not required to anchor near the sides. *The Redruth*, 67 Fed. 362; *Id.* [26 C. C. A. 338], 81 Fed. 227; *The Indiana*, Abb. Adm. 330 [Fed. Cas. No. 7,020]; *The Continental*, 3 Woods, 32 [Fed. Cas. No. 3,460]; *The Oscar Townsend*, 17 Fed. 93; *The S. Shaw*, 6 Fed. 93; *The J. W. Everman*, 2 Hughes, 17 [Fed. Cas. No. 7,591]; *The Lady Franklin*, 2 Low. 220 [Fed. Cas. No. 7,984]. She had a good anchor light, which was seen from the steamship when a quarter of a mile away, and could and should, I think, have been seen earlier. The pilot of the steamship says it was a "good bright light" and that he saw it the distance stated. She had, as before remarked, the usual anchor watch set, which appears to have been vigilant in discharging its duties. She did not sound a fog horn, as it is said she should, but the circumstances did not require it. Other vessels in the vicinity, including the steamship, did not sound fog horns, and the pilot of the steamship says it was not necessary, as he could see a light 400 yards or more away. It is now urged, however, that the barge had two lights up, while the Act Feb. 19, 1895, then in force, requires one, and excludes all others. Prior to March 1, 1895, when this act went into force, two lights were required, and as the collision occurred only three weeks later, it was still common to have both up, as the testimony indicates, in ignorance, doubtless, of the law. The exhibition of the second light was a fault. The steamship's complaint of it, however, comes with a very bad grace in view of the statement in her answer and cross libel, that she did not, and could not, see it,—in fact that the barge had but one light up, while it was her duty to have two, and that she, the steamship, was in consequence misled; and especially in view of her testimony, that the second light was hoisted after the collision occurred, as her crew saw. Her case was tried on the issue raised by this statement. It was not until the testimony had been taken, and the case presented for final hearing, that the steamship discovered the fact that Act Feb. 1895, had gone into operation before the collision. Then she changed her complaint, which up to that time, as before stated, had been, that the barge exhibited but one light while she should have shown two. The change does not improve her position. The barge's fault had no influence whatever in producing the collision,—could not possibly have, as the evidence demonstrated. The steamship did not see the second light; she not only says so, over and over, but calls numerous witnesses to prove it. Her movements were not therefore affected by its existence; and the neglect to take it down, when the vessel anchored, as she should have done to comply with the statute, is unimportant.

Having found the barge to be faultless, as respects the collision, it follows that the steamship must be held responsible for not keeping

off. This would be so even if the evidence failed to disclose the particular fault that caused the disaster. The evidence does, however, disclose it. Passing by the question whether a single man on duty as lookout was sufficient under existing circumstances, as she states them (and it may be remarked that in the light of *The Oregon*, 158 U. S. 186 [15 Sup. Ct. 804], and the cases there cited, I think he was not), the evidence shows that while the light should have been seen earlier than it was (as is demonstrated by the fact that the light on the tug, a quarter of a mile further up was seen at the same time, as the steamship pilot testifies) it was nevertheless seen in ample time to enable the steamship to keep off. Her fault consisted in going so near the barge as she did, with the light in view, before changing her course and then changing it in the wrong direction. When she first saw the barge her course was to the starboard of that vessel. There is no room for doubt of this. Her lookout so testifies and so signaled; and he is corroborated by two other members of the crew who heard and understood the signals. Her change of course to port seems to have been a blunder resulting from misunderstanding of signals or orders. Without any change she would probably have passed safely, —with very little change to starboard, she certainly would. Why should she therefore desire to run across, and go up the other side? The pilot, apparently in excuse for turning portward, says he thought the barge was off a little to starboard. Of course she was not, as the collision itself demonstrates. If she had been, no collision could possibly have occurred; the turn to port would have taken the steamship directly away from the barge. The pilot, apparently in further excuse of himself, says he did not give the order; that the mate gave it. This officer was not examined; possibly his presence could not be procured. His explanation might be interesting. The following language taken from *The Oregon*, *supra*, is as applicable here as it is there:

"Where one vessel, clearly shown to have been guilty of fault, adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributory fault. This principle is peculiarly applicable to the case of a vessel at anchor, since there is not only a presumption in her favor from the fact of her being at anchor, but a presumption of fault on the part of the other vessel, which shifts the burden of proof upon the latter."

The barge's libel must be sustained and the steamship's be dismissed, in each case with costs.

MEMORANDUM DECISIONS.

ALLEN et al. v. CHAPPELL et al. (Circuit Court of Appeals, Eighth Circuit. January 10, 1898.) No. 994. Appeal from the Circuit Court of the United States for the District of Colorado. T. A. Green, for appellants. Hedley V. Cooke, for appellees. Dismissed, with costs, on motion of appellees, pursuant to the twenty-third rule, for failure to print record.

AMERICAN STRAW-BOARD CO. v. INDIANAPOLIS WATER CO. (Circuit Court of Appeals, Seventh Circuit. May 11, 1894.) No. 152. Appeal from the Circuit Court of the United States for the District of Indiana. Edwin Walker, John W. Kern, and Arthur J. Eddy, for appellant. A. C. Harris, J. L. High, Edw. Daniels, and Albert Baker, for appellee. Dismissed, on motion of appellant. See 53 Fed. 970; 57 Fed. 1000; 65 Fed. 534; 75 Fed. 972; 26 C. C. A. 470, 81 Fed. 423.

BATES v. KEITH. (Circuit Court of Appeals, First Circuit. February 18, 1898.) No. 231. Appeal from the Circuit Court of the United States for the District of Massachusetts. James E. Maynadier, for appellant. William Quinby, for appellee. Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

PER CURIAM. Upon a careful examination of this case we are satisfied with the conclusions reached by the circuit court (82 Fed. 100), and affirm the decree. The decree of the circuit court is affirmed, with the costs of this court for the appellee.

BLAKE v. PINE MOUNTAIN IRON & COAL CO. SOUTHERN LAND IMP. CO. v. MERRIWETHER. BLAKE v. SAME. (Circuit Court of Appeals, Sixth Circuit. May 4, 1897.) Nos. 379, 380, and 390. Appeals from the Circuit Court of the United States for the District of Kentucky. Thomas W. Bullitt, for appellant John D. Blake. No opinion. Upon a petition for modification in accordance with the reservation contained in the decrees entered in these cases on June 22, 1896, granting leave to apply for the modification suggested by the opinion of the court (Blake v. Coal Co., 43 U. S. App. 490, 549, 22 C. C. A. 430, and 76 Fed. 624), the decree of the circuit court was modified, by striking out therefrom so much thereof as commands Blake to remove his mortgage for \$17,290 on certain Minneapolis property to the Metropolitan Trust Company, dated on August 29, 1892, and by inserting therein a direction that, in the reformation of the deed of trust to the Germania Trust Company, therein decreed, the deed should contain a declaration that the imposition of the mortgage above described was unauthorized, and that in any settlement of its accounts with Blake the amount of said mortgage should be charged against Blake by the trustee, unless Blake should meantime pay and remove the same before said settlement, without prejudice to the right of the parties to take such steps to secure further relief in this behalf to which they may be entitled; in other respects, said decree should be affirmed.

BOWEN v. DENTON et al.

(Circuit Court of Appeals, Fifth Circuit. January 25, 1898.)

No. 615.

FOLLOWING STATE DECISIONS.

In Error to the Circuit Court of the United States for the Northern District of Texas.

John L. Henry and De Edward Greer, for plaintiff in error.

Eugene Williams, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The rulings attacked by the assignment of errors in this case seem to be in accordance with the decisions of the appellate courts of the state of Texas. See Robb v. Henry, 40 S. W. 1047; Bowen v. Kirkland (not yet officially reported) 44 S. W. 189. As the decisions of the highest courts of a state on the scope and effect of the state statutes of limitation controlling the possession and title of real estate are rules of property, we are disposed to follow, and not lead, in the decisions of new questions arising under the statutes of limitation of the state of Texas; and, as the judgment below seems to do substantial justice, the same is affirmed.

BRATTON v. PEOPLE'S BUILDING & LOAN ASS'N. (Circuit Court of Appeals, Fifth Circuit. January 25, 1898.) No. 624. Appeal from the Circuit Court of the United States for the Northern District of Texas. James M. Robertson, for appellant. Drew Frint, for appellee. Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The questions presented on this appeal have been ruled adversely to the appellant in this court and in the supreme court of the United States. Association v. Logan, 30 U. S. App. 163, 14 C. C. A. 133, and 66 Fed. 827; Association v. Price (decided in the supreme court of the United States Jan. 10, 1898; not yet officially reported) 18 Sup. Ct. 251. The decree appealed from is affirmed.

CITY OF BURRTON, KAN., v. AETNA LIFE INS. CO. (Circuit Court of Appeals, Eighth Circuit. December 13, 1897.) No. 918. In Error to the Circuit Court of the United States for the District of Kansas. Samuel R. Peters and John C. Nicholson, for plaintiff in error. W. H. Rossington, Charles Blood Smith, and E. J. Dallas, for defendant in error. Dismissed, with costs, pursuant to the stipulation of the parties. See 75 Fed. 962.

CITY OF COLUMBUS v. DENNISON. (Circuit Court of Appeals, Fifth Circuit. January 17, 1898.) No. 450. In Error to the Circuit Court of the United States for the Northern District of Mississippi. Dismissed, for failure to print record. See 62 Fed. 775; 16 C. C. A. 125, 69 Fed. 58.

CITY OF DENVER v. BARBER ASPHALT PAVING CO. (Circuit Court of Appeals, Eighth Circuit.) No. 902. In Error to the Circuit Court of the United States for the District of Colorado. Application to the supreme court for a writ of certiorari. See 83 Fed. 1020.

CLYMER et al. v. BOWEN. (Circuit Court of Appeals, Fifth Circuit. January 25, 1898.) No. 614. In Error to the Circuit Court of the United States for the Northern District of Texas. This was an action by R. D. Bowen against J. M. Clymer and others to try the title and recover the possession of certain lands described in the pleading. At the first trial the court instructed the jury to render a verdict for the defendants, but on a writ of error the judgment entered was heretofore reversed by this court (24 C. C. A. 446, 79 Fed. 53), and the case was remanded, with instructions to grant a new trial. On the second trial there was a verdict and judgment for plaintiffs, and the defendants sued out a writ of error. J. G. Matthews, for plaintiffs in error. De Edward Greer and John L. Henry, for defendant in error. Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. This is the second writ of error in this case, and presents no questions not considered in the first writ. On the last trial in the circuit court the case seems to have been submitted on substantially the same evidence as on the first trial, and the rulings of the trial judge on the questions presented and now assigned as erroneous were in conformity with the views expressed by this court on the first writ. *Bowen v. Clymer*, 24 C. C. A. 446, 79 Fed. 53. The equitable defense presented on the first trial was somewhat accented on the last; but no question is raised thereby which we can now consider. As we find no sufficient reason to change our views as to the law applicable, the judgment of the circuit court must be affirmed, and it is so ordered.

COCKRILL v. UNITED STATES NAT. BANK. (Circuit Court of Appeals, Eighth Circuit. November 23, 1897.) No. 984. In Error to the Circuit Court of the United States for the Eastern District of Arkansas. Removed to the supreme court on writ of error. See 82 Fed. 1000.

DARRAGH v. H. WETTER MFG. CO. (Circuit Court of Appeals, Eighth Circuit. November 10, 1897.) No. 766. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. Removed to supreme court on appeal. See 23 C. C. A. 609, 78 Fed. 7.

Ex parte DAWSON. (Circuit Court of Appeals, Eighth Circuit.) No. 908. Appeal from the District Court of the United States for the Western District of Arkansas. Application to supreme court for a writ of certiorari. See 83 Fed. 306.

DE LA VERGNE REFRIGERATING MACH. CO. v. GERMAN SAVINGS INST. et al. (Circuit Court of Appeals, Eighth Circuit. January 31, 1898.) No. 974. In Error to the Circuit Court of the United States for the Eastern District of Missouri. Charles H. Aldrich and Frederick W. Lehmann (W. F. Boyle and H. S. Priest, on the brief), for plaintiff in error. B. Schnurmacher (Leo Rassieur, on the brief), for defendants in error. Before SANBORN and THAYER, Circuit Judges.

PER CURIAM. The judges are divided in opinion upon the question whether or not the contract which is the basis of this action was ultra vires the De La Vergne Refrigerating Machine Company, and are of opinion that the other questions presented should be determined in favor of the defendants in error. The judgment below is therefore affirmed by a divided court. See 17 C. C. A. 34, 70 Fed. 143.

FARMERS' LOAN & TRUST CO. v. CHICAGO & N. P. R. CO. Appeal of DAENELL. (Circuit Court of Appeals, Seventh Circuit. January 5, 1897.) No. 232. Appeal from the Circuit Court of the United States for the Northern District of Illinois. William Burry and Clark Varnum, for appellant. George P. Miller and F. H. Wichet, for appellee. Dismissed by consent. See 61 Fed. 543; 68 Fed. 412; 19 C. C. A. 477, 73 Fed. 314.

FLANDRAU et al. v. MASSACHUSETTS LOAN & TRUST CO. (Circuit Court of Appeals, Seventh Circuit. January 5, 1897.) No. 309. Appeal from the Circuit Court of the United States for the Western District of Wisconsin. F. W. Cutcheon, for appellant. Dismissed on stipulation.

GORHAM MFG. CO. v. WATSON & NEWELL CO. (Circuit Court of Appeals, First Circuit. October 14, 1896.) No. 188. Appeal from the Circuit Court of the United States for the District of Massachusetts. William A. Jenner, for appellant. Charles E. Mitchell, for appellee. Dismissed, pursuant to the fifth section of the twenty-second rule, for failure to argue. See 74 Fed. 418.

GREENE v. SOCIETE ANONYME DES MATERIEVES COLORANTES ET PRODUITS CHEMEQUES DE ST. DENIS. (Circuit Court of Appeals, First Circuit. January 27, 1898.) No. 221. Appeal from the Circuit Court of the United States for the District of Rhode Island. For opinion of circuit court, see 81 Fed. 64. Richard B. Comstock, Rathbone Gardner, H. G. Hull, and B. N. Lapham, Jr., for appellant. Edmund Wetmore, W. A. Jenner, W. H. Thurston, and L. E. Sexton, for appellee. Before PUTNAM, Circuit Judge, and ALDRICH and LOWELL, District Judges, by whom the following decree was entered: Dismissed, without costs, by agreement on file. Mandate to issue forthwith.

HAMLIN v. CONTINENTAL TRUST CO. OF CITY OF NEW YORK. (Circuit Court of Appeals, Sixth Circuit. July 7, 1896.) No. 430. Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio. Benjamin Harrison and John H. Doyle, for appellants. Willard Parker Butler, for appellees. No opinion. Motion by appellants to advance the cause, and motion by appellees to dismiss the appeal and for a writ of certiorari for diminution of the record, denied. See 72 Fed. 92; 24 C. C. A. 271, 78 Fed. 664.

HEAP v. TREMONT & SUFFOLK MILLS.

(Circuit Court of Appeals, First Circuit. January 28, 1898.)

No. 205.

PATENTS—INFRINGEMENT—NOVELTY AND INVENTION.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by Charles Heap against the Tremont & Suffolk Mills for alleged infringement of letters patent No. 377,151, issued January 31, 1888, to Henry Nicholas Groselin, fils, for a machine for napping cloth. The circuit court dismissed the bill on the merits (75 Fed. 406), and the complainant appealed. This court heretofore reversed the decree (82 Fed. 449), but subsequently granted a rehearing on a particular point, as indicated in the opinion below.

Dickerson & Brown, for complainant.

Wm. A. Macleod (Edmund Wetmore, of counsel), for respondent.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PER CURIAM. This appeal was fully heard by the court, and on August 21, 1897, a judgment was entered as follows: "The decree of the circuit court is reversed, with costs, and the case remanded to that court, with directions to enter a decree for an accounting, but to deny an injunction, on the ground that the patent expired after the appeal was taken." Subsequently, the appellant filed a petition for a rehearing under rule 29 (21 C. C. A. cxxv., 78 Fed. cxxv.), on consideration of which the court entered the following order: "Ordered that the petition for rehearing filed by the complainant be so far allowed that the cause be reargued orally as to the effect, in all respects, of the French patent, dated February 16, 1881, No. 141,170, including its effect on the various claims of the patent in suit, and on infringing machines antedating the alleged expiration of said French patent." This order, of course, vacated the judgment; but, having fully heard the parties in accordance therewith, we are all of the opinion that the judgment was correct. Ordered, the judgment of August 21, 1897, is renewed, and a mandate in accordance therewith will issue forthwith.

HIGHLAND AVE. & B. R. CO. v. COLUMBIAN EQUIPMENT CO. (Circuit Court of Appeals, Fifth Circuit.) No. 427. Questions of law certified to the supreme court of the United States. See 74 Fed. 920; 18 Sup. Ct. 240.

HOPKINS et al. v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 27, 1897.) No. 1,002. Appeal from the Circuit Court of the United States for the District of Kansas. Questions certified to the supreme court, on December 8, 1897, under the provisions of section 6 of the act of March 3, 1891. Cause removed to the supreme court on writ of certiorari. See 82 Fed. 529.

HUNT v. ARCHIBALD et al. (Circuit Court of Appeals, First Circuit. February 11, 1898.) No. 232. Appeal from the Circuit Court of the United States for the District of Massachusetts. James E. Maynadier, for appellant. George O. G. Coale, for appellees. Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PER CURIAM. We agree with the conclusions of the circuit court, for the reasons stated in the opinion filed in that court. The decree of the circuit court is affirmed, with the costs of this court for the appellees. See 81 Fed. 385.

INDIANAPOLIS AIR-LINE RY. CO. et al. v. CEDAR CREEK & WEST CREEK TP. (Circuit Court of Appeals, Seventh Circuit. December 9, 1896.) No. 369. Appeal from the Circuit Court of the United States for the District of Indiana. A. C. Harris, for appellant. Henry Crawford and E. C. Field, for appellee. Dismissed, for failure to file record.

LAKE NAT. BANK v. WOLFEBOROUGH SAV. BANK et al. (Circuit Court of Appeals, First Circuit. April 15, 1896.) No. 176. Appeal from the Circuit Court of the United States for the District of New Hampshire. Reuben E. Walker and Hollis R. Bailey, for appellant. Heman W. Chapin, J. S. H. Frink, and John R. Poor, for appellees. No opinion. Motion challenging authority of the attorneys for the appellant to appear was denied, after argument. See 24 C. C. A. 195, 78 Fed. 517.

LOSS v. MERCANTILE TRUST CO. (Circuit Court of Appeals, Seventh Circuit. October 23, 1896.) No. 297. Appeal from the Circuit Court of the United States for the Southern District of Illinois. Milford J. Thompson and S. W. McCaslin, for appellant. Dismissed, for failure to print record.

LOWELL MFG. CO. v. WHITTALL.

(Circuit Court of Appeals, First Circuit. February 18, 1898.)

No. 219.

PATENTED DESIGN—INFRINGEMENT.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Alan D. Kenyon (William Houston Kenyon, on the brief), for appellant.
Louis W. Southgate, for appellee.

Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

PER CURIAM. An examination of this case leads us to the same conclusion as that reached by the court below (79 Fed. 787), and we do not feel called upon to add anything to the reasoning of that court in explanation of its decision. The grounds of the decision are fully set out in a carefully drawn opinion, and sustain the result reached. The fact that the Lowell Company's artist or designer, when creating the infringing design, had before him a pattern embodying the complainant's patented design, and that his work resulted in so close an imitation, is upon the most charitable view strongly suggestive of the idea that the purpose was to appropriate the attractive features and effect of the complainant's pattern. The decree of the circuit court is affirmed, with costs of this court to the appellee.

MATSON et al. v. GREEN MOUNTAIN STOCK-RANCHING CO. et al. (Circuit Court of Appeals, Eighth Circuit. December 15, 1897.) No. 955. Appeal from the Circuit Court of the United States for the District of Minnesota. George C. Ripley, C. E. Brennan, Fayette I. Foss, and William R. Matson, for appellants. George P. Wilson, John R. Van Derlip, Frank B. Kellogg, Cushman K. Davis, and C. A. Severance, for appellees. Dismissed, with costs, pursuant to the twenty-third rule, for failure to print the record, on motion of the appellees.

McHENRY v. ALFORD et al. (Circuit Court of Appeals, Eighth Circuit.) No. 139. Questions of law certified to the supreme court of the United States. See 18 Sup. Ct. 242.

MORGAN v. ROGERS, Mayor of City of Denver, et al. (Circuit Court of Appeals, Eighth Circuit. January 5, 1898.) No. 839. In Error to the Circuit Court of the United States for the District of Colorado. Removed to the supreme court on writ of error. See 25 C. C. A. 577, 79 Fed. 577.

MUTUAL LIFE INS. CO. OF NEW YORK v. OWEN. (Circuit Court of Appeals, Eighth Circuit. December 7, 1897.) No. 949. In Error to the Circuit Court of the United States for the Western District of Missouri. James L. Blair, Louis C. Krauthoff, and Frank P. Blair, for plaintiff in error. John T. Sturgis, for defendant in error. Pursuant to stipulation of the parties, judgment of the circuit court reversed, at costs of plaintiff in error, and cause remanded, with directions to set aside the judgment and dismiss the cause, at the costs of the insurance company.

NORTHERN PAC. R. CO. v. BOYLE. (Circuit Court of Appeals, Seventh Circuit. January 12, 1897.) No. 322. In Error to the Circuit Court of the United States for the Western District of Wisconsin. Thomas H. Gill, for plaintiff in error. W. H. Stafford and T. F. Frawley, for defendant in error. Dismissed, per stipulation.

PEOPLE ex rel. DEIMEL v. ARNOLD, United States Marshal. (Circuit Court of Appeals, Seventh Circuit. April 7, 1896.) No. 222. Appeal from the Circuit Court of the United States for the Northern District of Illinois. H. T. Gilbert, for appellant. Moran, Kraus & Mayer, for appellee. Stipulation filed in this cause awaiting the determination of No. 221 (Deimel v. Arnold, 16 C. C. A. 575, 69 Fed. 987). Judgment entered in accordance with stipulation. See 73 Fed. 430; 23 C. C. A. 467, 77 Fed. 802.

THE PHILADELPHIA. (Circuit Court of Appeals, First Circuit. December 8, 1896.) No. 155. Appeal from the District Court of the United States for the District of Massachusetts. Eugene P. Carver and Edward E. Blodgett, for appellant The Philadelphia. Frederic Dodge and Edward S. Dodge, for appellee James Baker. No opinion. Affirmed, on agreement that the same decree be entered as in The Philadelphia, 21 C. C. A. 501, 75 Fed. 684.

PITTSBURGH PLATE-GLASS CO. v. KIDD. (Circuit Court of Appeals, Eighth Circuit. December 13, 1897.) No. 901. In Error to the Circuit Court of the United States for the Eastern District of Missouri. John F. Shepley, for plaintiff in error. F. R. Dearing, for defendant in error. Dismissed, with costs, on motion of the plaintiff in error.

RICE et al. v. INGALLS. (Circuit Court of Appeals, Seventh Circuit. October 5, 1896.) No. 343. Appeal from the Circuit Court of the United States for the Northern District of Illinois. George H. Wilbur, for appellant. Robert A. Childs, for appellee. Dismissed, for failure to file record.

THE SATURNINA. THOMAS v. LARRINAGA et al. (Circuit Court of Appeals, Fifth Circuit. January 17, 1898.) No. 651. Appeal from the District Court of the United States for the Eastern District of Louisiana. John D. Grace, for appellant. E. B. Kruttschnitt, for appellee. Dismissed, per stipulation of counsel.

SHAPLEIGH v. CITY OF SAN ANGELO. (Circuit Court of Appeals, Fifth Circuit. January 3, 1898.) No. 392. In Error to the Circuit Court of the United States for the Western District of Texas. T. K. Skinker, for plaintiff in error. W. M. Stanton, for defendant in error. Dismissed, on motion of plaintiff in error.

SHAW v. KELLOGG. (Circuit Court of Appeals, Eighth Circuit. December 30, 1897.) No. 664. In Error to the Circuit Court of the United States for the District of Colorado. Removed to supreme court on writ of certiorari.

SHORES LUMBER CO. v. THE JOHNSON. (Circuit Court of Appeals, Seventh Circuit. November 9, 1896.) No. 327. Appeal from the District Court of the United States for the Northern District of Illinois. C. E. Kremer, for appellant. W. H. Condon, for appellee. Dismissed, for failure to print record.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE CO. et al. v. TRUST CO. OF NORTH AMERICA. (Circuit Court of Appeals, Eighth Circuit. December 17, 1897.) No. 801. Appeal from the Circuit Court of the United States for the Northern District of Iowa. Removed to supreme court on writ of certiorari. See 82 Fed. 124.

SMEETH et al. v. BEST et al. (Circuit Court of Appeals, Seventh Circuit. October 7, 1896.) No. 294. Appeal from the Circuit Court of the United States for the Northern District of Illinois. Ephraim Banning and Thomas A. Banning, for appellants. James I. Kay and R. D. Totten, for appellees. Dismissed, by consent.

SMILEY v. BARKER. (Circuit Court of Appeals, Eighth Circuit.) No. 913. In Error to the Circuit Court of the United States for the District of Wyoming. Application to the supreme court for writ of certiorari. See 83 Fed. 684.

SOUTHERN RY. CO. v. PARKER. (Circuit Court of Appeals, Fourth Circuit. February 5, 1898.) No. 242. In Error to the Circuit Court of the United States for the Western District of North Carolina. Geo. F. Bason and Chas. Price, for plaintiff in error. Carter & Weaver, for defendant in error. Before GOFF, Circuit Judge, and PAUL and JACKSON, District Judges. Dismissed, for failure to file record.

STANLEY v. HOLCOMBE et al. (Circuit Court of Appeals, Fifth Circuit. December 24, 1897.) No. 660. Appeal from the Circuit Court of the United States for the Northern District of Georgia. Alex. C. King, for appellee. Appeal docketed and dismissed, pursuant to the sixteenth rule.

SYMONDS v. UNITED STATES. (Circuit Court of Appeals, First Circuit. January 27, 1898.) No. 215. In Error to the Circuit Court of the United States for the District of Massachusetts. "And now comes the United States, by Boyd B. Jones, United States attorney for the district of Massachusetts, and says: First. That this is a writ of error to review a judgment of the circuit court, recovered on the fourteenth day of October, A. D. 1896, for the sum of one thousand and twenty-one and seventy one-hundredths dollars (\$1,021.70) damages, and costs of suit, taxed at sixty-nine dollars and twenty-five cents (\$69.25), in favor of the United States of America, against said Charles E. Symonds, in an action brought under section 3 of the act of congress approved February 26, 1885 (23 Stat. 332), and commonly known as the 'Allen Contract Labor Act.' Second. That the aforesaid plaintiff in error has heretofore, to wit, on the seventeenth day of December, 1897, made an offer in writing, in duplicate, to pay five hundred dollars in full compromise and settlement of the above-entitled suit, and heretofore, to wit, on the seventeenth day of December, 1897, deposited five hundred dollars with the assistant treasurer of the United States at Boston, to the credit of special account No. 5, as required by the treasury regulations, on account of and for the purposes of the aforesaid offer and settlement. Third.

That the solicitor of the treasury has instructed the United States attorney to submit said offer to the court for its consent thereto, under the provisions of section 2 of the act of congress approved March 3, 1891 (26 Stat. 108), and that the plaintiff in error has prepared and desires to submit a motion to the court for such consent, in accordance with the provisions of said section. Wherefore the United States pray this honorable court to reverse said judgment, and remand said cause to said circuit court, in order that said circuit court may receive said motion and may consider and take action thereon, and that further proceedings may be had in said cause according to law. Boyd B. Jones, United States Attorney." W. D. Northend, for plaintiff in error. Boyd B. Jones and Frederick P. Cabot, for the United States.

PER CURIAM. Upon the motion of the attorney of the United States, and by consent of the plaintiff in error, it is ordered and adjudged that the judgment of the circuit court be, and the same is, reversed, and that this cause be remanded to the circuit court for further proceedings according to law.

UNITED STATES v. BORGFELDT et al.

(Circuit Court of Appeals, Second Circuit. January 25, 1898.)

No. 27.

CUSTOMS DUTIES—APPRAISEMENT.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Henry C. Platt, for appellants.

Albert Comstock, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We concur in the conclusions expressed by Judge Townsend in his opinion rendered in deciding this cause in the court below (78 Fed. 809), and his decision and that of the board of general appraisers is therefore affirmed.

UNITED STATES v. GOLDENBERG. (Circuit Court of Appeals, Second Circuit.) No. 35. Questions of law certified to the supreme court of the United States. See 78 Fed. 927; 18 Sup. Ct. 3.

UNITED STATES v. UNION PAC. RY. CO. (Circuit Court of Appeals, Eighth Circuit.) No. 133. Questions of law certified to the supreme court of the United States. See 18 Sup. Ct. 167.

VENNER v. FARMERS' LOAN & TRUST CO. et al. (Circuit Court of Appeals, Eighth Circuit. January 31, 1898.) Nos. 1012, 1022. Appeal from the Circuit Court of the United States for the Southern District of Iowa. W. E. Blake (M. E. Blake, on the brief), for appellant. H. Scott Howell and W. A. Underwood (W. C. Howell, Herbert B. Turner, David McClure, and Louis B. Rolston, on the brief), for appellees. Before SANBORN, Circuit Judge, and PHILIPS, District Judge.

PER CURIAM. The judges who heard this case are divided in opinion upon the questions it presents, and the decree below is accordingly affirmed, without an opinion.

WALDER v. ULRICH. (Circuit Court of Appeals, Third Circuit. February 9, 1898.) Appeal from the Circuit Court of the United States for the District of New Jersey. A. v. Briesen, for appellant. A. G. N. Vermilya, for appellee. For opinion of circuit court, see 83 Fed. 477. Dismissed, pursuant to the twentieth rule.

WEAVER v. TABOR et al. (Circuit Court of Appeals, Fifth Circuit. September 6, 1897.) No. 636. Appeal from the Circuit Court of the United States for the Northern District of Texas. D. A. Kelley, for appellee. Appeal docketed and dismissed, on certificate, pursuant to the sixteenth rule.

WEST v. MORRIS et al. (Circuit Court of Appeals, Eighth Circuit. January 21, 1898.) No. 925. Appeal from the Circuit Court of the United States for the District of Colorado. T. A. Green, for appellant. Gustave C. Bartels, James H. Blood, and J. C. Helm, for appellees. Dismissed, with costs, for failure of appellants to comply with the order of December 15, 1897, requiring the appellants to deposit the amount of the estimated cost of printing the record, and to direct the printing thereof, on or before January 3, 1898.

WILSON v. WARD LUMBER CO. (Circuit Court of Appeals, Eighth Circuit. December 6, 1897.) No. 745. In Error to the Circuit Court of the United States for the Eastern District of Missouri. H. J. Cantwell and Albert W. Edwards, for plaintiff in error. Martin L. Clardy, for defendant in error. Dismissed, with costs, on motion of the plaintiff in error. See 67 Fed. 674.